

# COLORADO REVISED STATUTES



TITLES 7-9

2012



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# Colorado Revised Statutes 2012

Titles 7-9  
Corporations and Associations  
Labor and Industry  
Safety — Industrial and Commercial



Edited, Collated, Revised,  
Annotated, and Indexed  
Under the Supervision and Direction of the

COMMITTEE ON LEGAL SERVICES

by

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*Reenacted by the General Assembly as the  
Positive Statutory Law of Colorado of a General and Permanent Nature  
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**CERTIFICATION  
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The Committee on Legal Services hereby certifies that the 2012 Colorado Revised Statutes includes all the laws of a general and permanent nature of the state of Colorado as revised and reenacted in Colorado Revised Statutes 1973, together with all of the laws of a general and permanent nature enacted by the General Assembly subsequent to 1973, as corrected, collated, and revised as authorized by and in conformity with Article 5 of Title 2, Colorado Revised Statutes.

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## Source Note Information

A source note shows the legislative history of a C.R.S. section and is located immediately after the text of the section. The source note for each section indicates the year the section was added, each year it was amended, and the page of the Session Laws and the section of the bill where the amendment can be found. The source note includes the number of the section in prior codifications when applicable. For amendments made after 1973, information on each specific provision of the section that has been changed by a bill, the specific change to the provision (i.e. added, added with relocations, amended, amended with relocations, repealed, repealed and reenacted, or recreated and reenacted), and the effective date of the bill are shown.

The legislative history is arranged by year of passage; if the section was amended by two or more acts in the same year, the order of the information for that year is determined by the effective dates of the acts. The effective date in the source note indicates the date the act or portion of the act takes effect even if the text of the amendment indicates a different date. If the year is not included with the month and day, the provision is effective the year of passage. Additional information to assist the user in researching C.R.S. sections can be found beginning on page vii.

The following provides a further explanation of the information found in a source note:

“L.” is the symbol for “Session Laws” and will be followed by a number indicating the year when the C.R.S. section was changed by an act generally either creating new law, amending existing law, or repealing existing law; except that, in the constitution, “L.” also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

“Ex. Sess.” is the symbol for “Extraordinary Session”. If this symbol follows the year, the amended provision can be found in the Session Laws for an extraordinary session for that year and not in the Session Laws for the regular session of the General Assembly for that year (S, S2 in the Red Book).

“p.” is the symbol for “page” and will be followed by a number indicating the page of the Session Laws where the amendment to the C.R.S. section can be found.

“§” is the symbol for “section” and will be followed by a number indicating the section of the act where the amendment to the C.R.S. section can be found.

“IP” is the symbol for the “introductory portion” to a section, subsection, paragraph, or subparagraph.

“Added” means the provision was newly enacted by the act (N in the Red Book).

“Added with relocations” means the provision in existing law was relocated from one title, article, part, or section to another title, article, part, or section with amendments by the act.

“Amended” means the provision in existing law was amended by the act (A in the Red Book).

“Amended with relocations” means the provision in existing law was amended to reorganize an entire title, article, part, or section by the act.

“Repealed” means the provision was deleted from the existing law by the act through the use of a repeal provision (R in the Red Book).

“R&RE” is the symbol for “Repealed and Reenacted” and means the provision in existing law was repealed and reenacted by the act (RE in the Red Book).

“RC&RE” is the symbol for “Recreated and Reenacted” and means a previously repealed provision has been recreated by the act (RC in the Red Book).

“Added by revision” means a provision providing for the repeal of a statutory provision on a specified date has been added by the Revisor of Statutes as a C.R.S. provision. Adding the provision is necessary because a separate section of the act provided for the repeal of the provision with a future effective date.

“Initiated” means a provision that was amended by means of an initiated petition approved by a vote of the people of Colorado at a general or an odd-year election.

“Referred” means a provision that was amended by a measure referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election; except that, in the constitution, a referred measure is indicated by “L.” and also means constitutional measures referred by the General Assembly and voted on by the people of Colorado at a general or an odd-year election.

Starting in 2009, references to the bill number and chapter number have been included in the source note. If you are conducting a search on-line, the bill number reference within the source note links directly to the bill itself.

## **Colorado Statutory Research**

Legislative history is not already written. It must be compiled by the researcher from many different sources and materials. The following information is a helpful starting point in identifying information you wish to research. Consult the red book table distributed with the session laws, the softbound editions of Colorado Revised Statutes beginning in 1997, the comparative tables located in the back of the C.R.S. index, C.R.S. 1963 and subsequent cumulative supplements thereto through 1971, and C.R.S. 1973 and annual cumulative supplements thereto through 1996.

Prior to 1921, enacted laws were not compiled into a comparative table, thereby making it more difficult to track the legislative history. Determining the subject matter in the statutory index is the only choice for tracking the history of a statute since a statute did not retain its original number. The General Statutes of 1883 arranged laws into numbered chapters, alphabetically entitled, collated, and arranged by sections. This became the foundation and

model for compiling the statutes until the codification of C.R.S. 1973. (See Revised Statutes of Colorado 1908, An Act Providing For the Compilation, Publication, and Distribution of all the general statutes of the state.)

References in some source notes throughout the Colorado Revised Statutes to “Code 08”, “Code 21”, and “Code 35” are to the Revised Statutes of Colorado 1908, the Compiled Laws of Colorado 1921, and the Colorado Statutes Annotated 1935, respectively. Each of these volumes set forth the general statutes of the state of Colorado, including the Code of Civil Procedure and, in 1935, the Colorado Supreme Court Rules. On January 6, 1941, the Colorado Supreme Court adopted the new Rules of Civil Procedure, which became effective on April 6, 1941, resulting in the publication of a replacement volume. Thereafter, the publication of the Colorado Court Rules, although a continuing part of the Colorado Revised Statutes, contained a combination of the Federal Rules and the Colorado Code of Civil Procedure and, in addition, included some provisions that were entirely distinct from both the Federal Rules and the Colorado Code of Civil Procedure, as adopted or amended by the Supreme Court of Colorado.

To research a statute as it existed in previous years, the following is a chronological list of C.R.S. publications and the correct citation for each publication.

Revised Statutes of Colorado	(1868)	R.S.
General Laws of Colorado	(1877)	G.L.
General Statutes of Colorado	(1883)	G.S.
Revised Statutes of Colorado	(1908)	R.S. 08
Compiled Laws of Colorado	(1921)	C.L.
Colorado Statutes Annotated	(1935)	CSA
Colorado Revised Statutes 1953	(1953)	CRS 53
Colorado Revised Statutes 1963	(1963)	C.R.S. 1963
Colorado Revised Statutes	(1973)	C.R.S.

**Comparative Tables:**

- R.S. 08 to C.L. 1921 - located in the front of the C.L. 1921
- C.L. 1921 to CSA 1935 - located in the back of the Index to CSA 1935
- CSA 1935 to CRS 1953 - located in the front of the Index to CRS 1953
- CRS 1953 to C.R.S. 1963 - located in the front of the Index to C.R.S. 1963
- C.R.S. 1963 to C.R.S. - located in the back of the Index to C.R.S.

**Supplements to C.R.S. 1963 include:**

- 1965 hardbound supplement containing laws enacted in 1964 and 1965
- 1967 hardbound supplement containing laws enacted in 1966 and 1967
- 1969 hardbound supplement containing laws enacted in 1968 and 1969
- 1971 hardbound supplement containing laws enacted in 1970 and 1971

The softbound publication of the “Official Report of the Committee on Legal Services” was not intended as an official publication of our office. Copies were distributed to the members of the General Assembly for the purpose of certifying the laws enacted in the 1972 and 1973 Sessions for inclusion in the compilation of the 1973 C.R.S., which was not available until 1974. To find the 1972 or 1973 amended language, refer to the session laws of either 1972 or 1973.



**Supplements and Replacement Volumes to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes**

<b>Titles</b>	<b>Supplements to C.R.S. 1973 and, on and after 1983, to Colorado Revised Statutes</b>	<b>Replacement Volumes and Supplements to Replacement Volumes</b>
Titles 7 to 9	1975-85 Supplements	<b>1986 Replacement Volume</b> 1987-96 Supplements <b>Vol. 3A</b> - Title 7 1987-96 Supplements <b>Vol. 3B</b> - Titles 8 & 9 1987-96 Supplements

**Starting in 1997**, annual softbound volumes are published each year.

For additional information on researching legislative history, see [www.leg.state.co.us](http://www.leg.state.co.us), Services Agencies, and select Legislative Legal Services. Choose Legal Topics and click on Researching Legislative History.

**Bills Enacted Without A Safety Clause  
Explanation of Effective Date**

If a bill is enacted without a safety clause and an effective date is not indicated in the bill, the effective date is the day following the expiration of the ninety-day period after final adjournment of the General Assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state Constitution unless a referendum petition is filed against the act within such time period. If a referendum petition is filed, the act, if approved by the people, will take effect on the date of the official declaration of the vote thereon by proclamation of the Governor or the date indicated in the act if it is later than the Governor’s proclamation. The source note for a provision contained in such an act will indicate the actual date following the ninety-day period or the date set out in the act. If a referendum petition is filed, the date in the source note will be adjusted accordingly in the next publication following the election where the referendum petition is considered.

**Annotations**

Beginning in 2012, the annotations for Colorado state appellate court decisions include both public domain and regional reporter case cites. In preparing annotations to court decisions, we endeavor to include the most recent decisions. Occasionally, this may result in the inclusion of a decision before it becomes finalized and published in an official reporter. In such instances, the case cite will contain blank spaces for the volume and page number of the reporter. The volume and page number will be substituted for the blank spaces in subsequent publications of the statutes.



## **TITLE 7**

# **CORPORATIONS AND ASSOCIATIONS**

THE

CONSTITUTION AND ASSOCIATES

# TITLE 7

## CORPORATIONS AND ASSOCIATIONS

### CORPORATIONS

#### Colorado Corporation Code

- Art. 1. Definitions and Application (Repealed).
- Art. 2. Incorporation - Articles - Amendments (Repealed).
- Art. 3. Corporate Powers and Limitations (Repealed).
- Art. 4. Shareholders and Shares of Stock (Repealed).
- Art. 5. Directors - Officers - Records (Repealed).
- Art. 6. Stated Capital - Amount and Reduction (Repealed).
- Art. 7. Merger or Consolidation (Repealed).
- Art. 8. Dissolution - Voluntary and Involuntary (Repealed).
- Art. 9. Foreign Corporations (Repealed).
- Art. 10. Reports, Fees, Licenses, Penalties (Repealed).

#### Nonprofit Corporations

- Art. 20. Definitions and Application (Repealed).
- Art. 21. Incorporation - Articles - Amendments (Repealed).
- Art. 22. Corporate Powers and Limitations (Repealed).
- Art. 23. Members (Repealed).
- Art. 24. Directors - Officers - Records (Repealed).
- Art. 25. Merger or Consolidation (Repealed).
- Art. 26. Dissolution - Voluntary and Involuntary (Repealed).
- Art. 27. Foreign Nonprofit Corporations (Repealed).
- Art. 28. Reports - Fees (Repealed).
- Art. 29. Secretary of State - Powers and Duties (Repealed).
- Art. 30. Uniform Unincorporated Nonprofit Association Act, 7-30-101 to 7-30-119.

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- Art. 43. Flume and Pipeline Companies, 7-43-101 to 7-43-103.
- Art. 44. Water Users' Associations, 7-44-101 to 7-44-107.
- Art. 45. Toll Road Companies, 7-45-101 to 7-45-111.
- Art. 46. Bridge and Ferry Companies (Repealed).
- Art. 47. Cemetery Companies, 7-47-101 to 7-47-109.
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##### Nonprofit Corporations

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- Art. 123. Purposes and Powers, 7-123-101 to 7-123-105.
- Art. 124. Name (Repealed).
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## **CORPORATIONS**

### **Colorado Corporation Code**

**Editor's note:** (1) Articles 1 to 10 were numbered as articles 1 to 10 of chapter 31, C.R.S. 1963. For amendments to these articles prior to their repeal in 1993, effective July 1, 1994, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. A comparative table showing the relocation of subject matter to articles 101 to 117 as a result of the recodification of the Colorado Corporation Code in 1993 is found in the comparative tables located in the back of the index.

(2) Current provisions concerning the "Colorado Business Corporation Act" are located in articles 101 to 117 of this title.

## **ARTICLE 1**

### **Definitions and Application**

#### **7-1-101 to 7-1-108. (Repealed)**

**Editor's note:** Section 7-1-108 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

## **ARTICLE 2**

### **Incorporation - Articles - Amendments**

#### **7-2-101 to 7-2-119. (Repealed)**

**Editor's note:** Section 7-2-119 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

## **ARTICLE 3**

### **Corporate Powers and Limitations**

#### **7-3-101 to 7-3-119. (Repealed)**

**Editor's note:** Section 7-3-119 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

**ARTICLE 4****Shareholders and Shares of Stock****7-4-101 to 7-4-126. (Repealed)**

**Editor's note:** Section 7-4-126 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

**ARTICLE 5****Directors - Officers - Records****7-5-101 to 7-5-120. (Repealed)**

**Editor's note:** Section 7-5-120 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

**ARTICLE 6****Stated Capital - Amount and Reduction****7-6-101 to 7-6-107. (Repealed)**

**Editor's note:** Section 7-6-107 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

**ARTICLE 7****Merger or Consolidation****7-7-101 to 7-7-109. (Repealed)**

**Editor's note:** Section 7-7-109 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

**ARTICLE 8****Dissolution - Voluntary and Involuntary****7-8-101 to 7-8-126. (Repealed)**

**Editor's note:** Section 7-8-126 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

**ARTICLE 9****Foreign Corporations****7-9-101 to 7-9-120. (Repealed)**

**Editor's note:** Section 7-9-120 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)



**ARTICLE 10****Reports, Fees, Licenses, Penalties****7-10-101 to 7-10-114. (Repealed)**

**Editor's note:** Section 7-10-114 provided for the repeal of this article, effective July 1, 1994. (See L. 93, p. 866.)

**Nonprofit Corporations**

**Editor's note:** (1) Articles 20 to 29 were numbered as article 24 of chapter 31, C.R.S. 1963. For amendments to these articles prior to their repeal in 1997, effective July 1, 1998, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Current provisions concerning nonprofit corporations are located in articles 121 to 137 of this title.

**ARTICLE 20****Definitions and Application****7-20-101 to 7-20-109. (Repealed)**

**Editor's note:** Section 7-20-109 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 21****Incorporation - Articles - Amendments****7-21-101 to 7-21-116. (Repealed)**

**Editor's note:** Section 7-21-116 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 22****Corporate Powers and Limitations****7-22-101 to 7-22-110. (Repealed)**

**Editor's note:** Section 7-22-110 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 23****Members****7-23-101 to 7-23-111. (Repealed)**

**Editor's note:** Section 7-23-111 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 24****Directors - Officers - Records****7-24-101 to 7-24-113. (Repealed)**

**Editor's note:** Section 7-24-113 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 25****Merger or Consolidation****7-25-101 to 7-25-108. (Repealed)**

**Editor's note:** Section 7-25-108 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 26****Dissolution - Voluntary and Involuntary****7-26-101 to 7-26-123. (Repealed)**

**Editor's note:** Section 7-26-123 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 27****Foreign Nonprofit Corporations****7-27-101 to 7-27-118. (Repealed)**

**Editor's note:** Section 7-27-118 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 28****Reports - Fees****7-28-101 to 7-28-107. (Repealed)**

**Editor's note:** Section 7-28-107 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 29****Secretary of State - Powers and Duties****7-29-101 to 7-29-109. (Repealed)**

**Editor's note:** Section 7-29-109 provided for the repeal of this article, effective July 1, 1998. (See L. 97, p. 645.)

**ARTICLE 30****Uniform Unincorporated Nonprofit  
Association Act**

**Editor's note:** The governor signed S-94-168 which enacted this article on May 22, 1994. Section 7-30-117 sets forth July 1, 1994, as the date the article shall take effect.

**Law reviews:** For article, “Colorado Choice of Form of Organization and Structure 2001”, see 30 Colo. Law. 11 (October 2001); for article “Entity and Trade Name Registration: 2001 Update”, see 30 Colo. Law. 81 (October 2001); for article, “No Paper Required: Business Entity Legislation Makes Life Easier for Business Lawyers”, see 33 Colo. Law. 6 (June 2004); for article, “Entity and Trade Name Registration: 2004 Update”, see 34 Colo. Law. 11 (January 2005).

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## UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

### PREFATORY NOTE

This Act reforms the common law concerning unincorporated, nonprofit associations in three basic areas — authority to acquire, hold, and transfer property, especially real property; authority to sue and be sued as an entity; and contract and tort liability of officers and members of the association.

At common law an unincorporated association, whether nonprofit or for-profit, was not a separate legal entity. It was an aggregate of individuals. In many ways it had the characteristics of a business partnership.

This approach obviously created problems. A gift of real property to an unincorporated association failed because no legal entity existed to receive it. For example, a gift of Blackacre to Somerset Social Club (an unincorporated, nonprofit association) would fail because in law there is no legal entity to receive title. Some courts in time became uncomfortable with this result. Some construed such a gift as a grant to the officers of the association to hold the real estate in trust and manage it for the benefit of the members of the association. Later, some legislatures provided various solutions, including treating the association for these purposes as an entity.

Proceedings by or against an unincorporated association presented similar problems. If it were not a legal entity, each of the members needed to be joined as party plaintiffs or defendants. Class action offered another approach. Again courts and legislatures, especially the latter, provided solutions. “Sue and be sued” stat-

utes found their way on the law books of most states.

Unincorporated associations, not being legal entities, could not be liable in tort, contract, or otherwise for conduct taken in their names. On the other hand, their members could be. Courts borrowed from the law of partnership the concept that the members of the association, like partners, were co-principals. As co-principals they were individually liable. Again courts and legislatures, responding to concerns of their constituents about this result, modified these rules. Courts found that, in large membership associations, some members did not have the kind of control or participation in the decision process that made it reasonable and fair to view them as co-principals. Legislatures also took steps. Perhaps most striking are the statutes adopted in many states in the last decade excusing officers, directors, members, and volunteers of nonprofit organizations from liability for simple negligence. There is great variety in the details; a few statutes condition the immunity on the association carrying appropriate insurance or qualifying under Internal Revenue Code Section 501(c).

Related to liability is the question of enforcement of a judgment obtained against an unincorporated association, its members, and its property. If fewer than all members are liable in contract or tort, the property that members own jointly or in common may not be seized in execution of a judgment without severing the interest of those who are liable from those who



are not. Again, courts using "joint debtor," "common property," and "common name" statutes fashioned more workable solutions. Some legislatures have also addressed the problem directly. For these purposes, unincorporated associations have been treated as legal entities — like a corporation.

What is striking about the legislative treatment of these and other legal issues concerning unincorporated, nonprofit associations is that no state appears to have addressed them in a comprehensive, integrated, and internally consistent manner.

This Act deals with a limited number of the major issues relating to unincorporated, nonprofit associations in an integrated and consistent manner.

The American Bar Association first issued its Model Nonprofit Corporation Act in 1964; it was most recently revised in 1987. The act deals comprehensively with nonprofit corporations, including troublesome questions of governance and membership. This Act, on the other hand, does not treat these and other questions. Enactment of this Act would leave these matters to a jurisdiction's common law or its statutes on the subject. It should be noted, too, that many states have statutes on special kinds of unincorporated, nonprofit associations, such as churches, mutual benefit societies, social clubs, and veteran's organizations. Which of these acts should be repealed and which retained in whole or part may require careful consideration.

This Act applies to all unincorporated, nonprofit associations. Nonprofit organizations are often classified as public benefit, mutual benefit, or religious. For purposes of this Act, it is unnecessary to treat differently these three categories of unincorporated, nonprofit associations. Unlike some state laws, it is not confined to the nonprofit organizations recognized as nonprofit under Section 501(c) (3), (4), and (6) of the Internal Revenue Code. There is no principled basis for excluding any nonprofit association. Therefore, the Act covers unincorporated philanthropic, educational, scientific, and literary clubs, unions, trade associations, political organizations, cooperatives, churches, hospitals, condominium associations, neighborhood associations, and all other unincorporated, nonprofit associations. Their members may be individuals, corporations, other legal entities, or a mix.

The Act is designed to cover all of these associations to the extent possible. To the extent a jurisdiction decides to retain statutes dealing with specific kinds of nonprofit associations, this Act will supplement existing legislation. As is pointed out in the Comments, a state electing to adopt this Act will need to examine carefully its statutes to determine which it wants to repeal, which to amend, and which to retain.

The basic approach of the Act is that an unincorporated, nonprofit association is a legal

entity for the purposes that the Act addresses. It does not make these associations legal entities for all purposes. It is left to the courts of an adopting state to determine whether to use this Act by analogy to conclude that an association is a legal entity for some other purpose.

It should be noted, too, that many of the provisions are intended to be supplemented by a jurisdiction's existing law. For example, Section 5 (numbered as section 7-30-105 in C.R.S.) which provides for the filing of a statement of association authority, does not provide details concerning the filing process. It leaves to other law such details as whether the filing officer returns a copy marked "filed" and stamps the hour and date thereof, and the amount of the filing fee.

Two sections are bracketed as optional — Section 12 (numbered as section 7-30-112 in C.R.S.) on venue and Section 13 (numbered as section 7-30-113 in C.R.S.) on service of process. A jurisdiction may decide that its present rules are consistent with the entity view of an association and provide the appropriate rule. Therefore, it would not adopt Sections 12 and 13 (numbered as sections 7-30-112 and 7-30-113 in C.R.S.). Both sections deal with only a part of the questions of venue and service of process. This means that if they are adopted they are only a part of the jurisdiction's law on the subject. And perhaps they should be placed in the court rules or statutes on those subjects instead of in the state's code with the other sections of this Act.

A nonprofit organization wanting a comprehensive governance structure might consider incorporating under a nonprofit corporation statute, particularly one that follows the format of the ABA Model Nonprofit Corporation Act. These statutes provide, among other things, comprehensive governance provisions. As this Act contains none, adoption of a substantial charter and bylaws would be required to obtain similar internal rules and structure.

There has been concern that this Act may deter nonprofit organizations from incorporating and that failure to incorporate would deprive the public of protections incorporation would provide. Clearly, incorporation does provide governmental involvement that this Act does not.

Most jurisdictions regulate solicitation by charitable organizations. Many of these are comprehensive. See, for example, Ill. Ann. Stat. ch. 23, Sections 100-5121 (Smith-Hurd 1992); Minn. Stat. Ann. Sections 309.50-309.61 (West 1992); Uniform Management of Institutional Funds Act.

These statutes frequently require, among other things, filing of a comprehensive statement with the attorney general before soliciting funds, including a copy of contracts with any professional fundraisers, and registration of professional fundraisers. A range of civil and crim-

inal sanctions are provided. These statutes apply to all persons soliciting for charitable purposes, incorporated or not. In short, this Act's nonprofit associations are covered.

It should be noted, too, that a nonprofit corporation or unincorporated, nonprofit association is not the only choice. The Uniform Law Foundation, like many Illinois foundations, is

organized as a charitable trust. Ill. Ann. Stat. ch. 14, Sections 51-69, (Smith-Hurd 1992); Uniform Supervision of Trustees for Charitable Purposes Act. Finally, it should be repeated that this Act is needed for the informal nonprofit organizations that do not have legal advice and so may not consider whether to incorporate.

### **7-30-101. Definitions.** In this article:

(1) "Member" means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association or who is considered to be a member by such person and the nonprofit association.

(2) "Nonprofit association" means an unincorporated organization consisting of two or more members joined by mutual consent for a common, lawful, nonprofit purpose. However, joint tenancy or tenancy in common does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

(3) and (4) Repealed.

**Source:** L. 94: Entire article added, p. 1271, § 1, effective May 22. L. 2003: (3)(b) and (4)(b) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsections (3)(b) and (4)(b) provided for the repeal of subsections (3) and (4) respectively, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

## **OFFICIAL COMMENT**

1. With respect to relations external to a nonprofit association, whether a person is a member of the organization determines principally a member's responsibility to third parties. Internally, whether a person is a member might determine specified rights and responsibilities, including access to facilities, voting, and obligation to pay dues. This Act is concerned only with determining whether a person is a member for purposes of external relations, such as liability to third parties on a contract of the nonprofit association. Therefore, "member" is defined in terms appropriate to these purposes. "Member" includes a person who has sufficient right to participate in the affairs of a nonprofit association so that under common law the person would be considered a co-principal and so liable for contract and tort obligations of the nonprofit association.

The definition may reach somewhat beyond decisions of some courts. Either participation in the selection of the leadership or in the development of policy is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person, simply because the person was a member.

2. A fundraising device commonly used by many nonprofit associations is the membership drive. In most cases the contributors are not

members for purposes of this Act. They are not authorized to "participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy." Simply because an association calls a person a member does not make the person a member under this Act.

Section 6 (numbered as section 7-30-106 in C.R.S.) nevertheless protects "a person considered to be a member by a nonprofit association" even though the person is not within the definition of member in paragraph (subsection) (1).

3. The role of a member in the affairs of an association is described as "may participate in the selection" instead of "may select or elect" the governing board and officers and "may participate ... in the development of policy" instead of "may determine" policy. This accommodates the Act to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated ex officio members of the governing board. Similarly, the role in determination of policy is described in general terms. "Persons authorized to manage the affairs of the association" is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational struc-



tures of nonprofit association to which this Act applies and the informality of some of them the more generic term is more appropriate.

4. "Person" instead of individual is used to make it clear that associations covered by this Act may have individuals, corporations, and other legal entities as members. Unincorporated, nonprofit trade associations, for example, commonly have corporations as members. Some national and regional associations of local government officials and agencies have governmental units or agencies as members.

5. Paragraph (Subsection) (2) defines "nonprofit association." The model American Bar Association acts deal with both for-profit and nonprofit corporations. Unincorporated, for-profit organizations are largely covered by the uniform partnership acts. The differences between for-profit and nonprofit, unincorporated organizations are so significant that it would be impractical to cover both in a single act. Therefore, this Act deals only with nonprofit organizations.

6. The term "nonprofit association" is used instead of "association" for several reasons. The risk that this Act when placed in a state's code would be construed to apply to both nonprofit and for-profit associations should thus be avoided. Acts dealing with one kind of association when placed in a code have sometimes lost their identification and been inadvertently applied to the other kind where the term "association" alone was used. For example, the New York Joint-Stock Association Act of 1894 used the term "association," which it defined to include only for-profit organizations. "Association" was held in 1938 to include an unincorporated political party and the act applied to it. *Democratic Organization of Richmond County v. Democratic Organization of Richmond County*, 1 N.Y.S.2d 349 (1938). Subsequent decisions applied the act to other unincorporated, nonprofit organizations. The use of "nonprofit association" instead of merely "association" should also avoid the risk of this Act being improperly used to develop a common law rule by analogy from this Act to apply in a case involving a for-profit association. Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908); Robert F. Williams, *Statutes as Sources of Law Beyond their Terms in Common Law Cases*, 50 Geo. Wash. L. Rev. 554 (1982).

Legal issues concerning unincorporated, for-profit associations that are not partnerships and so not controlled by a partnership act would be governed by a state's other statutory or common law. Resort to one of the two partnership acts for the purposes of developing a common law rule by analogy would be appropriate. Resort for this purpose to this Act in the case of an unincorporated, for-profit association would not be appropriate.

7. Two or more persons is the common statutory requirement to constitute an unincorporated, nonprofit association. New Jersey, on the other hand, requires that there be seven or more members to be an association under its laws. This Act suggests the smaller number — two. Consideration was given to specifying "one" instead of "two." For example, the developer of a condominium may have created a condominium association as an unincorporated nonprofit association. Before any units are sold the developer as owner of all units has all of the memberships in the association. Should it be treated as a nonprofit association under this Act from the beginning? It should not. Can one person be "joined by mutual consent for a common purpose?" To ask the question would seem to be to answer it. If the concern is to give the developer the entity protections provided by this Act, it is very likely that it already has some protection because it is a business corporation. Nevertheless, the number is placed in brackets, in part, to raise the question whether the number should be one or two or even a larger number.

The members must be joined together for a common purpose. Several states provide that they be "joined together for a **stated** common purpose" (emphasis added). Because of the informality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be "stated." Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this Act.

8. "Nonprofit" is not defined. A common definition — it is an association whose net gains do not inure to the benefit of its members and which makes no distribution to its members, except on dissolution — does not work for all nonprofit associations. Consumer cooperatives, for example, make distributions to their members; but they are not for-profit organizations. Those consumer cooperatives not organized under specific state or federal laws need the benefits of this Act.

It is instructive to note that the drafting committee for the ABA Model Nonprofit Corporation Act finally determined that it could not develop a satisfactory definition of nonprofit.

9. The final sentence of paragraph (subsection) (2) is adapted from Section 201(d)(1) of Revised Uniform Partnership Act (RUPA). This stresses that more than common ownership and use is required. For example, that three families own a lake cottage and share its use does not make the three families a nonprofit association. Paragraph (Subsection) (2) precludes arrangements that are merely common ownership from being a nonprofit association under this Act.

10. The definition of "person" in paragraph (subsection) (3) is a standard NCCUSL definition.

11. The definition of “state” in paragraph (subsection) (4) is a standard NCCUSL definition.

**7-30-101.1. Suspended, defunct, and dissolved nonprofit corporations.** Any nonprofit corporation other than a nonprofit corporation that is governed by the “Colorado Revised Nonprofit Corporation Act”, articles 121 to 137 of this title, that was suspended, declared defunct, administratively dissolved, or dissolved by operation of law, and the business or affairs of which are continued for nonprofit purposes, with or without knowledge of the suspension, declaration, or dissolution, and the business and affairs of which are not wound up, shall be deemed an unincorporated organization that qualifies as a nonprofit association for purposes of sections 7-30-101.2 and 7-30-106, unless such nonprofit corporation is reinstated as provided in part 10 of article 90 of this title.

**Source:** **L. 97:** Entire section added, p. 645, § 2, effective July 1, 1998. **L. 2006:** Entire section amended, p. 848, § 1, effective July 1.

**7-30-101.2. Charitable nonprofit corporations - private foundations.** (1) As used in this section, “charitable purposes” means one or more charitable purposes enumerated in section 501(c) (3) of the federal “Internal Revenue Code of 1986”, as amended, hereinafter referred to as “the internal revenue code” and formed exclusively for one or more charitable purposes.

(2) In the case of a deemed unincorporated organization, its articles of incorporation shall be presumed to be its principal governing document for the purposes of this section.

(3) Except as otherwise provided in its constitution, articles of association, or other principal governing document, the purposes of a charitable nonprofit association and the disposition of its assets upon liquidation shall be limited to charitable purposes.

(4) Except as otherwise expressly provided in its constitution, articles of association, or a principal governing document, or otherwise determined by a court of competent jurisdiction, a charitable nonprofit association that is also a private foundation within the meaning of section 509 (a) of the internal revenue code:

(a) Shall distribute such amounts for each taxable year at such time and in such manner as not to subject the nonprofit corporation to tax under section 4942 of the internal revenue code;

(b) Shall not engage in any act of self-dealing as defined in section 4941(d) of the internal revenue code;

(c) Shall not retain any excess business holdings as defined in section 4943(c) of the internal revenue code;

(d) Shall not make any investments that would subject the nonprofit association to taxation under section 4944 of the internal revenue code;

(e) Shall not make any taxable expenditures as defined in section 4945(d) of the internal revenue code.

**Source:** **L. 97:** Entire section added, p. 645, § 2, effective July 1, 1998. **L. 98:** (4)(d) amended, p. 611, § 1, effective July 1. **L. 2003:** (1) amended, p. 2202, § 1, effective July 1, 2004.

**7-30-102. Supplementary general principles of law and equity.** Principles of law and equity supplement this article unless displaced by a particular provision of it.

**Source:** **L. 94:** Entire article added, p. 1272, § 1, effective May 22.

#### OFFICIAL COMMENT

1. This section is adapted from Uniform Commercial Code Section 1-103. The reference

in Section 1-103 to “the law merchant” and its examples of supplementary rules, such as those



of principal and agent and estoppel, were deleted as irrelevant or incomplete and unnecessary. This change in language does not manifest any change in substance.

2. This Act contains no rules concerning governance. However, recourse to rules of governance must be had to apply some of the Act's rules. For example, whether a nonprofit association is liable under a contract made for it by an individual depends on whether the individual had the necessary authority to act as agent. Was the individual given the authority by someone empowered by the nonprofit association to give the authority? To decide a case like this a court

must resort to the rules of the nonprofit association or, if there are none applicable or none at all, to the common law or other statutory law of the jurisdiction.

3. Efforts were made to develop default internal rules of governance — applicable if an association had none or none that were applicable. This effort demonstrated the complexity and difficulty of fashioning rules that would reasonably fit a wide variety of nonprofit associations — large and small, public benefit, mutual benefit, and religious, and of short and indefinite duration. It was thought best to leave this question to other law of the jurisdiction.

**7-30-103. Territorial application.** Real and personal property in this state may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this state.

**Source: L. 94:** Entire article added, p. 1272, § 1, effective May 22.

#### OFFICIAL COMMENT

This section is consistent with Restatement (Second) of Conflict of Laws Section 223 (1971). Section 3 (numbered as section 7-30-103 in C.R.S.) makes a conveyance or devise of land located in a state that has adopted this Act effective even though it would not be effective

under the law of the state in which the nonprofit association has its principal office or other significant relationship. No relationship of the nonprofit association other than that the property is situated in the state is required.

**7-30-104. Real and personal property - nonprofit association as legatee, devisee, or beneficiary.** (1) A nonprofit association in its name may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(2) A nonprofit association may be a legatee, devisee, or beneficiary of a trust or contract.

**Source: L. 94:** Entire article added, p. 1272, § 1, effective May 22.

#### OFFICIAL COMMENT

1. Subsection (a) (numbered as subsection (1) in C.R.S.) is based on Section 3-102(8), Uniform Common Interest Act. It reverses the common law rule. Inasmuch as an unincorporated, nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, *Unincorporated Non-Profit Associations* 1-45 (Oxford Univ. Press 1959), 15 A.L.R. 2d 1451 (1951); Warburton, *The Holding of Property by Unincorporated Associations*, Conveyancer 318 (September-October 1985).

2. This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members

of the association. *Matter of Anderson's Estate*, 571 P. 2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, Section 3-1.3 (1981).

California gives any "unincorporated society or association and every lodge or branch of any such association, and any labor organization" full right to acquire, hold, or transfer any "real estate and other property as may be necessary for the business purposes and objects of the society," and acquire and hold any property not so necessary for 10 years. California Corporations Code, Title 3, Unincorporated Associations, Section 20001 (West 1991).

As is the case with many of the problems created by the view that an unincorporated as-



sociation is not an entity the statutory solutions are often partial — limited to special circumstances and associations. Subsection (a) (numbered as subsection (1) in C.R.S.) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

3. Even if a nonprofit association's governing documents provide that it "may not acquire real property," subsection (a) (numbered as subsection (1) in C.R.S.) makes effective a transfer of Blackacre to the association. A different result would obviously disrupt real estate titles. The remedy for this violation of internal rules lies not in preventing title from passing but, as with other organizations, in an action by members

against their association and its appropriate officers to undo the transaction.

4. Subsection (b) (numbered as subsection (2) in C.R.S.) is a necessary corollary of subsection (a) (numbered as subsection (1) in C.R.S.) and, thus, it may be unnecessary. However, several states expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. See, for example, Md. Estates & Trusts Code Ann. Section 4-301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (b) (numbered as subsection (2) in C.R.S.) applies to both trusts and contracts. Not all state statutes apply expressly to both.

**7-30-105. Statement of authority as to real property.** (1) A nonprofit association is an entity for purposes of, and may execute and record a statement of authority pursuant to, section 38-30-172, C.R.S.

(2) In addition to the matters required or permitted to be contained therein pursuant to section 38-30-172, C.R.S., a statement of authority executed and recorded on behalf of a nonprofit association shall state any limitation that may exist upon the authority of the person named in the statement of authority, or holding the position described in the statement of authority, to execute instruments encumbering, conveying, or otherwise affecting title to the real property on behalf of the nonprofit association.

**Source:** L. 94: Entire article added, p. 1272, § 1, effective May 22. L. 2003: Entire section R&RE, p. 2202, § 2, effective July 1, 2004.

**Editor's note:** Colorado amended subsection (1) (numbered as subsection (a) in the uniform act) to require the execution and recording of the statement of authority, and, in subsection (2) (numbered as subsection (b) in the uniform act), required that the statement be recorded in the county in which the property is situated. Further, Colorado amended § 7-30-105 to specify that property may be encumbered in addition to being transferred, whereas the uniform act refers only to transferring. The official comment should be read with these changes in mind.

## OFFICIAL COMMENT

1. This section is based on Revised Uniform Partnership Act (RUPA) Section 303. California Corporations Code, Title 3, Unincorporated Associations, Section 20002 (West 1991), is similar.

2. A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing provides important documentation.

3. Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) (numbered as subsection (2) in C.R.S.) requires that the statement be filed or recorded in the office where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. RUPA Section 303 provides for cen-

tral filing, such as with the secretary of state, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

4. "Filed" and "recorded" are bracketed to direct an enacting state to choose. In most jurisdictions "recorded" will be the appropriate choice.

5. Subsection (c)(2) (numbered as subsection (3)(b) in C.R.S.) may present a problem for small, ad hoc, nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address.

6. Subsection (c)(3) (numbered as subsection (3)(c) in C.R.S.) permits the statement to identify as the person who can act for the association one who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title stan-

dards and practices the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

7. Subsection (c)(4) (numbered as subsection (3)(d) in C.R.S.) requires the statement to document the authority of the person granted power to deal with the nonprofit association's real property and of the person authorized to execute the statement of authority.

8. Subsection (d) (numbered as subsection (4) in C.R.S.) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association.

9. Subsection (f) (numbered as subsection (6) in C.R.S.) makes a statement inoperative five years after its most recent recording or filing. This prevents a statement whose recording or filing is unknown by the association's current leadership from being effective. Reliance on a filing or recording this old is, in effect, not in good faith.

10. Subsection (g) (numbered as subsection (7) in C.R.S.) is based on RUPA Section 303(h). Its obvious purpose is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. There remains, of course, the risk that the statement itself was unauthorized.

**7-30-106. Liability in contract and tort.** (1) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and tort.

(2) A person is not liable for a breach of a nonprofit association's contract merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association.

(3) A person is not liable for a tortious act or omission for which a nonprofit association is liable merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association.

(4) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association.

(5) A member of, or a person considered to be a member by, a nonprofit association may assert a claim against the nonprofit association. A nonprofit association may assert a claim against a member or a person considered to be a member by the nonprofit association.

**Source:** L. 94: Entire article added, p. 1273, § 1, effective May 22.

### OFFICIAL COMMENT

1. At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the common law viewed a nonprofit association as an aggregate of its members. The members are co-principals. Subsection (a) (numbered as subsection (1) in C.R.S.) changes that. It makes a nonprofit association a legal entity separate from its members for purposes of contract and tort.

2. This Act does not deal with liability of a member or other person acting for a nonprofit association for their own conduct. With respect to contract and tort Section 6 (numbered as section 7-30-106 in C.R.S.) leaves that to the other law of the jurisdiction enacting this Act.

3. Subsections (b) through (e) (numbered as subsections (2) through (5) in C.R.S.) are applications to common cases of the basic principle in subsection (a) (numbered as subsection (1) in C.R.S.). Because a nonprofit association is made

a separate legal entity, its members are not co-principals. Consequently they are not liable on contracts or for torts for which the association is liable. Subsection (b) (numbered as subsection (2) in C.R.S.) specifies that result with respect to contracts.

4. Subsection (b) (numbered as subsection (2) in C.R.S.) applies the principle in subsection (a) (numbered as subsection (1) in C.R.S.) to relieve members and others from vicarious liability for the contracts of a nonprofit association.

5. Subsections (a) and (b) (numbered as subsections (1) and (2) in C.R.S.) eliminate a risk that existed under common law. An agent makes an implied warranty of authority to the other contracting party. If the purported principal does not exist, the agent obviously breaches the warranty. Because an unincorporated, nonprofit association was not a legal entity; one purporting to act for it breached this implied



warranty. *Smith & Edwards v. Golden Spike Little League*, 577 P. 2d 132, 134 (Utah 1978). Subsection (b) (numbered as subsection (2) in C.R.S.) treats a nonprofit association as a legal entity; therefore, an agent who acts for it within her authority does not breach the warranty.

6. "Merely" because a person is a member does not make the person liable on an association's contract. This formulation means that there are special circumstances that may result in liability. For example, a member may expressly become a party to a contract with the nonprofit association. Subsection (b) (numbered as subsection (2) in C.R.S.) relieves members only of their vicarious liability. Liability for one's own conduct is left to the other law of the jurisdiction.

An agent with authority from a nonprofit association who negotiates a contract without disclosing the agent's representative status is liable on the contract. Under agency law an agent acting within the agent's scope of authority for an undisclosed or partially disclosed principal is personally liable on the contract along with the principal, unless the other contracting party agrees not to hold the agent liable. *Restatement (Second) Of Agency* 320-322; Reuschlein and Gregory, *Agency & Partnership* 161-163 (West 2d ed. 1990).

Courts have pierced the corporate veil of nonprofit corporations. Comment, *Piercing the Nonprofit Corporate Veil*, 66 Marq. L. Rev. 134 (1984). Section 6 (numbered as section 7-30-106 in C.R.S.) makes a nonprofit association a legal entity for these purposes. Therefore, as a matter of its other law a jurisdiction enacting this Act may appropriately apply this doctrine to a nonprofit association. In *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251 (1981), the president of a nonprofit corporation was found to have so commingled its funds and assets with his own and those of a business corporation he controlled and have treated them as his own for his benefit that the corporate veil must be pierced to promote justice. He was found liable for a debt contracted in the name of the nonprofit corporation. See also Harry G. Henn & John R. Alexander, *Law of Corporations*, pp. 344-352 (West 3d ed. 1983); Alfred F. Conard, *Corporations in Perspective*, pp. 424-433 (Foundation Press, 1976).

7. An example of a partial statutory solution of members' liability for contracts of a nonprofit association is California Corporations Code, Title 3, Nonprofit Associations, Section 21100 (West 1991). It relieves members from liability for "debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, contraction, repair, or furnishing of buildings or other structures, to be used for purposes of the association." As noted earlier, partial and unco-

ordinated statutory solutions of common law problems are typical.

8. Subsection (c) (numbered as subsection (3) in C.R.S.) applies the principle in subsection (a) (numbered as subsection (1) in C.R.S.) to relieve members and others from liability for torts for which the nonprofit association is liable. Inasmuch as Section 6 (numbered as section 7-30-106 in C.R.S.) provides that a member is not a co-principal, the member cannot be considered to be an employer of the employee who committed the tort. Again, only relief from vicarious liability is provided.

Liability of a member or other person who acts for the nonprofit association is governed by other law of the jurisdiction. That an employer is liable for a tort committed by its employee does not excuse the employee.

9. The immunity from vicarious liability provided by subsections (b) and (c) (numbered as subsections (2) and (3) in C.R.S.) does not depend on the remedy sought. Whether it is for damages for breach of contract or tort, unjust enrichment, or the like the immunity is provided.

10. Since the mid 1980's all states have enacted laws providing officers, board members, and other volunteers some protection from liability for their own negligence. The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. *State Liability Laws for Charitable Organizations and Volunteers* (Nonprofit Risk Management & Insurance Institute, 1990); *Developments, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1685-1696 (1992).

The 1987 Texas act, for example, relieves directors, officers, and other volunteers from liability for simple negligence that causes death, damage, or injury if the volunteer acted in the scope of her duties for a charitable organization exempt under Internal Revenue Code Section 501(c)(3) or (4). The act also limits the amounts that may be recovered from an employee or the organization if the organization carries requisite liability insurance. The constitutionality of the provision relieving volunteers from liability has been questioned under Article I, Section 13 of the Texas Constitution — the Open Courts provision. Note, *The Constitutionality of the Charitable Immunity and Liability Act 1987*, 40 Baylor L. Rev. 657 (1988). Some statutes premise all relief upon the organization having specified liability insurance.

Section 6 (numbered as section 7-30-106 in C.R.S.) does not affect these statutes. As noted earlier Section 6 deals only with vicarious liability. These statutes concern liability for one's own conduct.

11. Although not a concern of Section 6 (numbered as section 7-30-106 in C.R.S.), per-

haps it should be noted that nonprofit organizations have been held liable for tortious acts and omissions not only of employees but also of members. In *Guyton v. Howard*, 525 So.2d 948 (Fl. App. 1988) a nonprofit organization was held liable for the negligence of members who acted for the organization in conducting an initiation that resulted in injury.

12. Subsection (d) (numbered as subsection (4) in C.R.S.) applies the principle in subsection (a) (numbered as subsection (1) in C.R.S.) to reverse the common law rule that the negligence of an employee of an association is imputed to its members. A member as co-principal was vicariously responsible for an employee's conduct within the scope of the employee's duties. Section 6 (numbered as section 7-30-106 in C.R.S.), however, makes the nonprofit association a legal entity. Thus, a member is not a co-principal and the employee's negligence is not imputed to a member.

Because the employee's negligence is not imputed, the member's suit against the nonprofit association for negligence by the employee is not subject to the defense of contributory negligence.

Some courts treated large nonprofit associations as entities for some purposes and so did not impute the negligence of an employee to a member. Therefore, a member could recover from the association. *Marshall v. International Longshoreman's and Warehouseman's Union*, 57 Cal.2d 781, 371 P.2d 987 (1962); Judson A. Crane, *Liability of an Unincorporated Association for Tortious Injury to a Member*, 16 Vand. L. Rev. 319, 323 (1963).

13. Subsection (e) (numbered as subsection (5) in C.R.S.) applies the principle in subsection (a) (numbered as subsection (1) in C.R.S.) to reverse the common law rule that a member may not sue the member's unincorporated, nonprofit association. A member as co-principal is logically a defendant as well as a plaintiff in such an action. The logic is that one may not sue oneself.

Subsection (a) (numbered as subsection (1) in C.R.S.) makes an unincorporated nonprofit association a legal entity. Therefore, a member is separate from the nonprofit association. There is thus no logical obstacle to either suing the other. A nonprofit association may, for example, sue a member for delinquent dues. See, for example, Section 6.13 ABA Nonprofit Corporation Act (1987).

14. The Texas Supreme Court recently overruled the common law rule and held that a member may sue the unincorporated, nonprofit

association of which the person is a member. *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992). The court also overturned the Texas common law rule that the negligence of an employee is imputed to a member. The court referred to a statute authorizing a nonprofit association to sue and be sued and other Texas statutes giving entity status for limited purposes to unincorporated, nonprofit associations. It did not, however, rely on them in overturning the historic common law rule. It simply found the old rule not suitable for present times. The court also followed recent developments in other courts.

15. Section 6 (numbered as section 7-30-106 in C.R.S.) relieves from vicarious liability not only members but also certain others. Persons who are "authorized to participate in the management of the affairs of the nonprofit association" are protected. Persons within this group — largely directors and officers, however denominated — are likely also to be members as defined in Section 1(1) (numbered as section 7-30-101 (1) in C.R.S.), and protected as such. If they are not members (i.e. not co-principals) they should not be found liable at common law. Section 6 (numbered as section 7-30-106 in C.R.S.) extends protection to this group out of abundant caution. It is possible that a court might misapply the common law rationale for liability to hold a non-member manager vicariously liable. Section 6 (numbered as section 7-30-106 in C.R.S.) prevents that somewhat remote possibility.

Section 6 (numbered as section 7-30-106 in C.R.S.) also extends protection to a person who is not within the definition of "member" in Section 1(1) (numbered as section 7-30-101 (1) in C.R.S.) but is "considered to be a member by the nonprofit association." A person within this clause is one who does not have the relationship to the nonprofit association that would permit a finding under the common law that the person is a co-principal. Also the person is not a director, officer, or manager within the preceding phrase. That a person not within the two preceding phrases but within the third phrase might be found vicariously liable seems quite remote. Nevertheless, Section 6 (numbered as section 7-30-106 in C.R.S.) accords this person protection.

As noted earlier, Section 6 (numbered as section 7-30-106 in C.R.S.) concerns vicarious liability only. Liability for one's own conduct is covered by other law of the enacting jurisdiction.

## ANNOTATION

**Candidate is not liable for contracts of his campaign committee, a nonprofit unincorporated association, merely because he was the**

candidate, was a member of the campaign committee, had management responsibilities, or negotiated the employment contracts on behalf of



the campaign committee; therefore the candidate is not responsible to pay the committee's

former employees. *Mohr v. Kelley*, 8 P.3d 543 (Colo. App. 2000).

**7-30-107. Capacity to assert and defend - standing.** (1) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(2) A nonprofit association may assert a claim in its name on behalf of its members if one or more members of the nonprofit association have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member.

**Source:** L. 94: Entire article added, p. 1274, § 1, effective May 22.

#### OFFICIAL COMMENT

1. Subsection (a) (numbered as subsection (1) in C.R.S.) broadly recognizes the right of a nonprofit association to participate as an entity in judicial, administrative, and governmental proceedings, and in arbitration and mediation on behalf of it and its members. It may sue and be sued. Many states have enacted statutes granting unincorporated associations these rights. Many have rejected the argument that these acts made an unincorporated, nonprofit association a separate legal entity for other purposes.

2. Ohio Rev. Code Ann. Section 1745.01 (Baldwin 1991) provides that an unincorporated association may "sue or be sued as an entity under the name by which it is commonly known and called." This formulation has an element that subsection (a) (numbered as subsection (1) in C.R.S.) does not have — a description of the association name to be used. Maryland requires that the unincorporated association have a "group name." Md. Estates & Trust Code Ann. Section 6-406(a) - (1991). As some of the informal nonprofit associations may not have fixed on a name but need the benefit of the rule, subsection (a) (numbered as subsection (1) in C.R.S.) does not require that it have a name.

3. Subsection (b) (numbered as subsection (2) in C.R.S.) describes an association's standing to represent the interests of its members in a proceeding. It is the federal standing rule. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977). A nonprofit association must meet the three requirements only if it seeks to represent the interests of its members. If the suit concerns only the nonprofit association's interests, sub-

section (b) (numbered as subsection (2) in C.R.S.) does not apply.

4. If participation of individual members is required, the nonprofit association does not have standing. If the injury for which a claim is made or the remedy sought is different for different members, their participation through testimony and presenting other evidence is required. The typical case in which a nonprofit association has standing is where it seeks only a declaration, injunction, or some form of prospective relief for injury to its members. *Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975).

5. Subsection (b) (numbered as subsection (2) in C.R.S.) does not require the nonprofit association to show that it suffered harm or has some interest to protect to have standing to represent the interests of its members. *Warth v. Seldin*, 422 U.S. 490, 511 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975). Some states require an association to have an interest to protect which is separate from that of its members. One court found that the probable loss of members if it did not take action on their behalf was a sufficient interest to protect to give it standing to represent its members. This approach certainly diminishes greatly the burden of satisfying the requirement. States have further modified the old standing rule. Recently many states have adopted the three-pronged federal rule, which is the rule in subsection (b) (numbered as subsection (1) in C.R.S.).

This section does not re-state rules of joinder because they will be governed by the jurisdiction's other law.

**7-30-108. Effect of judgment or order.** A judgment or order against a nonprofit association is not by itself a judgment or order against a member or a person considered to be a member by the nonprofit association.

**Source:** L. 94: Entire article added, p. 1274, § 1, effective May 22.

## OFFICIAL COMMENT

1. This section is consistent with Restatement (Second) of Judgments, Section 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation ..."

2. Section 8 (numbered as section 7-30-108 in C.R.S.) applies not only to judgments but also to orders, such as an award rendered in arbitration or an injunction.

3. Section 8 (numbered as section 7-30-108 in C.R.S.) reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-princi-

pals, were individually liable for obligations of the association.

4. Some states changed the common law rule by statute. Ohio, for example, provides that the property of an unincorporated association is subject to judgment, execution, and other process and that a money judgment against the association may be "enforced only against the association as an entity" and not "against a member." Ohio Rev. Code Ann., Section 1745.02 (Baldwin 1991).

An obvious corollary of this section is that a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member.

### 7-30-109. Disposition of personal property of inactive nonprofit association.

(1) If a nonprofit association has been inactive for three years or longer, a person in possession or control of personal property of the nonprofit association may transfer the property:

(a) If a document of the nonprofit association states a person to whom transfer is to be made under those circumstances, to that person; or

(b) If no person is so stated, to a nonprofit association or nonprofit corporation pursuing broadly similar purposes or to a government, governmental subdivision, agency, or instrumentality.

**Source:** L. 94: Entire article added, p. 1274, § 1, effective May 22. L. 2003: Entire section amended, p. 2203, § 3, effective July 1, 2004.

## OFFICIAL COMMENT

1. Section 9 (numbered as section 7-30-109 in C.R.S.) is not a dissolution rule. An inactive nonprofit association may not be one that has dissolved. It may have just stopped functioning and have taken no formal steps to dissolve. It might possibly be revived.

Section 9 (numbered as section 7-30-109 in C.R.S.) gives a person in possession or control of personal property of a nonprofit association an opportunity to be relieved of responsibility for it. Compliance with the section provides a safe harbor.

2. "Inactive" is not defined. A nonprofit association that has accomplished its purpose, such as seeking approval in a school bond election, is very likely inactive. A nonprofit association that has stopped pursuing its purposes, collecting dues, holding elections of officers and board members, and conducting meetings, and has no employees would seem to be inactive.

"Inactive" does not describe a nonprofit association whose sole purpose is to act should a specific problem arise. That there has been no activity because the problem has not arisen does not make the standby organization "inactive."

A three year period of inactivity is suggested. It is unlikely that a nonprofit association that has

been inactive for that period will begin functioning again. Thus, it is prudent to transfer its assets to someone likely to make appropriate use of them.

3. Section 9 (numbered as section 7-30-109 in C.R.S.) applies only to personal property — tangible and intangible. Unclaimed property acts also apply to both kinds of personal property. All states have some form of unclaimed property act. Therefore, the relationship of these acts to this Act must be examined.

The Uniform Unclaimed Property Act (1981) applies to certain intangible and tangible personal property. If the property has been unclaimed by the owner for five or more years it is presumed abandoned. Intangible property, such as checking and savings accounts and uncollected dividends, is the main concern of these Acts. The obligor, such as a bank or other financial institution and corporation, is directed to report and turn over the property to the state administrator.

The only tangible personal property to which the Uniform Unclaimed Property Act (1981) applies is that in "a safe deposit box or any other safekeeping repository." Many states have additional statutes that apply to property abandoned



in airport, bus, and railroad lockers and the like. Tangible personal property of an inactive nonprofit association in the control or possession of a member or other person is not likely to be in these places. Therefore, overlap of this Act with the other state acts with respect to tangible personal property is likely to be very limited.

Property of an inactive nonprofit association is likely to be in the possession or control of a former member, board member, officer, or employee. Especially with respect to intangible property, their relation to the property is unlike that of those regulated by the unclaimed property acts. They are custodians or fiduciaries and not obligors. Those upon whom duties are imposed by the unclaimed property acts are obligors on such intangible property as bank accounts, money orders, life insurance policies, and utility deposits. The person acting under Section 9 (numbered as section 7-30-109 in C.R.S.) is very unlikely to be in the position of an obligor on such intangible property. In summary, there appears to be limited overlap.

Other special statutes may apply, such as laws governing unexpended campaign funds. Texas, for example, permits a person to retain political contributions for six years after the person is no longer an office-holder or candidate. It gives the person six choices of transferees, including a "recognized tax exempt charitable organization formed for educational, religious or scientific purposes." Tex. Code Ann. Elections Section 251.012(d) and (e) (Vernon's 1986). Minnesota provides that if an unincorporated religious society "ceases to exist or to maintain its organization" title to its real and personal property vests in the "next higher governing or supervisory" body of the same denomination. Minn. Stat. Ann. Section 315.37 (West 1992).

4. Section 9 (numbered as section 7-30-109 in C.R.S.) does not address what should be done with real property of an inactive nonprofit association. This seems justified. A nonprofit association owning real property of significant value is unlikely to become inactive. In the rare case that it does, the assistance of a court may be obtained in making appropriate disposition of the real property, primarily to ensure good title.

5. To obtain a Section 501(c)(3) tax classification as a nonprofit organization an associa-

tion must specify a distribution of assets on dissolution that satisfies the Internal Revenue Code. To avoid the interpretation that Section 9 (numbered as section 7-30-109 in C.R.S.) might be construed to override an approved distribution provision in an association's governing document the primacy of that distribution provision is expressly recognized in paragraph (1) (numbered as subsection (1)(a) in C.R.S.).

6. If there is no bylaw or other controlling document the person may transfer the personal property to another nonprofit organization or a government or governmental entity. The nonprofit organization need not have the same nonprofit purpose as the inactive one. It is enough that the transferee's purpose is "broadly similar." This requirement should not be construed narrowly. Otherwise, the risk of potential litigation over the transferor's choice will frustrate the section's purpose to provide a safe harbor.

There is no limitation with respect to the choice of a government or governmental entity.

7. Inasmuch as the transfer is made without consideration and the association almost certainly rendered insolvent, creditors of a nonprofit association would be protected by the Uniform Fraudulent Transfer Act Sections 4(a) and 5 and similar statutes. Whether they would also be protected if the transfer is made to the administrator of an unclaimed property statute depends on the terms of a jurisdiction's act. Uniform Unclaimed Property Act (1981) Sections 20 and 24 contemplate that a creditor may proceed against property in the hands of the administrator if the creditor claims an interest in the property, such as a security interest or judgment lien. However, a general creditor without some claim against the property would not be protected. It is unlikely that an inactive nonprofit association would have both unpaid creditors and a significant amount of property. Therefore, the two issues discussed above are unlikely to arise.

8. The person in possession or control is not required to give notice of the proposed transfer to anyone. An examination of to whom notice might reasonably be given reveals the difficulty with such a requirement. Almost by definition an inactive nonprofit association has no current members.

**7-30-110. Appointment of agent to receive service of process.** (1) A nonprofit association may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement appointing an agent authorized to receive service of process. If a nonprofit association has such an agent, part 7 of article 90 of this title shall apply as if the agent were a registered agent required to be appointed pursuant to said part.

(2) A statement appointing an agent authorized to receive service of process shall state:

- (a) The true name of the nonprofit association;
- (b) The principal office address of the principal office of the nonprofit association;
- (c) The registered agent name and registered agent address of the agent; and
- (d) A statement that the agent has consented to being so appointed.

(3) (Deleted by amendment, L. 2003, p. 2203, § 4, effective July 1, 2004.)

(4) to (6) (Deleted by amendment, L. 2002, p. 1810, § 3, effective July 1, 2002; p. 1674, § 1, effective October 1, 2002.)

**Source: L. 94:** Entire article added, p. 1274, § 1, effective May 22. **L. 2002:** (1) and (3) to (6) amended, p. 1810, § 3, effective July 1; (1) and (3) to (6) amended, p. 1674, § 1, effective October 1. **L. 2003:** (1), (2), and (3) amended, p. 2203, § 4, effective July 1, 2004. **L. 2004:** (1) and (2)(b) amended, p. 1399, § 1, effective July 1.

**Editor's note:** Colorado amended § 7-30-110 (numbered as Section 10 in the uniform act) by deleting the requirement for "acknowledgment" in subsection (3) (numbered as subsection (c) in the uniform act) and adding new language as set forth in subsection (6).

### OFFICIAL COMMENT

1. This section authorizes but does not require a nonprofit association to file a statement authorizing an agent to receive service of process. It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's leadership gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and address.

2. Central filing with a state official is provided. This is where parties will seek information of this kind and where this is commonly publicly filed.

3. The format of this section is very much like Section 5 (numbered as section 7-30-105 in C.R.S.), which concerns a statement of authority with respect to property. Because one requires local and other central filing they are not combined.

**7-30-111. Claim not abated by change of members or officers.** A claim for relief against a nonprofit association does not abate merely because of a change in its members, persons authorized to manage the affairs of the nonprofit association, or persons considered by the nonprofit association to be members.

**Source: L. 94:** Entire article added, p. 1275, § 1, effective May 22.

### OFFICIAL COMMENT

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated, nonprofit associations. Uniform Partnership Act Sections 29 and 31(4). This Act's entity approach requires this change of the old common law rule. Similar provisions are

found in many state statutes. See, for example, Ohio Rev. Code Ann., Corporations, Section 1745.04 (Baldwin 1991); Md. Ann. Code art. 6-406(a)(2); and 12 Vt. Stat. Ann. Section 815 (Equity Pub. 1973).

**7-30-112. Venue.** For purposes of venue, a nonprofit association is a resident of a county or city and county in which it has an office.

**Source: L. 94:** Entire article added, p. 1275, § 1, effective May 22.

### OFFICIAL COMMENT

1. Venue, unlike service of process, is treated by statute. See for example Mont. Code Ann. Section 25-2-118(1) (1991); 28 USCA 1391. A criterion used by all states for fixing venue is the county of residence of the defendant. Most states specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the

suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated, nonprofit association.

2. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. See



Wright, Miller, & Cooper, 15 *Federal Procedure & Practice* 3812 (1986). Conforming to the entity view of an association, Section 12 (numbered as section 7-30-112 in C.R.S.) rejects the common law view.

This section is bracketed because some states have already satisfactorily solved this problem.

States have by statute modified the common law rule. Illinois, for example, provides that "a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can

be found, in which any officer resides." Ill. Code Civ. Prac. Section 2-102(c).

3. Section 12 (numbered as section 7-30-112 in C.R.S.) makes a nonprofit association a resident of any county (or city) in which it has an office. If it has an office in five counties, for example, it may be sued in any of the five counties.

4. "City," in brackets, is for use by those states, such as Virginia, in which there is territory that is not in a county but in a city only.

**7-30-113. Summons and complaint - service on whom.** In an action or proceeding against a nonprofit association, a summons and complaint must be served on an agent authorized by appointment to receive service of process, an officer, a managing or general agent, or a person authorized to participate in the management of its affairs. If none of them can be served, service may be made on a member who may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

**Source: L. 94:** Entire article added, p. 1275, § 1, effective May 22.

**Editor's note:** Colorado amended § 7-30-113 (numbered as Section 13 in the uniform act) by adding a qualification in the last sentence that service may be made on a member "who may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association".

#### OFFICIAL COMMENT

1. In most states the law with respect to service of process is in court rules. Where that is the case, this section, if adopted, should be placed in these rules.

2. Some states have expressly addressed service of process on a nonprofit association. Those states may wish to continue their rules and so should not adopt this section. For this reason this section is bracketed.

Section 13 (numbered as section 7-30-113 in C.R.S.) adapts Rule 4 of the Federal Rules of Civil Procedure to this setting. However, it

leaves to other applicable law details concerning service, such as who may make service and the kind of the mailing. It specifies only to or on whom the service of process must be addressed.

By rule or statute all jurisdictions have extensive law on service of process. The real question for nonprofit associations is which set of these rules should apply. This Act treats a nonprofit unincorporated association as a legal entity. Thus, the rules applicable to another legal entity, the corporation, seem most appropriate.

**7-30-114. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source: L. 94:** Entire article added, p. 1275, § 1, effective May 22.

**7-30-115. Short title.** This article may be cited as the "Uniform Unincorporated Nonprofit Association Act".

**Source: L. 94:** Entire article added, p. 1275, § 1, effective May 22.

**7-30-116. Severability clause.** If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

**Source: L. 94:** Entire article added, p. 1275, § 1, effective May 22.

**7-30-117. Effective date.** This article shall take effect July 1, 1994.

**Source: L. 94:** Entire article added, p. 1276, § 1, effective May 22.

### OFFICIAL COMMENT

This Act provides an unincorporated, nonprofit association and its members with a legal structure that conforms to the expectations of many of them. Therefore, the need by the nonprofit association for additional time to revise procedures and forms to conform to a significant change in the law is not necessary. However, this Act materially affects third parties, particularly creditors of nonprofit associations. Anecdotal evidence suggests that many creditors place little reliance on their rights against mem-

bers in extending credit. If they have any reservations about the creditworthiness of a nonprofit association they obtain guarantees from creditworthy members or insist on cash. To the extent that this is true, no change in credit policies is needed and so no extra planning time is needed.

Unless a jurisdiction's usual effective date rule provides little time for affected parties to learn of a new law, it is unnecessary to extend this Act's effective date.

**7-30-118. Transition concerning real and personal property.** If, before July 1, 1994, an estate or interest in real or personal property was purportedly transferred to a nonprofit association, on July 1, 1994, the estate or interest vests in the nonprofit association, unless the parties had treated the transfer as ineffective. No such purported transfer of real property shall impart notice pursuant to section 38-35-109, C.R.S., until the date after July 1, 1994, a deed or other proper instrument conveying such estate or interest in real property is recorded in the office of the clerk and recorder of the county or city and county in which such real property is located.

**Source: L. 94:** Entire article added, p. 1276, § 1, effective May 22.

**Editor's note:** Colorado amended § 7-30-118 (numbered as Section 19 in the uniform act) by adding a provision that specifies that the transfer of real property will not impart notice until the date a deed or other proper instrument is recorded after July 1, 1994, whether such transfer was effective prior to July 1, 1994, and by removing the language found in subsection (b) in the uniform act. The official comment should be read with these changes in mind.

### OFFICIAL COMMENT

1. Section 19 (numbered as section 7-30-118 in C.R.S.) brings to fruition the parties' expectations that previous law frustrated. Inasmuch as the common law did not consider an unincorporated, nonprofit association to be a legal entity, it could not acquire property. A gift of real or personal property thus failed. Reference in subsection (a) (numbered as section 7-30-118 in C.R.S.) to the transfer as "purportedly" made identifies the document of transfer as one not effective under the law. Subsection (a) (numbered as section 7-30-118 in C.R.S.) gives effect to the gift. However, if parties were informed about the common law they may have treated the gift as ineffective. In that case, the final clause of subsection (a) (numbered as section 7-30-118 in C.R.S.) provides that the gift does not become effective when this Act takes effect.

2. Section 19 (numbered as section 7-30-118 in C.R.S.) should not be read as a retroactive rule. It applies to the facts existing when this Act takes effect. At that time subsection (a)

(numbered as section 7-30-118 in C.R.S.) applies to a purported transfer of property that under the law of the jurisdiction could not be given effect at the time it was made. Subsection (a) (numbered as section 7-30-118 in C.R.S.) belatedly makes it effective — effective when this Act takes effect and not when made. The practical result of this difference in when the purported transfer is effective is that the transfer is subject to interests in the property that came into being in the interim. The nonprofit association's interest is subject, for example, to a tax or judgment lien that became effective in the interim. An intervening transfer by the initial transferor may simply be evidence that the "parties had treated the transfer as ineffective." If so, subsection (a) (numbered as section 7-30-118 in C.R.S.) by its terms does not vest ownership in the nonprofit association.

3. Some courts gave effect to gift of property to an unincorporated, nonprofit association by determining that the gift lodged title in someone, often officers of the association, to hold the



property in trust for the benefit of the association and its members. Subsection (b) (language removed in C.R.S.) addresses this situation. When the Act takes effect it authorizes the fiduciary to transfer the property to the association. If the fiduciary is unwilling or reluctant, the association may require the fiduciary to transfer the property to the association. In either case, the association will get a deed transferring the property to it which, in the case of real property, the association may record.

4. Jurisdictions may face one of three different legislative situations with respect to Section 19 (numbered as section 7-30-118 in C.R.S.). First, a jurisdiction may not have changed the common law. In that case, Section 19 (numbered as section 7-30-118 in C.R.S.) fits its situation well. Subsections (a) (numbered as section 7-30-118 in C.R.S.) and (b) (language removed in C.R.S.) address the two approaches taken by the courts under the common law. Secondly, a jurisdiction may have changed the common law so as to make effective transfers of real and personal property to some but not all nonprofit associations. In this case Section 19 (numbered as section 7-30-118 in C.R.S.)

should be made applicable to those nonprofit associations that did not have the benefit of the special acts. Thirdly, some jurisdictions may have extended to all nonprofit associations the privilege of acquiring in their names real and personal property. In this case, the jurisdiction does not need Section 19 (numbered as section 7-30-118 in C.R.S.) and so should not adopt it.

5. Jurisdictions that have a statute like New York's concerning grants of property by will have a problem that needs special attention. The New York statute provides that a grant by will of real or personal property to an unincorporated association is effective only if the association incorporates within three years after probate of the will. McKinney's N.Y. Estates, Powers & Trust Law Section 3-1.3 (1991). The grants by will that need attention are those that have not become effective by incorporation of the association and have not become ineffective by the running of the three year period. These grants seem entitled to the benefits of Section 19 (numbered as section 7-30-118 in C.R.S.). If so, some modification of Section 19 (numbered as section 7-30-118 in C.R.S.) may be required.

**7-30-119. Savings clause.** Except to the extent set forth in section 7-30-118, this article does not affect any right accrued before July 1, 1994, or any action or proceeding then pending.

**Source:** L. 94: Entire article added, p. 1276, § 1, effective May 22.

**Editor's note:** Colorado amended § 7-30-119 (numbered as Section 20 in the uniform act) by adding an exception to the savings clause to accommodate the provision added to § 7-30-118. The official comment should be read with this change in mind.

#### OFFICIAL COMMENT

1. Section 20 (numbered as section 7-30-119 in C.R.S.) is adapted from RUPA Section 1006(c). It continues the prior law after the effective date of this Act with respect to a (i) "right accrued" and (ii) pending "action or proceeding." But for this section the new law of this Act would displace the old in some circumstances. The power of a new act to displace the old statute with respect to conduct occurring before the new act's enactment is substantial. Millard H. Ruud, *The Savings Clause — Some Problems in Construction and Drafting*, 33 Tex. L. Rev. 285, 286-293 (1955). A court generally applies the law that exists at the time it acts.

2. Almost all states have general savings statutes, usually as a part of their statutory construction acts. These are often very broad. See, for example, Model Statutory Construction Act, Section 53. As this Act is remedial, the more limited savings provisions in Section 20 (numbered as section 7-30-119 in C.R.S.) are more appropriate than the broad savings provisions of the usual general savings clause. Section 20

(numbered as section 7-30-119 in C.R.S.) and not a jurisdiction's general savings clause applies to the Act.

3. "Right Accrued." It is not always clear whether an alleged right has "accrued." Some courts have interpreted the phrase to mean that a "matured cause of action or legal authority to demand redress" exists. *Estate of Hoover v. Iowa Dept. of Social Services*, 299 Iowa 702, 251 N.W. 2d 529 (1977). In *Nielsen v. State of Wisconsin*, 258 Wis. 1110, 141 N.W. 2d 194 (1966), a landowner brought suit after the repeal of an act granting a landowner the right to recover from the state for damages to her land caused by the state's failure to install necessary culverts and the like to prevent flooding. Before the act's repeal the landowner's land had been damaged by flooding caused by the state's failures. The court held that the statutory saving of "rights of action accrued" saved her cause of action. In both of these cases, conduct that gave rise to a cause of action had occurred before the act was repealed. It is said that it is not enough

that there is an inchoate right. Apparently, there is no "accrued right" under a contract, for example, until there is a breach.

4. "Action or Proceeding" Pending. The principal question is what is an "action or proceeding" for this purpose. "Action" refers to a judicial proceeding. "Proceeding" alone, especially when used with "action," is broader and so includes administrative and other governmental proceedings. It has been given the broader meaning. For example, in *State ex rel. Carmean v. Board of Education of Hardin County*, 170 Ohio 2d 415, 165 N.E. 2d 918 (1960) a petition to transfer certain land from one school district to another filed before a change in the law was a "pending proceeding" to be decided under the old law. Similarly, a

request for permission to petition for an election to consolidate school districts was held to be a "proceeding commenced" so that the substance and procedure of the old law, which was materially different from the new, was preserved. *Grant v. Norris*, 249 Iowa 236, 85 N.W. 2d 261 (1957).

5. RUPA provides that the Act does not "impair obligations of contract existing." This is not carried forward. This phrase is intended to save only obligations protected by the contracts clauses of state and federal constitutions. However, as it might be construed more broadly and the constitution would protect without the phrase, the phrase is not present in Section 20 (numbered as section 7-30-119 in C.R.S.).

## Special Purpose Corporations

### ARTICLE 40

#### Corporations Not For Profit

**Cross references:** For definitions applicable to this article, see § 7-90-102.

7-40-101.	Who may organize - certificate - fees.	7-40-109.	Procedure for consolidation. (Repealed)
7-40-102.	Powers.	7-40-110.	Approval of merger or consolidation. (Repealed)
7-40-103.	Contents of certificate or bylaws.	7-40-111.	Certificate of merger or consolidation. (Repealed)
7-40-104.	Additional powers - indemnification - liability.	7-40-112.	Effect of merger or consolidation. (Repealed)
7-40-105.	Amendments - where filed - fees.	7-40-113.	Merger and consolidation with religious, educational, and benevolent societies. (Repealed)
7-40-106.	Associations which can be formed.		
7-40-107.	Dividend only on dissolution.		
7-40-108.	Procedure for merger. (Repealed)		

**7-40-101. Who may organize - certificate - fees.** (1) (a) Any three or more persons, who may or may not be residents of the state of Colorado, may associate themselves together to establish a corporation not for profit for any lawful business or to promote any legitimate object or purpose and may make, sign, and acknowledge and file in the office of the secretary of state of the state of Colorado and record in the office of the recorder of each county in which said corporation owns real estate in the state of Colorado a certificate in writing, setting forth the name of such corporation, the business, objects, or purposes for which it is formed, and the names of the first directors, trustees, or managers. The department of revenue shall collect a fee of five dollars for filing said certificate.

(b) Notwithstanding the amount specified for the fee in paragraph (a) of this subsection (1), the executive director of the department of revenue by rule or as otherwise provided by law may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the executive director by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.

(2) The provisions of this article shall not apply to any nonprofit corporation formed after December 31, 1967, nor shall they apply to any corporation not for profit formed prior to January 1, 1968, which is subject to the provisions of articles 121 to 137 of this title.

**Source:** G.L. § 224. G.S. § 367. R.S. 08: § 1013. C.L. § 2379. L. 31: p. 248, § 22. CSA: C. 41, § 172. L. 51: p. 282, § 1. CRS 53: § 31-20-1. C.R.S. 1963: § 31-19-1.



**L. 67:** p. 658, § 10. **L. 68:** p. 2, § 2. **L. 97:** (2) amended, p. 756, § 7, effective July 1, 1998. **L. 98:** (1) amended, p. 1320, § 14, effective June 1.

#### ANNOTATION

**Law reviews.** For article, "When Corporate Stock Becomes Real Estate", see 21 Dicta 53 (1944). For a brief comment on the 1951 amendment to this section, see 28 Dicta 174 (1951). For article, "Highlights of the 1955 Legislative Session — Corporations", see Rocky Mt. L. Rev. 60 (1955). For article, "Non-Profit and Charitable Corporations in Colorado", see 36 U. Colo. L. Rev. 9 (1963). For article, "Generation and Transmission Loan Policy Under the Rural Electrification Act", see 43 Den. L. J. 269 (1966).

**Duty of secretary of state to file certificate.** It is only upon the tender of a certificate properly setting forth what this section specifically requires that the secretary of state is under a duty to file it. *Saunders v. People ex rel. Tyler*, 99 Colo. 468, 63 P.2d 1231 (1936).

**An association organized under this section may compel issuance of a permit** by writ of mandamus to establish and maintain an old folks' home for aged people in good health and an orphanage for children of the Negro race. *City Council v. United Negroes Protective Ass'n*, 76 Colo. 86, 230 P. 598 (1924).

**The treatment of nonmembers comes within the general scope of the purposes of a nonprofit association**, by implication, there is no express restriction against it. *Union Gold Mining Co. v. Rocky Mt. Nat'l Bank*, 2 Colo. 248 (1873); *Denver & R.G.R.R. Employees' Relief Ass'n v. Rishmiller*, 64 Colo. 306, 171 P. 501 (1918).

**Consequently, a hospital established by a nonprofit corporation may receive nonmember patients.** Where the ultimate object of an association organized under this section was to treat and care for injured members and there was nothing in the certificate, constitution, or bylaws which provided that the hospital established should be for the exclusive use of the members of the association, the receiving of nonmembers as patients was not carrying on or transacting a separate and distinct business from that for which the association was formed. *Denver & R.G.R.R. Employees' Relief Ass'n v. Rishmiller*, 64 Colo. 306, 171 P. 501 (1918).

**7-40-102. Powers.** A corporation not for profit shall be a body corporate in the name stated in its certificate and may sue and be sued; make and enforce contracts in relation to its business, powers, and objects; have a seal; acquire, hold, encumber, and dispose of property, real, personal, or mixed; adopt and alter bylaws; amend its certificate of incorporation; consolidate or merge with any other corporation; have different classes of members with or without voting rights; and exercise every right and privilege necessary, incident, or appertaining to its business, objects, and purposes. Associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, where the members thereof receive no money as profit or otherwise, shall not be deemed insurance companies.

**Source:** G.L. § 226. G.S. § 369. R.S. 08: § 1015. C.L. § 2381. CSA: C. 41, § 174. L. 51: p. 282, § 2. CRS 53: § 31-20-2. C.R.S. 1963: § 31-19-2.

#### ANNOTATION

**Law reviews.** For article, "Restrictions on Charitable Gifts in Colorado", see 23 Rocky Mt. L. Rev. 434 (1951). For a brief comment on the 1951 amendment to this section, see 28 Dicta 174 (1951).

**This section is specifically for the benefit of corporations, associations and societies, not for pecuniary profit**, founded under this section; and where the association is not a corporation, association, or society so founded, it does not come within the purview of this section and can claim no benefit or exemption from it. *Head Camp, Pac. Jurisdiction, Woodmen of the World v. Sloss*, 49 Colo. 177, 112 P. 49 (1910).

**Hence the provisions of this section relating to nonprofit corporations not being deemed insurance companies have no application** to a corporation not organized under this section or one insuring those not of the classes named herein. *Head Camp, Pac. Jurisdiction, Woodmen of the World v. Sloss*, 49 Colo. 177, 112 P. 49 (1910).

**Corporate powers are to be determined from statute.** The powers which can be exercised by a corporation organized under a special statute are to be determined from the provisions of the legislative act and not from the company's charter, for it is a mere creature of the act to

which it owes its existence and it derives all of its powers therefrom. *Int'l. Serv. Union Co. v. People ex rel. Wettengel*, 101 Colo. 1, 70 P.2d 431 (1937).

**Prohibiting life insurance companies organized on the mutual assessment plan from**

**doing business** in the state does not effect this section. *Int'l. Serv. Union Co. v. People ex rel. Wettengel* 101 Colo. 1, 70 P.2d 431 (1937).

**7-40-103. Contents of certificate or bylaws.** (1) The certificate of incorporation or bylaws of the corporation shall provide:

(a) The number and term of office of trustees, directors, or managers of the corporation and the manner of their selection or election;

(b) The officers of the corporation and their term of office and the manner of their designation or selection;

(c) The kinds and classes of members and the rights and privileges of each; and

(d) The authority under which conveyance or encumbrance of all or any part of the corporate property may be made, and the persons who are authorized to execute the instruments of conveyance or encumbrance; and, if not contained in the certificate of incorporation or any amendment thereof, a certified copy of this authority shall be recorded in each county in which the corporation owns real estate.

**Source:** G.L. § 227. G.S. § 370. R.S. 08: § 1016. C.L. § 2382. CSA: C. 41, § 175. L. 51: p. 283, § 3. CRS 53: § 31-20-3. C.R.S. 1963: § 31-19-3. L. 2003: (1)(d) amended, p. 2203, § 5, effective July 1, 2004.

#### ANNOTATION

**Law reviews.** For a brief comment on the 1951 amendment to this section, see 28 Dicta 174 (1951).

**Nonprofit corporation may sell assets and dissolve by majority vote.** Since statutes requiring vote of two-thirds of outstanding authorized voting shares to sell corporation's assets

and to adopt resolution of dissolution do not apply to nonprofit corporation, determination of these issues by simple majority vote is valid if in accordance with bylaws of nonprofit corporation. *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**7-40-104. Additional powers - indemnification - liability.** (1) The certificate of incorporation or the bylaws of the corporation may provide the authority for the amendment of the certificate of incorporation or the bylaws, for the merging or consolidation of the corporation with another corporation, and for the exercising of any corporate function, power, right, duty, or privilege.

(2) (a) The certificate of incorporation or the bylaws of the corporation may set forth a provision limiting or eliminating the personal liability of directors to the same extent and in the same manner as is provided for cooperative associations in section 7-55-107 (1) (h).

(b) Any such corporation shall have the same powers, rights, and obligations and shall be subject to the same limitations as those that apply to domestic corporations, as set forth in article 109 of this title. Corporation directors, officers, employees, and agents shall have the same rights as directors, officers, employees, and agents, respectively, of domestic corporations, as set forth in article 109 of this title. Corporation directors and officers shall have the benefit of the same limitations on personal liability for any injury to person or property arising out of a tort, as set forth in section 7-108-402 (2), for directors and officers, respectively, of domestic corporations. Any reference in said sections to shareholders shall be construed to refer to voting members or voting stockholders, if any, for the purpose of this section.

**Source:** L. 51: p. 283, § 4. CSA: C. 41, § 175(1). CRS 53: § 31-20-4. C.R.S. 1963: § 31-19-4. L. 88: Entire section amended, p. 405, § 3, effective May 17. L. 93: (2)(b) amended, p. 855, § 7, effective July 1, 1994. L. 2003: (2)(b) amended, p. 2204, § 6, effective July 1, 2004.



## ANNOTATION

**Law reviews.** For a brief comment on the act which inserted this section, see 28 Dicta 174 (1951).

**Nonprofit corporation may sell assets and dissolve by majority vote.** Since statutes requiring vote of two-thirds of outstanding authorized voting shares to sell corporation's assets

and to adopt resolution of dissolution do not apply to nonprofit corporation, determination of these issues by simple majority vote is valid, if in accordance with bylaws of nonprofit corporation. *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**7-40-105. Amendments - where filed - fees.** (1) (a) All amendments to the certificate of incorporation shall be filed in the office of the secretary of state of Colorado and recorded in the office of the recorder of each county in which said corporation owns real estate in the state of Colorado. The department of revenue shall collect a fee of five dollars for the filing of each amendment.

(b) Notwithstanding the amount specified for the fee in paragraph (a) of this subsection (1), the executive director of the department of revenue by rule or as otherwise provided by law may reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the executive director by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.

(2) If a true copy of the certificate of incorporation of the corporation or any amendment to the certificate is presented to the secretary of state with a request that the same be certified, the secretary of state shall certify the same for a fee that shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., which certificate or amendment shall contain, in addition to the usual statement, a statement that the same is a true copy of the original certificate or amendment, as the case may be, on file in the records of the secretary of state and a statement as to the date of filing of the original certificate or amendment.

**Source:** **L. 51:** p. 283, § 4. **CSA:** C. 41, § 175(2). **CRS 53:** § 31-20-5. **C.R.S. 1963:** § 31-19-5. **L. 83:** (2) amended, p. 869, § 19, effective July 1. **L. 98:** (1) amended, p. 1321, § 15, effective June 1. **L. 2003:** (2) amended, p. 2204, § 7, effective July 1, 2004. **L. 2004:** (2) amended, p. 1399, § 2, effective July 1.

## ANNOTATION

**Law reviews.** For a brief comment on the act which inserted this section, see 28 Dicta 174 (1951).

**7-40-106. Associations which can be formed.** Religious, educational, benevolent, charitable, and other nonprofit associations may incorporate under the provisions of this article or any other applicable law authorizing such incorporation.

**Source:** **L. 51:** p. 284, § 4. **CSA:** C. 41, § 175(3). **CRS 53:** § 31-20-6. **C.R.S. 1963:** § 31-19-6.

## ANNOTATION

**Law reviews.** For a brief comment on the act which inserted this section, see 28 Dicta 174 (1951).

**7-40-107. Dividend only on dissolution.** No dividend or distribution of the property of any such corporation, association, or society shall be made until all debts are fully paid and then only upon its final dissolution and surrender of organization and name, nor shall any



distribution be made except by a vote of a majority of the members. When a distribution of any of their property is contemplated, the directors, trustees, or managers shall file a statement, under oath, in the office of the recorder of deeds in the county in which the business office is located that all debts of the corporation, association, or society are paid, and, in case a distribution is made before filing this statement under oath or if the statement is willfully false, said directors, trustees, or managers shall be jointly and severally liable for the debts of such corporation, association, or society. When a final dissolution of any such corporation, association, or society, formed by virtue of law, has been agreed upon, the directors, trustees, or managers shall file, in the office of the secretary of state, a certificate thereof under seal of the corporation, association, or society, and upon filing this certificate the organization shall cease to exist.

**Source:** G.L. § 228. G.S. § 371. R.S. 08: § 1017. C.L. § 2383. CSA: C. 41, § 176. CRS 53: § 31-20-7. C.R.S. 1963: § 31-19-7. L. 2003: Entire section amended, p. 2204, § 8, effective July 1, 2004.

#### ANNOTATION

**An insurance company is in violation of this section** when it issues certificates to its members entitling them to cash payments from a reserve or profit fund. *Int'l. Serv. Union Co. v. People ex rel. Wettengel*, 101 Colo. 1, 70 P.2d 431 (1937).

**A complaint alleging that a terminated member of a nonprofit corporation had demanded an accounting** and the right to inspect the books of the corporation to determine the member's fair share of the assets upon dissolu-

tion, which rights had been denied, is sufficient as against a motion to dismiss for failure to state a claim; inasmuch as a member of a nonprofit corporation has the right to inspect the books and records of the corporation, and a member of a nonprofit corporation is entitled to be informed concerning the business activities conducted by the corporation. *Bill Reno, Inc. v. Rocky Mt. Ford Dealers' Adv. Ass'n*, 151 Colo. 406, 378 P.2d 206 (1963).

#### **7-40-108. Procedure for merger. (Repealed)**

**Source:** L. 59: p. 322, § 1. CRS 53: § 31-20-14. C.R.S. 1963: § 31-19-8. L. 2003: IP(2) amended, p. 2204, § 9, effective July 1, 2004. L. 2004: Entire section repealed, p. 1400, § 3, effective July 1.

#### **7-40-109. Procedure for consolidation. (Repealed)**

**Source:** L. 59: p. 322, § 1. CRS 53: § 31-20-15. C.R.S. 1963: § 31-19-9. L. 2003: IP(2) amended, p. 2205, § 10, effective July 1, 2004. L. 2004: Entire section repealed, p. 1400, § 4, effective July 1.

#### **7-40-110. Approval of merger or consolidation. (Repealed)**

**Source:** L. 59: p. 323, § 1. CRS 53: § 31-20-16. C.R.S. 1963: § 31-19-10. L. 2003: (1)(b) and (1)(c) amended, p. 2205, § 11, effective July 1, 2004. L. 2004: Entire section repealed, p. 1400, § 5, effective July 1.

#### **7-40-111. Certificate of merger or consolidation. (Repealed)**

**Source:** L. 59: p. 323, § 1. CRS 53: § 31-20-17. C.R.S. 1963: § 31-19-11. L. 83: (2) and (3) amended, p. 869, § 20, effective July 1. L. 2002: IP(1) and (2) to (4) amended, p. 1810, § 4, effective July 1; IP(1) and (2) to (4) amended, p. 1675, § 2, effective October 1. L. 2003: IP(1) amended, p. 2205, § 12, effective July 1, 2004. L. 2004: Entire section repealed, p. 1401, § 6, effective July 1.

**7-40-112. Effect of merger or consolidation. (Repealed)**

**Source:** L. 59: p. 324, § 1. CRS 53: § 31-20-18. C.R.S. 1963: § 31-19-12. L. 2002: (1) amended, p. 1811, § 5, effective July 1; (1) amended, p. 1675, § 3, effective October 1. L. 2004: Entire section repealed, p. 1401, § 7, effective July 1.

**7-40-113. Merger and consolidation with religious, educational, and benevolent societies. (Repealed)**

**Source:** L. 59: p. 324, § 1. CRS 53: § 31-20-19. C.R.S. 1963: § 31-19-13. L. 2003: Entire section amended, p. 2205, § 13, effective July 1, 2004. L. 2004: Entire section repealed, p. 1402, § 8, effective July 1.

**ARTICLE 41****Telegraph Companies****7-41-101 to 7-41-104. (Repealed)**

**Source:** L. 95: Entire article repealed, p. 192, § 3, effective April 13.

**Editor's note:** This article was numbered as article 13 of chapter 31, C.R.S. 1963. For amendments to this article prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** For current information relating to telegraph messages, see § 18-9-306.

**ARTICLE 42****Ditch and Reservoir Companies**

**Cross references:** For definitions applicable to this article, see § 7-90-102.

**Law reviews:** For article, "Cities and Ditch Companies: Can They Live Together? — Parts I and II", see 16 Colo. Law. 815 and 996 (1987); for article, "Ownership of Mutual Ditch Company Assets", see 20 Colo. Law. 2081 (1991).

7-42-101.	Additional statements in certificates.	7-42-110.	Consolidation of ditch companies - repeal. (Repealed)
7-42-101.5.	Acequia mutual ditch - definition - powers.	7-42-111.	Extension of term.
7-42-102.	Work after organization.	7-42-112.	Procedure to extend term.
7-42-103.	Right-of-way.	7-42-113.	Duplicate certificate issued - when.
7-42-104.	Assessment on stock.	7-42-114.	Statement of loss.
7-42-105.	Right to purchase own stock.	7-42-115.	Publication of notice of demand.
7-42-106.	Assessments to pay purchase price.	7-42-116.	Duplicate conclusive against original.
7-42-107.	Shall furnish water to whom - rate.	7-42-117.	Proof of right to certificate.
7-42-108.	Shall keep ditch in repair.	7-42-118.	Liability of stockholders, directors, and officers.
7-42-109.	Penalty for damage.		

**7-42-101. Additional statements in certificates.** (1) When three or more persons associate under the provisions of law to form a corporation for the purpose of constructing a ditch, reservoir, pipeline, or any part thereof to convey water from any natural or artificial stream, channel, or source whatever to any mines, mills, or lands or for storing the same, they shall in their articles of incorporation, in addition to the matters otherwise required, state: The stream, channel, or source from which the water is to be taken; the point or place



at or near which the water is to be taken; the location, as near as may be, of any reservoir intended to be constructed; the line, as near as may be, of any ditch or pipeline intended to be constructed; and the use to which the water is intended to be applied.

(2) A corporation formed under the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title, shall have all of the rights and powers granted by this article to the extent not inconsistent with said act, if such nonprofit corporation otherwise complies with the terms and provisions of this article.

(3) In the case of a municipal corporation, county, special district, or entity, as that term is defined in section 7-90-102, that is a member or stockholder of a corporation described in subsection (1) or (2) of this section, an individual officer, partner, member, manager, agent, or employee of the municipal corporation, county, special district, or entity as designated by the municipal corporation, county, special district, or entity is eligible for election to serve as a director of the corporation irrespective of the fact that such individual is not a member or stockholder of the corporation.

**Source:** G.L. § 274. G.S. § 308. L. 1891: p. 97, § 1. R.S. 08: § 988. C.L. § 2353. CSA: C. 41, § 141. CRS 53: § 31-14-1. C.R.S. 1963: § 31-14-1. L. 67: p. 656, § 5. L. 92: Entire section amended, p. 248, § 1, effective March 24. L. 97: (2) amended, p. 756, § 8, effective July 1, 1998. L. 2003: (1) and (2) amended, p. 2205, § 14, effective July 1, 2004. L. 2009: (3) amended, (HB 09-1248), ch. 252, p. 1136, § 23, effective May 14.

## ANNOTATION

**Law reviews.** For article, "When Corporate Stock Becomes Real Estate", see 21 *Dicta* 53 (1944). For article, "Irrigation Corporations", see 32 *Rocky Mt. L. Rev.* 527 (1960). For comment, "Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States (196 Colo. 539, 589 P.2d 57 (1978))", see 57 *Den. L. J.* 103 (1979). For article, "Water Rights — How to Avoid Getting in Over Your Head", see 11 *Colo. Law* 2143 (1982).

**Purpose.** Mutual ditch companies were formed expressly for the purpose of furnishing water to shareholders, not for profit or hire. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Purposes of mutual ditch companies discussed.** *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501 (Colo. 1982).

**Convenience of members.** Mutual ditch companies were organized solely for the convenience of their members in the management of the irrigation and reservoir systems. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Mutual ditches and carrier ditches distinguished.** *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981).

**Powers of carrier ditches.** Carrier ditches carry water for sale to consumers who have contracted with the company. *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981).

A carrier ditch owns the legal title to a decreed appropriation of water from a natural stream. *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981).

**Ditch corporations are quasi-public carriers,** a means to an end to be resorted to for the

purpose of conveying water from the natural streams to places where it may be applied to beneficial uses. *Farmers' Indep. Ditch Co. v. Agric. Ditch Co.*, 22 Colo. 513, 45 P. 444 (1896).

Mutual ditch companies in Colorado have been recognized as quasi-public carriers. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**And a corporation owning and operating a ditch becomes a trustee for its stockholders** and is bound to protect their interests. *Farmers' Indep. Co. v. Agric. Ditch Co.*, 22 Colo. 513, 45 P. 444 (1896).

**Not under corporation statutes.** Mutual ditch companies are not organized under the general Colorado corporations statutes, but under special legislation for ditch and reservoir companies. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Because treatment differs.** The unique character of mutual ditch corporations mandates different treatment which is not fully in accord with the principles applicable to corporations in general. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Distinguishing rights of corporation and shareholders.** The right of the mutual ditch corporation to hold title to the water rights and other property, and to manage the affairs of the corporation, should be distinguished from the right of the shareholders to use the water on their lands. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**A mutual ditch company does not own water rights in a traditional sense;** however, a



mutual ditch company owns contractual water delivery rights. *E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrig. Co.*, 109 P.3d 969 (Colo. 2005).

**A mutual ditch corporation does not hold the actual "water rights" in trust.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**On the contrary, actual ownership of the water rights is in the shareholder.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**As well as interest in property and other works.** The shares of stock owned by shareholders in a mutual ditch corporation represent a definite and specific water right, as well as a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Individual shareholders of a mutual ditch company are indispensable parties in an ac-**

**tion to condemn the shareholders' decreed water priorities.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Despite responsibility of corporation in maintaining actions.** A mutual ditch corporation is responsible for maintaining actions in the corporate name to secure or protect the consumers' water rights or other property and to represent the shareholders in civil actions. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Duty of court to join shareholders.** Pursuant to C.R.C.P. 19 and the court's power under C.A.R. 21, the district court should join as parties to a condemnation action those shareholders in a mutual ditch corporation whose water rights would be affected by the condemnation action of the defendant as of the date of the initiation of the condemnation action and all parties in interest. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**7-42-101.5. Acequia mutual ditch - definition - powers.** (1) For purposes of this section, "acequia" means a ditch that:

- (a) Originated prior to Colorado's statehood;
- (b) Has historically treated water diverted by the acequia as a community resource and has therefore attempted to allocate water in the acequia based upon equity in addition to priority;
- (c) Relies essentially on gravity-fed surface water diversions;
- (d) Supplies irrigation water to long lots that are perpendicular to the stream or ditch to maximize the number of landowners who have access to water;
- (e) Has historically been operated pursuant to a one landowner-one vote system; and
- (f) Has historically relied on labor supplied by the owners of irrigated land served by the acequia.

(2) Subject to any contrary provision of subsection (3) of this section, the procedural and substantive requirements of this article other than this section that apply to the creation, powers, duties, and governance of a ditch corporation subject to this article shall be deemed to apply to the creation, powers, duties, and governance of an acequia ditch corporation.

(3) An acequia ditch corporation may be organized pursuant to this article, and a ditch corporation organized pursuant to this article may convert to an acequia ditch corporation, if:

(a) At least two-thirds of the irrigated land served by the ditch is platted or organized into long lots, the longest axes of which are perpendicular to the stream or ditch;

(b) Surface water rights provide all of the water rights used for irrigation in the ditch, and such water rights have had substantially uninterrupted use since before Colorado's statehood;

(c) The irrigated land served by the ditch is located wholly in one or more of the counties of Costilla, Conejos, Huerfano, and Las Animas; and

(d) As required pursuant to section 7-42-101, the stockholders of the ditch file articles of incorporation, or an amendment to the articles of incorporation, that state the stockholders' intention to create or convert to an acequia ditch corporation.

(4) An acequia ditch corporation, if its articles of incorporation so state, may specify in its bylaws that:

- (a) Its elections may be held pursuant to a one landowner-one vote system;
- (b) Owners of land irrigated by the ditch can be required to contribute labor to the maintenance and repair of the acequia or, in the alternative, to pay an assessment in lieu of such labor;

(c) Water in the ditch may be allocated on a basis other than pro rata ownership of the corporation; and

(d) The corporation has a right of first refusal regarding the sale, lease, or exchange of any surface water right that has historically been used to irrigate long-lot land by the acequia.

**Source: L. 2009:** Entire section added, (HB 09-1233), ch. 168, p. 739, § 2, effective April 22.

**Cross references:** For the legislative declaration contained in the 2009 act adding this section, see section 1 of chapter 168, Session Laws of Colorado 2009.

**7-42-102. Work after organization.** (1) Any corporation formed under the provisions of law for the purpose of constructing any ditch, flume, bridge, ferry, or telegraph line, within ninety days from the effective date of its articles of incorporation, shall commence work on such ditch, flume, bridge, ferry, or telegraph line, as shall be named in the articles, and shall complete the work with due diligence. The time of the completion of any such ditch, bridge, ferry, or telegraph line shall not be extended beyond a period of two years from the time work was commenced.

(2) Any corporation failing to commence work within ninety days after the effective date of the articles of incorporation, or failing to complete the same within two years after the time of commencement, shall forfeit all right to the water so claimed, and the same shall be subject to be claimed by any other company. The time for the completion of any flume constructed under the provisions of law shall not be extended beyond a period of four years.

(3) This section shall not apply to any ditch or flume for mining or other purposes constructed through and upon any grounds owned by the corporation. Any company formed to construct a ditch for domestic, agricultural, irrigating, milling, and manufacturing purposes or any of them shall have three years from the time of commencing work thereon within which to complete the same but no longer.

**Source: G.L. § 296. G.S. § 314. R.S. 08: § 989. C.L. § 2354. CSA: C. 41, § 142. CRS 53: § 31-14-2. C.R.S. 1963: § 31-14-2. L. 2008: (1) and (2) amended, p. 22, § 11, effective August 5.**

#### ANNOTATION

**Limitation for lack of due diligence.** Whether a court limits a priority decree because of this section or whether upon general principles it holds that due diligence in the prosecution of the work was not observed is quite immaterial. *Water Supply & Storage Co. v. Tenney*, 24 Colo. 344, 51 P. 505 (1897).

**Decree limiting priorities by court of proper jurisdiction may not be collaterally attacked.** Under this section, a decree limiting

the priorities of a ditch to the completion of the work pronounced by a court having jurisdiction of the subject matter, of the person, and to enter the particular judgment, which is not appealed from, cannot collaterally be attacked and set aside, even though an erroneous conclusion was reached. *Water Supply & Storage Co. v. Tenney*, 24 Colo. 344, 51 P. 505 (1897).

**Applied in** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**7-42-103. Right-of-way.** Any ditch, reservoir, or pipeline corporation formed under the provisions of law shall have the right-of-way over the line named in the articles of incorporation, and shall also have the right to run water from the stream, channel, or water source, whether natural or artificial, named in the articles through its ditch or pipeline, and store the same in any reservoir of the company when not needed for immediate use. The line proposed shall not interfere with any other ditch, pipeline, or reservoir having prior rights, except the right to cross by pipe or flume; nor shall the water of any stream, channel, or other water course, whether natural or artificial, be diverted from its original channel or



source to the detriment of any person or persons having priority of right thereto, but this shall not be construed to prevent the appropriation and use of any water not utilized and applied to beneficial uses.

**Source:** G.L. § 275. G.S. § 309. L. 1891: p. 98, § 2. R.S. 08: § 990. C.L. § 2355. CSA: C. 41, § 143. CRS 53: § 31-14-3. C.R.S. 1963: § 31-14-3. L. 2008: Entire section amended, p. 22, § 12, effective August 5.

#### ANNOTATION

The priority of right mentioned in this section is acquired by priority of appropriation, and appropriations of water shall be subordinate to the use thereof by prior appropriators. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

And "detriment" at the time of diversion can only exist where the water diverted has been previously appropriated or used; if there has been no previous appropriation or use thereof, there can be no present injury or "detriment". Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

For the "use" and "detriment" mentioned in this section are a use existing at the time of the diversion and a detriment resulting from that use. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

And so future "use" and "detriment" are of no consequence. The general assembly did not intend to prohibit the diversion of water to the "detriment" of parties who might at some future period conclude to settle upon the stream, nor were they legislating with a view to preserving in such stream sufficient water for the "use" of individuals who might never come and, consequently, never have use for it. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

**Appropriation not dependent upon locus of application.** In the absence of legislation to the

contrary, the right to water acquired by priority of appropriation is not in any way dependent upon the locus of its application to the beneficial use designed. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

Hence, water may be diverted from one watershed to another. Inasmuch as the doctrine of priority of right by priority of appropriation for agriculture is evoked by the imperative necessity for artificial irrigation of the soil, it would be an ungenerous and inequitable rule that would deprive one of its benefits simply because he has, by large expenditure of time and money, carried the water from one stream over an intervening watershed and cultivated land in the valley of another. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

**Section permits reservoir companies to store water already appropriated by others.** That the purpose of this section is to permit reservoir corporations to store water of which it has not made an appropriation — water already appropriated by others, but not then needed for immediate use — is made clear by the concluding words of the section: "but this shall not be construed to prevent the appropriation and use of any water not theretofore utilized and applied to beneficial uses". People ex rel. Park Reservoir Co. v. Hinderlider, 98 Colo. 505, 57 P.2d 894 (1936) (concurring opinion).

**7-42-104. Assessment on stock.** (1) If any corporation owning any ditch or canal for conveying or reservoir for storing water for irrigation purposes deems it necessary to raise funds to keep its ditch, canal, or reservoir in good repair or to pay any indebtedness theretofore contracted or the interest thereon, the corporation shall have power to make an assessment on the capital stock thereof, to be levied pro rata on the shares of stock payable in money, labor, or both, for the purpose of keeping the property of the corporation in good repair and for the payment of any indebtedness or interest thereon.

(2) But no such assessment shall be made unless the question of making the assessment is first submitted to the stockholders of the corporation at an annual meeting or at a special meeting called for that purpose, if a quorum is present, and the majority of stock represented at such meeting, either by the owner in person or by proxy, entitled to vote thereon shall vote in favor of making such assessment; and if said stockholders fail to hold any such meeting or fail to make or authorize any assessment within ninety days after the close of the company's fiscal year, the directors shall have power to make any such assessment at any regular or special meeting called therefor for that year.

(3) Such corporation may provide for the sale and forfeiture of shares of stock for such assessment as provided in subsection (4) of this section and may have the benefit of said subsection (4) for the recovery of such assessments by forfeiture or sale of the stock in default, and such corporation shall have a perpetual lien upon such shares of stock and the



water rights represented by the same for any and all such assessments until the same are fully paid. Such corporation may also provide that no water shall be delivered until all assessments are paid.

(4) The shares of stock shall be deemed personal property and transferable as such in the manner provided by the bylaws, and subscriptions thereof shall be made payable to the corporation and shall be payable in such installments and at such times as shall be determined by the directors or trustees. An action may be maintained in the name of the corporation to recover any installment which shall remain due and unpaid for the period of twenty days after personal demand therefor or, if personal demand is not made, within thirty days after a written or printed demand has been deposited in the post office properly addressed to the post office address of the delinquent stockholder. The directors or trustees may prescribe by bylaws for a forfeiture or sale of stock on failure to pay the installments or assessments that from time to time may become due, but no forfeiture of stock or of the amount paid thereon shall be declared as against any estate or against any stockholder before demand has been made for the amount due thereon either in person or by written or printed notice duly mailed to the last known address of such stockholder at least thirty days prior to the time the forfeiture is to take effect; but the proceeds of any sale, over and above the amount due on said shares, shall be paid to the delinquent stockholder.

**Source:** G.L. § 276. G.S. § 310. R.S. 08: § 991. L. 17: p. 149, § 1. C.L. § 2356. L. 27: p. 263, § 1. CSA: C. 41, § 144. CRS 53: § 31-14-4. C.R.S. 1963: § 31-14-4. L. 65: p. 443, § 1. L. 79: (2) R&RE, p. 333, § 1, effective June 15.

#### ANNOTATION

**Mutual ditches and carrier ditches distinguished.** Nelson v. Lake Canal Co., 644 P.2d 55 (Colo. App. 1981).

**Treatment differs from corporation.** The unique character of mutual ditch corporations mandates different treatment which is not fully in accord with the principles applicable to corporations in general. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**The relationship between the mutual ditch corporation and its shareholders arises out of contract,** implied in a subscription for stock and construed by the provisions of a charter or articles of incorporation. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**Rights of corporation and shareholders distinguished.** The right of the mutual ditch corporation to hold title to the water rights and other property, and to manage the affairs of the corporation, should be distinguished from the right of the shareholders to use the water on their lands. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**As well as interests.** Furthermore, the interests of the shareholders, insofar as the actual appropriation of the water is concerned, are not identical to the mutual ditch corporation. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**A mutual ditch company does not own water rights in a traditional sense;** however, a mutual ditch company owns contractual water delivery rights. E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrig. Co., 109 P.3d 969 (Colo. 2005).

**A mutual ditch corporation does not hold the actual "water rights" in trust.** Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**On the contrary, actual ownership of the water rights is in the shareholder.** Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**As well as interest in property and other works.** The shares of stock owned by shareholders in a mutual ditch corporation represent a definite and specific water right, as well as a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

The shares of stock in a mutual ditch corporation represent the consumer's interest in the reservoir, canal, and water rights. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**Shareholders in a mutual ditch corporation have the right to change the place of the use of water** if other users are not injured thereby. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

**But limitations on stockholder's right to change diversion point permitted.** A mutual ditch company bylaw imposing reasonable limitations, additional to those contained in section 37-92-305, upon the right of a stockholder to obtain a change in the point of diversion, can be enforced. Fort Lyon Canal Co. v. Catlin Canal Co., 642 P.2d 501 (Colo. 1982).

**Individual shareholders of a mutual ditch company are indispensable parties in an ac-**

**tion to condemn the shareholders' decreed water priorities.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Duty of court to join shareholders.** Pursuant to C.R.C.P. 19 and the court's power under C.A.R. 21, the district court should join as parties to a condemnation action those shareholders in a mutual ditch corporation whose water rights would be affected by the condemnation action of the defendant as of the date of the initiation of the condemnation action and all parties in interest. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Presumptions favor the acts of ditch company officials in assessing stock** under this section for the purpose of keeping a ditch in repair, hence it will be assumed by the courts, in the absence of contrary allegations, that the officials have done their duty. *Robinson v. Booth-Orchard Grove Ditch Co.*, 94 Colo. 515, 31 P.2d 487 (1934).

**Stockholder estopped to deny corporate existence and authority to levy assessments.** A stockholder of a ditch company who votes in favor of extending its corporate life and for levying assessments on the shareholders is estopped thereafter to deny the corporate existence and its authority to levy assessments. *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 P. 123 (1906).

**For a stockholder by implication enters into a contract with the company to pay all assessments** upon his stock, which may be levied pursuant to this section and the bylaws of the company, of which bylaws the stockholder will be presumed to have had notice. *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 P. 123 (1906).

**And stockholder is liable for additional assessment levied at adjourned meeting without notice.** Where a stockholder paid an assessment

levied at a stockholders' meeting, he ratified such meeting and thereby became liable for an additional assessment levied at an adjourned session of that meeting, although he received no notice of such adjourned session, as no notice of such adjournment is necessary. *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 P.2d 123 (1906).

**"Pro rata", as used in this section, means according to a measure which fixes proportions** according to a certain rate, percentage, or proportion. *Robinson v. Booth-Orchard Grove Ditch Co.*, 94 Colo. 515, 31 P.2d 487 (1934).

**Pro rata basis.** The benefit derived from the ownership of stock in a mutual ditch corporation is the right to the exclusive use of the water it represents, the water being divided pro rata according to the number of shares of stock held by each shareholder. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Pro rata assessments must be apportioned between classes of stock.** Where ditch stock is divided into different classes, each entitled to a different use varying in benefits from maintenance, a pro rata mandate as to assessments on the different classes requires only that the cost of maintenance shall be equitably apportioned between the classes and that the assessment on each share in a given class by the same. *Robinson v. Booth-Orchard Grove Ditch Co.*, 94 Colo. 515, 31 P.2d 487 (1934).

**Subsection (3) allows stoppage of water flow for nonpayment** of the cost of upkeep and maintenance of a ditch in the case of formally incorporated ditch companies. *Carson v. Williams*, 173 Colo. 546, 481 P.2d 725 (1971).

**Assessment for restoration of levy was a repair cost authorized under statute** and shareholder who refused to pay assessment was not entitled to return of his shares, nor entitled to damages or attorney fees. *Watson v. Vouga Reservoir Ass'n*, 969 P.2d 815 (Colo. App. 1998).

**7-42-105. Right to purchase own stock.** (1) It is lawful for any corporation owning any ditch or canal for conveying or reservoir for storing water for irrigation purposes for its stockholders to purchase and acquire any of its outstanding capital stock, but no purchase of or payment for its own shares shall be made at a time when the purchase or payment would make it insolvent.

(2) Any sale, exchange, lease, or other disposition of any part or all of the business, assets, property, or franchise of any such corporation to any conservancy district, irrigation district, or to the United States or any agency of the United States shall be deemed to be in the usual course of the corporation's business.

**Source:** L. 21: p. 212, § 1. C.L. § 2357. CSA: C. 41, § 145. CRS 53: § 31-14-5. C.R.S. 1963: § 31-14-5. L. 67: p. 312, § 1.

#### ANNOTATION

**Corporation may validly purchase own shares in settling assessment dispute.** Where, in settlement of an assessment dispute, a corpo-

ration accepts cash and the surrender of a stockholder's shares, such a transaction, properly carried out, is a valid purchase by the corporation



of its own shares. *Guadalupe Main Ditch Co. v. Mannassa Land & Irrigation Co.*, 104 Colo. 380, 91 P.2d 497 (1939).

**7-42-106. Assessments to pay purchase price.** When any such stock has been purchased or contract entered into for the purchase of the same, the corporation shall have the power to use its funds and to levy and collect assessments on the remaining outstanding capital stock in the manner provided by law for the payment of any other indebtedness, for the purpose of paying the purchase price of the stock so purchased.

**Source:** L. 21: p. 212, § 2. C.L. § 2358. CSA: C. 41, § 146. CRS 53: § 31-14-6. C.R.S. 1963: § 31-14-6.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

**7-42-107. Shall furnish water to whom - rate.** Any corporation constructing a ditch under the provisions of law shall furnish water to the class of persons using the water in the way named in the articles of incorporation, in the way the water is designated to be used, whether to miners, millmen, farmers, or for domestic use, whenever it has water in its ditch unsold, and it shall at all times give the preference to use of the water in said ditch to the class named in the articles. The rates at which water shall be furnished are to be fixed by the board of county commissioners as soon as the ditch is completed and prepared to furnish water.

**Source:** G.L. § 277. G.S. § 311. R.S. 08: § 992. C.L. § 2359. CSA: C. 41, § 147. CRS 53: § 31-14-7. C.R.S. 1963: § 31-14-7. L. 2008: Entire section amended, p. 22, § 13, effective August 5.

**Cross references:** For the duty of county commissioners to fix rates for water, see Colo. Const., art. XVI, § 8; for the right to continue purchasing water, see § 37-85-102 et seq.

#### ANNOTATION

- I. General Consideration.
- II. Duty to Furnish Water.
- III. County Commissioners Fix Rates.

#### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

**Purpose.** Mutual ditch companies were formed expressly for the purpose of furnishing water to shareholders, not for profit or hire. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Mutual ditches and carrier ditches distinguished.** *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981).

Carrier ditches carry water for sale to consumers who have contracted with the company. *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981).

**Carrier ditch owns title to decreed appropriation of water.** A carrier ditch owns the legal title to a decreed appropriation of water from a natural stream. *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981).

**A duality of effort exists between the mutual ditch corporation and its shareholders,** unlike a trust. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

#### II. DUTY TO FURNISH WATER.

**Distinguishing rights of corporation and shareholders.** The right of the mutual ditch corporation to hold title to the water rights and other property, and to manage the affairs of the corporation, should be distinguished from the right of the shareholders to use the water on their lands. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Appropriation of water to an actual beneficial use, and not mere ownership of stock,**



**entitles a shareholder to his water rights.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Pro rata water rights.** The benefit derived from the ownership of stock in a mutual ditch corporation is the right to the exclusive use of the water it represents, the water being divided pro rata according to the number of shares of stock held by each shareholder. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Shareholders in a mutual ditch corporation have the right to change the place of the use of water if other users are not injured thereby.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Ditch companies, having unsold water in their canals, shall furnish the same to the class of persons using it, in the manner named by the articles of incorporation upon payment of the established rate.** *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582, 17 P. 487 (1887).

**And consumer is entitled to mandamus where refused.** Upon tender of the rate fixed and compliance with reasonable regulations established, if the carrier has water undisposed of, the consumer is entitled to its use, and so mandamus lies where his demand is refused. *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582, 17 P. 487 (1887).

**This section does not impliedly recognize any preferential right of a contract consumer over the rights of owners of the company with respect to reallocation of water previously used by other contract consumers.** *City of Westminster v. City of Broomfield*, 769 P.2d 490 (Colo. 1989).

**Liability and obligation.** The mutual ditch corporation is not only obligated to furnish a proper proportion of water to each of its shareholders, but it is liable in damages for the failure to do so. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975); *Nelson v. Lake Canal Co.*, 644 P.2d 55 (Colo. App. 1981).

**Proceedings under this section to compel delivery of water must necessarily be somewhat summary** in their nature, for to be effective the relief must be immediate; and to this end trial courts should be liberal in matters of pleading and practice lest, for example, the crops of a farmer burn while counsel contend over legal technicalities. *Townsend v. Fulton Irrigating Ditch Co.*, 17 Colo. 142, 29 P. 453 (1891).

**Corporation is not the only proper representative of shareholders' interests.** Inasmuch as the right to "use water" vests solely in the shareholders, and the mutual ditch corporation neither administers nor participates in this actual use, the corporation cannot be deemed the trustee and only proper representative of the shareholders' interests in this matter. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**Individual shareholders of a mutual ditch company are indispensable parties in an action to condemn the shareholders' decreed water priorities.** *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**A carrier is entitled to compensation for carriage,** but it cannot charge for the right to use water from its canal, nor can it exact in advance a part or all of its transportation charge for the remaining years of its corporate life as a condition precedent to use for the current irrigating season. *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582, 17 P. 487 (1887).

**Moreover, a carrier does not have the rate-making power,** and if the carrier assumes and exercises such power, its acts would be subject to a review and change by the county commissioners upon a proper showing. *Montezuma Water & Land Co. v. McCracken*, 62 Colo. 394, 163 P. 286 (1917); *Northern Colo. Irrigation Co. v. Bd. of Comm'rs*, 95 Colo. 555, 38 P.2d 889 (1934).

**There mere failure of the owner of a water right to go to the irrigation company each season and pay the stipulated price for carrying his water does not entitle any other person to enter into a contract with the company for carrying such water and to thereby become the owner of the water right.** *Cooper v. Shannon*, 36 Colo. 98, 85 P. 175 (1906).

**However, this section does not apply to a proceeding between individuals in which no ditch company is a party,** as where the question to be determined is whether a sheriff's deed includes a water right. *Cooper v. Shannon*, 36 Colo. 98, 85 P. 175 (1906).

### III. COUNTY COMMISSIONERS FIX RATES.

**Commissioners prescribe rates.** This section provides that the county commissioners, when an irrigating ditch is completed and prepared to furnish water, are to prescribe the rates at which water shall be furnished. *Northern Colo. Irrigation Co. v. Bd. of Comm'rs*, 95 Colo. 555, 38 P.2d 889 (1934).

**But if a carrier has a rate of its own with which the consumer is satisfied,** he is not required to apply to the commissioners to fix a maximum rate. *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582, 17 P. 487 (1887).

**The rates fixed by the board of county commissioners are subject to judicial control.** *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582, 17 P. 487 (1887); *Montezuma Water & Land Co. v. McCracken*, 62 Colo. 394, 163 P. 286 (1917).

**And where a rate of charge fixed by the board has been judicially declared unreasonable and confiscatory,** the board will not be permitted to evade the effect of such judgment by declaring and establishing the same rate of

charge upon the same evidence. *Montezuma Water & Land Co. v. McCracken*, 62 Colo. 394, 163 P. 286 (1917).

**However, a new reasonable maximum rate may be set.** Where a rate prescribed by the board has been adjudged unreasonable and its

enforcement enjoined, it is no violation of an injunction for the board to immediately prescribe a reasonable maximum rate. *Montezuma Water & Land Co. v. McCracken*, 62 Colo. 394, 163 P. 286 (1917).

**7-42-108. Shall keep ditch in repair.** Every ditch corporation formed under the provisions of law shall be required to keep its ditch in good condition so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property. If it is necessary to convey any ditch over, across, or above any lode or mining claim or to keep the water so conveyed therefrom, the corporation, if necessary to keep the water of the ditch out or from any claim, shall flume the ditch so far as necessary to protect the claim or property from the water of said ditch.

**Source:** G.L. § 278. G.S. § 312. R.S. 08: § 993. C.L. § 2360. CSA: C. 41, § 148. CRS 53: § 31-14-8. C.R.S. 1963: § 31-14-8. L. 2003: Entire section amended, p. 2206, § 15, effective July 1, 2004.

**Cross references:** For the duty to maintain ditch in good repair, see § 37-84-119; for the duty to keep embankments in repair, see §§ 37-84-101 and 37-84-107.

## ANNOTATION

- I. Duty to Keep Ditches in Good Condition.
- II. Liability for Injury from Seepage.

### I. DUTY TO KEEP DITCHES IN GOOD CONDITION.

**This section imposes upon ditch companies the duty of keeping their ditches in "good condition".** *North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915).

The mutual ditch corporation must protect and preserve the interests of the shareholders by keeping the ditches, canals, reservoir, and other works in good repair, the expense of which is paid from the special assessment. *Jacobucci v. District Court*, 189 Colo. 380, 541 P.2d 667 (1975).

**And this duty to prevent injury to adjacent property is emphasized by the requirement that flumes be used** where necessary to protect property from injury by escaping water. *North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915).

**Duty to maintain ditch applies to improvements** such as trash racks that are incorporated into a ditch. *E. Meadows Co., LLC v. Greeley Irrig. Co.*, 66 P.3d 214 (Colo. App. 2003).

**The care required of a ditch owner** in the construction and management of his ditch to avoid injuries to others is ordinary care such as a man of ordinary prudence and intelligence would employ under like circumstances to protect his property. *City of Boulder v. Fowler*, 11 Colo. 396, 18 P. 337 (1888).

**It was within the discretion of the court to rule that expert testimony was not required**

**to establish the standard of care applicable to defendant.** *Oliver v. Amity Mut. Irrigation Co.*, 994 P.2d 495 (Colo. App. 1999).

**What is meant by "good condition" is specified** in the clause "so that the water shall not be allowed to escape, etc.", to the injury of the property of others. *North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915).

**And if water does escape to the injury of property**, that fact itself is evidence that the ditch is not in the "good condition" which the statute requires. *North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915).

### II. LIABILITY FOR INJURY FROM SEEPAGE.

**This section does not make the owner of a ditch absolutely liable for damages**, only for negligence. *Platte & Denver Ditch Co. v. Anderson*, 8 Colo. 131, 6 P. 515 (1884); *City of Boulder v. Fowler*, 11 Colo. 396, 18 P. 337 (1888); *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434, 21 P. 565 (1889); *Greeley Irrigation Co. v. House*, 14 Colo. 549, 24 P. 329 (1890); *Grand Valley Irrigation Co. v. Pitzner*, 14 Colo. App. 123, 59 P. 420 (1899); *Garnet Ditch & Reservoir Co. v. Sampson*, 48 Colo. 285, 110 P. 79 (1910); *North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915); *Bridgeford v. Colo. Fuel & Iron Co.*, 63 Colo. 372, 167 P. 963 (1917).

**And where there is a failure on the part of ditch owners to comply with this section** as to maintenance or use of an irrigating ditch



whereby injury results, there can be no question but an injured party is entitled to recover. *Greeley Irrigating Co. v. House*, 14 Colo. 549, 24 P. 329 (1890).

**The measure of damages to lands by seepage** is the difference between its value immediately before and immediately after the injury, with the cost of restoration a proper consideration in determining value after injury. *North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915).

**Cause of action for seepage damage is within the six-year statute of limitations**, with

the statute running from the first appearance of seepage. *Middlekamp v. Bessemer Irrigation Co.*, 46 Colo. 102, 103 P. 280 (1909).

**Section 15 of article II, Colo. Const., does not apply to this section** for this provision of the constitution is limited to proceedings under the eminent domain statute; it has not the effect to charge the owner of an irrigating ditch with the damages occasioned by seepage therefrom to the lands of another where negligence is shown. *North Sterling Irrigation Dist. v. Dickman*, 59 Colo. 169, 149 P. 97 (1915).

**7-42-109. Penalty for damage.** Any person who willfully or maliciously damages or interferes with any road, ditch, flume, bridge, ferry, railroad, or telegraph line or any of the fixtures, tools, implements, appurtenances, or property of any corporation that is formed under the provisions of law is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. Any such fine shall be paid into the county treasury, and the offender shall also pay all damages that any such corporation sustains, together with costs of suit.

**Source:** G.L. § 297. G.S. § 315. R.S. 08: § 994. C.L. § 2361. CSA: C. 41, § 149. CRS 53: § 31-14-9. C.R.S. 1963: § 31-14-9. L. 2003: Entire section amended, p. 2206, § 16, effective July 1, 2004.

**Cross references:** For the penalty for damaging a ditch or flume, see § 37-89-101.

#### **7-42-110. Consolidation of ditch companies - repeal. (Repealed)**

**Source:** L. 1876: p. 68, § 1. G.L. omitted. G.S. § 313. R.S. 08: § 995. C.L. § 2362. CSA: C. 41, § 150. CRS 53: § 31-14-10. C.R.S. 1963: § 31-14-10. L. 2002: Entire section amended, p. 1811, § 6, effective July 1; entire section amended, p. 1675, § 4, effective October 1. L. 2003: (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-42-111. Extension of term.** When the term of years for which any corporation has been incorporated as a ditch company for the purpose of carrying water for irrigation purposes or as a reservoir company for the storage of water for irrigation purposes has expired or is about to expire by lawful limitation, and such corporation has not been administered upon as an expired corporation or gone into liquidation and settlement and division of its affairs, it may have its term of incorporation extended and continued the same as if originally incorporated, as provided in section 7-42-112.

**Source:** L. 1891: p. 96, § 1. R.S. 08: § 996. C.L. § 2363. CSA: C. 41, § 151. CRS 53: § 31-14-11. C.R.S. 1963: § 31-14-11.

**7-42-112. Procedure to extend term.** (1) Whenever the corporate life of any such ditch or reservoir company has expired or is about to expire, the stockholders may vote upon the question of extending the life of such company for another twenty years, or for any other term provided by statute, by first giving notice of such intention by publication for two successive weeks in the newspaper printed nearest the place where the principal operations of said company are carried on. Such notice shall be signed by stockholders owning at least ten percent of the entire capital stock of said company, and shall state the place where and



the time when the question of renewal shall be submitted to the votes of the stockholders of said company at the meeting held in pursuance of such notice, if a majority of the stock of the corporation is represented.

(2) The votes shall be taken by ballot, and each stockholder shall be entitled to as many votes as the stockholder owns shares of stock in the company or holds proxies therefor. If a majority of the votes cast is in favor of a renewal of the corporation, the president and secretary of the company, under the corporate seal of the company, shall certify the fact, and shall make as many certificates as may be necessary. The company shall record one certificate in the office of the recorder of deeds in each county in which the company does business and shall deliver to the secretary of state for filing pursuant to part 3 of article 90 of this title a statement of extension of term that states that the term of the company has been extended, the principal office address of the company, and the registered agent name and registered agent address of the company. The corporate life of the company shall be renewed upon such recording and filing of the declaration, and all stockholders shall have the same rights in the renewed corporation as they had in the company as originally formed.

**Source:** L. 1891: p. 96, § 2. R.S. 08: § 997. C.L. § 2364. L. 31: p. 247, § 21. CSA: C. 41, § 152. CRS 53: § 31-14-12. C.R.S. 1963: § 31-14-12. L. 83: (2) amended, p. 870, § 21, effective July 1. L. 2002: (2) amended, p. 1811, § 7, effective July 1; (2) amended, p. 1676, § 5, effective October 1. L. 2003: (2) amended, p. 2206, § 17, effective July 1, 2004. L. 2004: (2) amended, p. 1402, § 9, effective July 1. L. 2009: (2) amended, (HB 09-1248), ch. 252, p. 1128, § 1, effective December 1.

#### ANNOTATION

**Law reviews.** For article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

**Participation of a stockholder in stockholder's meeting at which it is voted to extend the life of the company estops him** to deny the existence of the corporation under its certificate extending its corporate life and also its authority to levy assessments. *Hymphreys v. Mooney*, 5

*Colo.* 282 (1880); *Plummer v. Struby-Estabrooke Mercantile Co.*, 23 *Colo.* 190, 47 P. 294 (1896); *Grande Londe Lumber Co. v. Cotton*, 12 *Colo. App.* 375, 55 P. 610 (1898); *Thompson v. Commercial Union Assurance Co.*, 20 *Colo. App.* 331, 78 P. 1073 (1904); *Callahan v. Chilcott Ditch Co.*, 37 *Colo.* 331, 86 P. 123 (1906).

**7-42-113. Duplicate certificate issued - when.** Any owner of capital stock, as shown by the records of a corporation formed under the law of this state, entitling the stockholder to the services of a ditch or to the use of water subject to the payment of assessments, the legal representative or assignee of any such stockholder, or any lienholder named in the books of the corporation as a lienholder on the lost certificate, whose stock certificate has been lost, mislaid, or destroyed, may have a duplicate certificate issued in accordance with sections 7-42-114 to 7-42-117.

**Source:** L. 51: p. 278, § 1. CSA: C. 41, § 152(1). CRS 53: § 31-14-13. C.R.S. 1963: § 31-14-13. L. 2003: Entire section amended, p. 2207, § 18, effective July 1, 2004. L. 2012: Entire section amended, (HB 12-1010), ch. 12, p. 30, § 1, effective August 8.

**Editor's note:** Section 6 of chapter 12, Session Laws of Colorado 2012, provides that the act amending this section applies to requests for duplicate stock certificates filed on or after August 8, 2012.

**7-42-114. Statement of loss.** If a certificate of capital stock has been lost, mislaid, or destroyed, and the stockholder, legal representative, or assignee has paid all assessments levied by the corporation against the stock, the stockholder, the stockholder's legal representative or assignee, and any lienholder named in the books of the corporation as a lienholder on the lost certificate may file with the secretary of the corporation a statement under oath that the certificate of stock has been lost, mislaid, or destroyed and that the

certificate is the property of the person making the statement and has not been transferred or hypothecated by the stockholder, and demand the issuance of a duplicate certificate in accordance with this section and sections 7-42-115 to 7-42-117.

**Source:** L. 51: p. 278, § 2. CSA: C. 41, § 152(2). CRS 53: § 31-14-14. C.R.S. 1963: § 31-14-14. L. 2004: Entire section amended, p. 1402, § 10, effective July 1. L. 2012: Entire section amended, (HB 12-1010), ch. 12, p. 30, § 2, effective August 8.

**Editor's note:** Section 6 of chapter 12, Session Laws of Colorado 2012, provides that the act amending this section applies to requests for duplicate stock certificates filed on or after August 8, 2012.

**7-42-115. Publication of notice of demand.** Upon receipt of a demand pursuant to section 7-42-114, the corporation shall publish, at the expense of the person making the demand, at least once a week for five successive weeks, the fifth publication being on the twenty-eighth day after the first publication, in a newspaper of general circulation in the county in which the principal office of the corporation is located or, if there is no newspaper in such county, then in such a newspaper of an adjoining county, a notice that such a demand has been filed with the corporation in accordance with sections 7-42-114 to 7-42-117, stating the demand in full and stating that the corporation will issue, on or after a date therein stated, following the last publication of the notice by at least thirty days, a duplicate certificate to the registered owner, the registered owner's legal representative or assignee, or any lienholder named in the books of the corporation as a lienholder on the lost certificate unless a contrary claim is filed with the corporation prior to the date stated in the notice.

**Source:** L. 51: p. 278, § 3. CSA: C. 41, § 152(3). CRS 53: § 31-14-15. C.R.S. 1963: § 31-14-15. L. 2003: Entire section amended, p. 2207, § 19, effective July 1, 2004. L. 2004: Entire section amended, p. 1403, § 11, effective July 1. L. 2012: Entire section amended, (HB 12-1010), ch. 12, p. 31, § 3, effective August 8.

**Editor's note:** Section 6 of chapter 12, Session Laws of Colorado 2012, provides that the act amending this section applies to requests for duplicate stock certificates filed on or after August 8, 2012.

**7-42-116. Duplicate conclusive against original.** If no claim of interest or ownership other than that made by the person filing a notice pursuant to section 7-42-114 or such person's legal representative or assignee is on file in the records of the secretary of the corporation prior to the date stated in the notice, the corporation shall issue, on or after said date, a duplicate certificate to the person, the person's legal representative or assignee, or any lienholder named in the books of the corporation as a lienholder on the lost certificate. All rights under the original certificate shall immediately cease and no person shall at any time thereafter assert any claim or demand against the corporation or any other person on account of the original certificate.

**Source:** L. 51: p. 279, § 4. CSA: C. 41, § 152(4). CRS 53: § 31-14-16. C.R.S. 1963: § 31-14-16. L. 2002: Entire section amended, p. 1812, § 8, effective July 1; entire section amended, p. 1676, § 6, effective October 1. L. 2003: Entire section amended, p. 2207, § 20, effective July 1, 2004. L. 2004: Entire section amended, p. 1403, § 12, effective July 1. L. 2012: Entire section amended, (HB 12-1010), ch. 12, p. 31, § 4, effective August 8.

**Editor's note:** Section 6 of chapter 12, Session Laws of Colorado 2012, provides that the act amending this section applies to requests for duplicate stock certificates filed on or after August 8, 2012.

**7-42-117. Proof of right to certificate.** The corporation may require any legal representative or assignee of a stockholder of record to prove the stockholder's legal right to such



certificate as a legal representative or assignee of the stockholder of record. The corporation may require any lienholder named in the books of the corporation as a lienholder on the lost certificate to prove the lienholder's legal right to such certificate.

**Source:** L. 51: p. 279, § 5. CSA: C. 41, § 152(5). CRS 53: § 31-14-17. C.R.S. 1963: § 31-14-17. L. 2004: Entire section amended, p. 1403, § 13, effective July 1. L. 2012: Entire section amended, (HB 12-1010), ch. 12, p. 31, § 5, effective August 8.

**Editor's note:** Section 6 of chapter 12, Session Laws of Colorado 2012, provides that the act amending this section applies to requests for duplicate stock certificates filed on or after August 8, 2012.

**7-42-118. Liability of stockholders, directors, and officers.** Stockholders, directors, and officers of corporations formed under the provisions of this article shall enjoy the same measure of immunity from liability for corporate acts or omissions as stockholders, directors, and officers of corporations formed under the "Colorado Business Corporation Act", articles 101 to 117 of this title, or as members, directors, and officers of nonprofit corporations formed under the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title.

**Source:** L. 86: Entire section added, p. 1092, § 2, effective May 16. L. 93: Entire section amended, p. 855, § 8, effective July 1, 1994. L. 97: Entire section amended, p. 756, § 9, effective July 1, 1998.

## ARTICLE 43

### Flume and Pipeline Companies

**Cross references:** For definitions applicable to this article, see § 7-90-102.

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| 7-43-101. Certificate for flume companies. | nies.                                      |
| (Repealed)                                 | 7-43-103. Nonprofit corporations - powers. |
| 7-43-102. Certificate for pipeline compa-  |  |

#### **7-43-101. Certificate for flume companies. (Repealed)**

**Source:** G.L. § 279. G.S. § 316. R.S. 08: § 998. C.L. § 2365. CSA: C. 41, § 153. CRS 53: § 31-15-1. C.R.S. 1963: § 31-15-1. L. 69: p. 218, § 1. L. 96: Entire section repealed, p. 554, § 2, effective April 24.

**7-43-102. Certificate for pipeline companies.** Whenever any three or more persons associate under the provisions of law to form a corporation for the purpose of constructing a pipeline for the conveyance of gas, water, or oil, they, in the articles of incorporation, in addition to the matters otherwise required, shall state the places from and to which it is intended to construct the proposed line. Any pipeline corporation formed under the provisions of law shall have the right-of-way over the line named in the articles and shall also have the right to convey gas, water, or oil by said line, as stated in the articles, through lands of the state of Colorado and lands of any persons, and to erect pump stations, storage tanks, and other buildings necessary for such business. If a corporation is unable to agree with the persons owning any of the lands for the purchase of any real estate required for the purpose of any such corporation or company, or the transaction of the business of the same, or for right-of-way, or any other lawful purpose connected with or necessary to the operation of said company, the corporation may acquire such title in the manner provided by law.



**Source:** L. 1891: p. 94, § 1. R.S. 08: § 999. C.L. § 2366. CSA: C. 41, § 154. CRS 53: § 31-15-2. C.R.S. 1963: § 31-15-2. L. 69: p. 218, § 2. L. 2003: Entire section amended, p. 2207, § 21, effective July 1, 2004. L. 2008: Entire section amended, p. 22, § 14, effective August 5.

**Cross references:** For the power of pipeline companies to exercise the power of eminent domain, see § 38-2-101; for pipeline company rights-of-way, see § 38-4-102.

#### ANNOTATION

**This section does not define a pipeline company.** Sinclair Transp. Co. v. Sandberg, 228 P.3d 198 (Colo. App. 2009).

**The plain language of this section indicates the legislature intended to describe a process by which any domestic pipeline corporation shall be formed under Colorado law.** Sinclair Transp. Co. v. Sandberg, 228 P.3d 198 (Colo. App. 2009).

Because Colorado cannot dictate or regulate how a foreign entity is formed, Wyoming corporation that has been authorized to do business in the state and that is in good standing is not subject to the pipeline formation requirements in this section. Sinclair Transp. Co. v. Sandberg, 228 P.3d 198 (Colo. App. 2009).

**7-43-103. Nonprofit corporations - powers.** A nonprofit corporation subject to the “Colorado Revised Nonprofit Corporation Act”, articles 121 to 137 of this title, shall have all of the rights and powers granted by this article to the extent not inconsistent with said act, if such nonprofit corporation otherwise complies with the terms and provisions of this article.

**Source:** L. 67: p. 657, § 6. C.R.S. 1963: § 31-15-3. L. 97: Entire section amended, p. 756, § 10, effective July 1, 1998.

#### ARTICLE 44

##### Water Users' Associations

**Cross references:** For definitions applicable to this article, see § 7-90-102.

7-44-101.	Tax exemptions - fees.	7-44-105.	Application to prior associations.
7-44-102.	Stock subscription record.	7-44-106.	Water users' association petition in district court - when.
7-44-103.	Organization - assessments.		
7-44-104.	Directors may file petition in district court.	7-44-107.	Associations may extend corporate life.

**7-44-101. Tax exemptions - fees.** Any water users' association that is organized in conformity with the requirements of the United States under the reclamation act of June 17, 1902, and that, under its articles of incorporation, is authorized to furnish water only to its stockholders, shall be exempt from the payment of any income tax and from the payment of any annual franchise tax but shall be required to pay, as preliminary to its incorporation, a fee that shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., for the filing and recording of its articles of incorporation.

**Source:** L. 05: p. 360, § 1. R.S. 08: § 1000. C.L. § 2367. CSA: C. 41, § 155. CRS 53: § 31-16-1. C.R.S. 1963: § 31-16-1. L. 81: Entire section amended, p. 430, § 4, effective July 1. L. 2008: Entire section amended, p. 23, § 15, effective August 5.

**Cross references:** For the “Reclamation Act of 1902”, see 43 U.S.C. § 371 et seq.

## ANNOTATION

**Law reviews.** For article, "When Corporate Stock Becomes Real Estate", see 21 Dicta 53 (1944). For article, "Irrigation Confirmation Proceedings", see 21 Dicta 140 (1944). For

article, "Curative Statutes of Colorado Respecting Titles to Real Estate", see 26 Dicta 321 (1949).

**7-44-102. Stock subscription record.** Any water users' association organized in conformity with the requirements of the United States under the reclamation act of June 17, 1902, with the consent of the board of county commissioners, may furnish the clerk and recorder of any county in Colorado a book containing printed copies of its articles of incorporation and forms of subscription for stock; and the county clerk and recorder to whom such book is furnished shall use the same for recording the stock subscriptions in such association, and the charges for the recording thereof shall be made on the basis of the number of words actually written therein.

**Source:** L. 05: p. 361, § 2. R.S. 08: § 1001. C.L. § 2368. CSA: C. 41, § 156. CRS 53: § 31-16-2. C.R.S. 1963: § 31-16-2.

**Cross references:** For the "National Irrigation Act of 1902", also known as the "Reclamation Act" or the "Newlands Reclamation Act", see 43 U.S.C. § 371 et seq.

**7-44-103. Organization - assessments.** A corporation known as a water users' association may be formed under the "Colorado Business Corporation Act", articles 101 to 117 of this title, or formed under or elect to be governed by the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title, for the purpose of dealing, contracting, or cooperating with the United States under the provisions of the act of congress of June 17, 1902, and acts amendatory thereof or supplementary thereto for the securing of a water supply or irrigation works, or both. It has, in addition to the powers conferred by law upon ditch, canal, or irrigation companies, the power to make assessments other than on a pro rata basis for the purpose of raising funds to accomplish the purposes for which formed, or to pay its debts or obligations, or to secure reduction in the principal debt due the United States of America for reclamation project construction cost, or delinquent assessments, or charges already due and payable, when the articles of incorporation so permit, or when required under existing or future contracts between the United States and the association or between the association and its stockholders, or under any laws or regulations of the United States.

**Source:** L. 29: p. 291, § 1. CSA: C. 41, § 157. CRS 53: § 31-16-3. C.R.S. 1963: § 31-16-3. L. 67: p. 657, § 7. L. 97: Entire section amended, p. 757, § 11, effective July 1, 1998. L. 2003: Entire section amended, p. 2208, § 22, effective July 1, 2004.

**Cross references:** For the "National Irrigation Act of 1902", also known as the "Reclamation Act" or the "Newlands Reclamation Act", see 43 U.S.C. § 371 et seq.

**7-44-104. Directors may file petition in district court.** (1) The board of directors of any water users' association formed under section 7-44-103 at any time may file a petition in the district court of the county in which the office of such water users' association is situated praying a judicial examination and determination of the question of the validity of the organization of the association, or of any power conferred by the articles of incorporation, or of any amendment to the articles of incorporation, or of any assessment levied, or of any act, proceeding, or contract of the association. Such petition shall state the facts wherein the validity of such organization, power conferred by the articles of incorporation, amendment to the articles of incorporation, assessment, act, proceeding, or contract is founded and shall be verified by a member of the board. Thereupon a notice in the nature of a summons shall issue under the hand and seal of the clerk of said court, directed to all stockholders, creditors, or other persons interested in said water users' association, naming



it, which designation shall be deemed sufficient to give the court jurisdiction of all matters and parties involved and interested. Service shall be obtained by publication of such notice as in the case of publication of summons in an action to quiet title to real property.

(2) Any stockholder, creditor, or other interested person may answer such petition within the time allowed therefor. All persons filing answers shall be entered as defendants in the cause and their several defenses consolidated for hearing or trial. Upon hearing, the court shall examine all things affecting the validity of the matter in controversy, shall make a finding with reference thereto, and shall enter judgment and decree as the case warrants. In reaching its conclusions in such causes, the court shall follow a liberal interpretation of the law and shall disregard informalities or omissions not affecting the substantial rights of the parties, unless it is affirmatively shown that such informalities or omissions led to a different result than would have been otherwise obtained. The Colorado rules of civil procedure shall govern matters of pleading and practice as nearly as may be. Costs may be assessed or apportioned among contesting parties in the discretion of the trial court. Review of judgments of the district court shall be as provided by law and the Colorado appellate rules.

**Source:** L. 29: p. 292, § 2. CSA: C. 41, § 158. CRS 53: § 31-16-4. C.R.S. 1963: § 31-16-4. L. 2003: (1) amended, p. 2208, § 23, effective July 1, 2004.

**7-44-105. Application to prior associations.** Sections 7-44-103 and 7-44-104 also apply to any water users' association formed under the law of this state prior to February 18, 1929.

**Source:** L. 29: p. 293, § 3. CSA: C. 41, § 159. CRS 53: § 31-16-5. C.R.S. 1963: § 31-16-5. L. 2003: Entire section amended, p. 2208, § 24, effective July 1, 2004.

**7-44-106. Water users' association petition in district court - when.** (1) Where any water users' association formed under the law of this state has entered into or proposes to enter into a contract with the United States for the payment by the association of the construction and other charges of a federal reclamation project constructed or under construction within this state, and where the funds for the payment of such charges are to be obtained by the association from assessments levied upon the stock of such association and constituting liens upon the lands of such stockholders, the association, in any case where the said contract or proposed contract would modify or affect any individual contracts between the United States and such stockholders or between the association and such stockholders, may file in the district court of the county in which the office of such water users' association is situated, a petition entitled "..... water users' association against the stockholders of said association and the owners and mortgagees of land within the ..... federal reclamation project". No other or more specific description of the defendants shall be required.

(2) In the petition it may be stated that the association has entered into or proposes to enter into a contract with the United States, to be set out in full in said petition, with a prayer that the court find the contract to be valid, and a modification of any individual contracts between the United States and the stockholders of said association or between the association and its stockholders, insofar as any individual contracts are at variance with such association contract. Thereupon a notice in the nature of a summons shall issue under the hand and seal of the clerk of the court stating in brief outline the contents of said petition and showing where a full copy of the contract or proposed contract may be examined, such notice to be directed to the said defendants under the same general designations, which shall be deemed sufficient to give the court jurisdiction of all matters involved and parties interested.

(3) Service shall be obtained by publication of this notice as in the case of publication of summons in an action to quiet title to real property and by the posting of the notice and complete copy of the contract or proposed contract in the office of the association and at three other public places within the boundaries of such federal reclamation project. Any



stockholder in the plaintiff association or owner or mortgagee of land within a federal reclamation project affected by the contract proposed to be made by the association may answer said petition within twenty days or such further time as may be allowed therefor by the court. The failure of any person affected by the said contract to answer shall be construed, so far as that person is concerned, as an acknowledgment of the validity of the said association contract and as a consent to the modification of the said individual contracts with the association or with the United States, to the extent that such modification is required to cause the said individual contracts to conform to the terms of the contract or proposed contract between the plaintiff and the United States. All persons filing answers shall be entered as defendants in said cause and their defenses consolidated for hearing or trial.

(4) At the hearing the court shall examine all matters in controversy and shall enter judgment and decree as the case warrants, showing how and to what extent, if any, the individual contracts of the defendants or under which they claim are modified by the association's contract or proposed contract with the United States. In reaching its conclusions in such causes, the court shall follow a liberal interpretation of the law and shall disregard informalities or omissions not affecting the substantial rights of the parties, unless it is affirmatively shown that these informalities or omissions led to a different result than would have been obtained otherwise. The Colorado rules of civil procedure shall govern matters of pleading and practice as nearly as may be. Costs may be assessed or apportioned among contesting parties in the discretion of the trial court. Review of the judgment of the district court shall be as provided by law and the Colorado appellate rules.

**Source:** L. 31: p. 265, § 1. CSA: C. 46, § 160. CRS 53: § 31-16-6. C.R.S. 1963: § 31-16-6. L. 2003: (1) amended, p. 2208, § 25, effective July 1, 2004.

**7-44-107. Associations may extend corporate life.** Any water users' association formed under the law of this state may amend its articles of incorporation so as to extend the life of the association to any date not later than one hundred years from the date of the approval, February 13, 1931.

**Source:** L. 31: p. 268, § 2. CSA: C. 41, § 161. CRS 53: § 31-16-7. C.R.S. 1963: § 31-16-7. L. 2003: Entire section amended, p. 2209, § 26, effective July 1, 2004.

## ARTICLE 45

### Toll Road Companies

**Editor's note:** This article was numbered as article 17 of chapter 31, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 2006, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2006, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** (1) For definitions applicable to this article, see § 7-90-102.

(2) For provisions regarding private toll roads; see part 3 of article 3 of title 43.

7-45-101.	Formation of toll road or toll highway company - description of corridor.	7-45-107.	Construction safety standards.
7-45-102.	Definitions.	7-45-108.	Notice requirements for proposed toll roads and toll highways - removal from titles and voiding of previously filed and recorded documents.
7-45-103.	Deadline to commence work - maintenance of effort requirement.	7-45-109.	Use of land by toll road or toll highway company - right to repurchase unneeded condemned property.
7-45-104.	Acquisition of right-of-way.		
7-45-105.	Planning standards and project review.		
7-45-106.	Environmental standards and re-		

7-45-110. Sale of interest in or assets of a  
toll road or toll highway com-

pany.  
7-45-111. Public-private initiatives.

**7-45-101. Formation of toll road or toll highway company - description of corridor.** (1) A toll road or toll highway company shall be formed under Colorado law. On and after June 2, 2008, a toll road or toll highway company may not specify and map a transportation corridor in its filed formation document, and any corridor included in a filed formation document filed before June 2, 2008, shall not be deemed to give the filing toll road or toll highway company any property right or exclusive development right of any kind within the corridor other than as specified in section 7-45-103. If a toll road or toll highway company complies with the provisions of this article, it shall have the power to erect toll gates and set and collect tolls.

(2) The secretary of state shall maintain a list of all toll road and toll highway companies and shall make the list and the filed formation documents for all toll road and toll highway companies available to the public. To allow the secretary of state to efficiently compile and maintain an accessible list, a toll road or toll highway company shall include the designation "PTR" in its official name as specified in its filed formation document.

(3) and (4) (Deleted by amendment, L. 2008, p. 1707, § 1, effective June 2, 2008.)

**Source:** L. 2006: Entire article R&RE, p. 1760, § 1, effective June 6. L. 2008: (1), (3), and (4) amended, p. 1707, § 1, effective June 2.

#### ANNOTATION

**Law reviews.** For article, "Forms Committee Presents Additional Standard Pleading Samples for Use in Foreclosures Through Public Trustee", see 29 Dicta 1 (1952).

**Annotator's note.** Since § 7-45-101 is similar to § 7-45-101 as it existed prior to the 2006 repeal and reenactment of this article and to laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

**The general assembly may delegate the power of collecting tolls** in return for a supposed public good with such restrictions as it may see fit to impose, and the grantee takes subject to all such limitations. *Virginia Canon Toll Rd. Co. v. People ex rel. Vivian*, 22 Colo. 429, 45 P. 398 (1896).

**And by virtue of this section the grant to exact tolls is conferred** in express terms only upon corporations organized to construct and which do construct toll roads. *Virginia Canon Toll Rd. Co. v. People ex rel. Vivian*, 22 Colo. 429, 45 P. 398 (1896).

**Right to locate road.** The effect of this section, and the section giving right of condemnation for construction of roads, is to give a road company the right to locate its road on the general course designated in its articles of incorporation, and when so located, to construct, maintain, and operate the road on the line of location, subject to the conditions of condemnation, compensation, and other requirements of the provision. *Riddell v. Animas Canon Toll Rd. Co.*, 5 Colo. 230 (1880).

**But toll road cannot be located on any existing road.** Under this section it is clear that

a toll road company may not locate its road, or any part thereof, upon any toll road previously existing or upon any public highway heretofore and as the time of the organization of such company used and traveled as such, except as it might be necessary to cross such road or highway. *Lyons & E. P. Toll Rd. Co. v. People ex rel. Sprague*, 29 Colo. 434, 68 P. 275 (1902).

**And such location results in forfeiture of franchise.** Where a toll road company located a considerable part of its road upon and along a previously existing toll road which at the time had been abandoned by the former toll road company for a period of more than 14 months and which had been repaired and traveled by persons living in the vicinity, the location was in violation of this section and the company thereby forfeited its franchise and right to collect tolls. *Lyons & E. P. Toll Rd. Co. v. People ex rel. Sprague*, 29 Colo. 434, 68 P. 275 (1902).

**Moreover, as long as the power to locate a road remains unexercised,** the lands upon which the exercise of the right may ultimately cast the easement are uncertain, and no given tract or parcel of land can be designated as charged with the easement. *Riddell v. Animas Canon Toll Rd. Co.*, 5 Colo. 230 (1880).

**Only one toll gate each 10 miles.** Under this section the board of county commissioners is powerless to authorize the erection of and taking of toll at more than "one gate to each ten miles". *Central Rd. Co. v. People*, 5, Colo. 39 (1879).

**Hence, wherever there are 2 gates or more, the distance between them must be** not less than 10 miles. *Central Rd. Co. v. People*, 5 Colo. 39 (1879).



A toll road company may alienate all its tangible property and also the franchise to collect tolls, but whatever limitations or burdens existed against it will still exist against its grantee. Virginia Canon Toll Rd. Co. v. People ex rel. Vivian, 22 Colo. 429, 45 P. 398 (1896).

**But not the power to continue the franchise after it expires.** A toll road company cannot by conveyance made during its corporate life impart to another corporation or to a natural person the power to continue the exercise of a franchise to collect tolls after the franchise itself has expired by operation of law. Virginia Canon Toll

Rd. Co. v. People ex rel. Vivian, 22 Colo. 429, 45 P. 398 (1896).

**For a toll road company cannot collect toll after the expiration of the term of its corporate existence.** Virginia Canon Toll Rd. Co. v. People ex rel. Vivian, 22 Colo. 429, 45 P. 398 (1896).

**And when the right to collect tolls ceases with the expiration of the term of a corporation** constructing a road, the public may use the highway without charge. Virginia Canon Toll Rd. Co. v. People ex rel. Vivian, 22 Colo. 429, 45 P. 398 (1896).

**7-45-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Associated rail corridor” means a corridor for a proposed rail line and any related rail facilities necessary for the operation of a rail line that are to be located in the right-of-way of a toll road or toll highway.

(2) “Associated service area” means a gas station, restaurant, or other travel-related service that serves motorists using a toll road or toll highway.

(3) “Associated utility corridor” means a utility line or system and any related infrastructure used to convey gas, electricity, water, sewage, telecommunications signals, data, or other media located or to be located in the right-of-way of a toll road or toll highway.

(4) “Commenting state agencies” means the department of transportation, the department of public health and environment, the department of natural resources, the department of agriculture, and the department of local affairs.

(5) “Commercial, residential, and industrial development” means the development of offices, shops, stores, hotels, restaurants, bars, warehouses, factories, houses, apartments, condominiums, and other buildings and structures used for the sale and rental of goods or services, for the manufacture, fabrication, assembly, or storage of products, or for sleeping or dwelling.

(6) “Company” means a domestic corporation, general partnership, limited partnership, limited liability company, limited liability partnership, limited liability limited partnership, limited partnership association, nonprofit association, nonprofit corporation, cooperative, or other organization or association that is created under a statute or common law of this state and that is recognized under the law of this state as a separate legal entity.

(7) “Filed formation document” means articles of incorporation, articles of organization, a certificate of limited partnership, articles of association, a statement of registration, or any other document of similar import filed by an entity with the secretary of state under which the entity is formed or obtains its legal status in this state.

(7.3) “New toll road or toll highway company” means a toll road or toll highway company that, as of June 2, 2008, has not specified and mapped a three-mile corridor in its filed formation document as was required by section 7-45-101 (1) before June 2, 2008.

(7.5) “Preexisting toll road or toll highway company” means a toll road or toll highway company that, as of June 2, 2008, had specified and mapped a three-mile corridor in its filed formation document as was required by section 7-45-101 (1) before June 2, 2008.

(8) “Toll road” or “toll highway” means a series of improvements, including but not limited to paving, grading, landscaping, curbs, gutters, culverts, sidewalks, bikeways, lighting, bridges, overpasses, underpasses, frontage roads, access roads, interchanges, drainage facilities, mass transit lanes, park and ride facilities, toll collection facilities, administrative or maintenance facilities, and emergency response and law enforcement services. Nothing in this article shall be construed to affect any common carrier, as defined in section 40-1-102 (3), C.R.S., including, but not limited to, any railroad. Any utility line, system, or infrastructure shall be subject to a reasonable fee and reasonable relocation provisions.

(9) “Toll road or toll highway company” means a company that proposes to construct a toll road or toll highway in this state under the provisions of this article.



(10) “Toll road or toll highway project” or “project” means a proposed toll road or toll highway together with any associated rail corridor, associated service area, or associated utility corridor.

**Source:** L. 2006: Entire article R&RE, p. 1761, § 1, effective June 6. L. 2008: (7.3) and (7.5) added, p. 1708, § 2, effective June 2.

**7-45-103. Deadline to commence work - maintenance of effort requirement.** A preexisting toll road or toll highway company shall commence work, including but not limited to planning, design, environmental mitigation, and other preconstruction work, on the toll road or toll highway proposed in its filed formation document no later than three years after the filing of the document or within one year after receiving all necessary approvals for construction. If any necessary approval is the subject of administrative or judicial review, then the one-year period shall be automatically extended until one year after all administrative or judicial review has been concluded. The preexisting toll road or toll highway company and any successor toll road or toll highway company shall continue the work from day to day until at least five hundred thousand dollars have been expended on the toll road or toll highway. If the preexisting toll road or toll highway company fails to perform the required work, it shall forfeit all rights to develop and construct the proposed toll road or toll highway. If the preexisting toll road or toll highway company performs the required work, it shall have the exclusive right to seek approval to develop a toll road or toll highway within the three-mile corridor specified in its filed formation document as required by section 7-45-101 (1) before June 2, 2008, and, only if such approval is granted, the exclusive right to develop a toll road or toll highway within the corridor.

**Source:** L. 2006: Entire article R&RE, p. 1762, § 1, effective June 6. L. 2008: Entire section amended, p. 1708, § 3, effective June 2.

**7-45-104. Acquisition of right-of-way.** (1) Notwithstanding the provisions of section 38-2-101, C.R.S., on and after June 6, 2006, a preexisting toll road or toll highway company shall not have the power to exercise the right of eminent domain to acquire any part of the right-of-way of the three-mile corridor of a proposed toll road or toll highway specified in the filed formation document of the company as required by section 7-45-101 (1) and a new toll road or toll highway company shall not have the power to exercise the right of eminent domain to acquire any part of the right-of-way of a toll road or toll highway it proposes to construct. Nothing herein shall prohibit a preexisting or new toll road or toll highway company from entering into a public-private initiative with the department of transportation in accordance with the provisions of part 12 of article 1 of title 43, C.R.S., and as authorized in section 7-45-111 for the purpose of enabling the construction of a toll road or toll highway, but in such a case the power of eminent domain shall not be exercised by the toll road or toll highway company and may be exercised by the department only for purposes of acquiring property and rights-of-way necessary for the completion of a toll road or toll highway open to the public that is incorporated into the comprehensive statewide transportation plan prepared pursuant to section 43-1-1103 (5), C.R.S. The department may not use the power of eminent domain provided in this section to acquire a cemetery, as defined in section 10-15-102 (2), C.R.S., or property owned by or primarily used by a religious organization. In exercising the power of eminent domain, the department shall comply with all laws and administrative rules that govern the department’s use of eminent domain for state highway projects, and the rights-of-way acquired shall form a corridor no larger than that approved by all affected metropolitan planning organizations, regional planning commissions, and the transportation commission pursuant to sections 7-45-105 and 7-45-106. In accordance with section 43-1-1204 (3) (b), C.R.S., the department may not sell or otherwise transfer ownership of property or rights-of-way acquired through the exercise of the power of eminent domain as authorized by this section to a toll road or toll highway company.

(2) As used in this section, “religious organization” means any organization, church, body of communicants, or group, not for pecuniary profit, gathered in common membership

for mutual support and edification in piety, worship, and religious observances or a society, not for pecuniary profit, of individuals united for religious purposes at a definite place.

**Source:** **L. 2006:** Entire article R&RE, p. 1763, § 1, effective June 6. **L. 2008:** (1) amended, p. 1709, § 4, effective June 2.

**Editor's note:** This section was enacted by Senate Bill 06-078 prior to the repeal and reenactment of this article by House Bill 06-1003. For the text of this section in effect from March 31, 2006, to June 6, 2006, see section 1 of chapter 74, Session Laws of Colorado 2006.

**7-45-105. Planning standards and project review.** (1) A preexisting or new toll road or toll highway company shall not commence the construction of a toll road or toll highway or of any other element of a toll road or toll highway project until the toll road or toll highway or other element has been reviewed by every metropolitan planning organization or regional planning commission that is located in whole or in part within the three-mile corridor designated by the preexisting toll road or toll highway company as required by section 7-45-101 (1) before June 2, 2008, or that is located in whole or in part within the proposed route of the toll road or toll highway proposed by the new toll road or toll highway company and has been included in the regional transportation plan in effect for the region pursuant to section 43-1-1103, C.R.S., and in the comprehensive statewide transportation plan required pursuant to section 43-1-1103 (5), C.R.S. In designated nonattainment areas for any pollutant pursuant to the federal "Clean Air Act", 42 U.S.C. sec. 7401 et seq., as amended, a metropolitan planning organization or regional planning commission shall not include a toll road or toll highway project in the regional transportation plan unless the organization or commission has performed an emissions analysis that demonstrates that regional emissions and local project emissions will continue to conform to the state implementation plan if the project is added to the regional transportation plan. The toll road or toll highway company shall pay the reasonable actual costs for the emissions analysis. Each organization or commission may condition its addition of a toll road or toll highway project into the regional transportation plan upon acceptable environmental mitigation activities and commitments to offset incremental costs of public services that will be necessary as a result of development of the project within the planning region.

(2) At least thirty days before a metropolitan planning organization or regional planning commission may amend its regional transportation plan pursuant to subsection (1) of this section, a toll road or toll highway company shall provide the organization or commission information on the toll road or toll highway project being considered for addition to the plan that includes the final environmental documentation required by section 7-45-106 (1) (b) (IV), the operating plan for the project, the technology to be utilized, an assessment of project feasibility, and an assessment of the long-term viability of the project.

(3) (a) At the discretion of a metropolitan planning organization or regional planning commission, a regional plan may initially be amended to include only environmental and preconstruction activities, excluding right-of-way acquisition, relating to a toll road or toll highway project and may later be amended to include actual construction and right-of-way acquisition of the project following agreement by the metropolitan planning organization or regional planning commission that acceptable environmental mitigation activities and commitments to offset incremental costs of public services are included in the project plans.

(b) Upon request of a local government located in whole or in part within the three-mile corridor of a proposed toll road or toll highway or toll road or toll highway project specified and mapped by a preexisting toll road or toll highway company in its filed formation document as required by section 7-45-101 (1) before June 2, 2008, or located in whole or in part within the proposed route of a toll road or toll highway proposed by a new toll road or toll highway company, a preexisting or new toll road or toll highway company shall consult with representatives from the local government and shall consider available mitigation of demonstrable negative impacts on the local government or its citizens that would result from the construction, operation, or financing of the toll road or toll highway or project.



**Source:** L. 2006: Entire article R&RE, p. 1763, § 1, effective June 6. L. 2008: (1) and (3)(b) amended, p. 1709, § 5, effective June 2.

**7-45-106. Environmental standards and review.** (1) (a) Before constructing and operating a toll road or toll highway or any other element of a toll road or toll highway project, a toll road or toll highway company shall prepare, at its own expense, environmental documentation that complies with the environmental stewardship guide approved by the transportation commission in May 2005. The documentation shall describe the environmental, social, and economic effects of the proposed toll road, toll highway, or project, identify feasible measures to avoid or otherwise mitigate the adverse effects of the project, and estimate the financial costs to implement mitigation measures that are included in the project or have been previously recommended in writing by the commenting state agencies or an affected metropolitan planning organization or regional transportation commission and comply with federal and state air and water quality standards, approvals, and permits.

(b) (I) A toll road or toll highway company shall not begin work on environmental documentation required by paragraph (a) of this subsection (1) until it has obtained preliminary approval from the executive director of the department of transportation that the scope of the planned environmental documentation is consistent with the environmental stewardship guide issued by the department in May 2005 and all other requirements of paragraph (a) of this subsection (1).

(II) A toll road or toll highway company shall provide a copy of any draft environmental documentation it prepares as required by paragraph (a) of this subsection (1) to the commenting state agencies, affected metropolitan planning organizations and regional planning commissions, and affected local governments. The toll road or toll highway company shall also make the draft environmental documentation electronically or otherwise available to the public. The commenting state agencies may, within sixty days, provide the toll road or toll highway company and affected metropolitan planning organizations and regional planning commissions with their analyses of the adequacy of the environmental documentation and shall make the analyses available to the public.

(III) Each of the commenting agencies may charge a fee to a toll road or toll highway company to cover the reasonable expenses that it incurred in fulfilling the requirements of subparagraphs (I) and (II), as applicable, of this paragraph (b).

(IV) A toll road or toll highway company shall prepare final environmental documentation that addresses comments received from the commenting state agencies, metropolitan planning organizations, regional planning commissions, and other interested parties. The final environmental documentation shall be made available to the department of transportation and the public at least thirty days prior to publication of any notice of hearing scheduled by the commission pursuant to subsection (2) of this section.

(2) The transportation commission created in section 43-1-106, C.R.S., shall not revise the comprehensive statewide transportation plan prepared pursuant to section 43-1-1103 (5), C.R.S., to include a toll road, toll highway, or toll road or toll highway project subject to the requirements of this section unless the commission, after holding a public hearing, determines that:

(a) The requirements of section 7-45-105 and subsection (1) of this section have been met;

(b) The toll road, toll highway, or project is:

(I) Necessary to meet the transportation needs of the state;

(II) Consistent with section 43-1-1103 (5), C.R.S., and the policies of the transportation commission;

(III) Consistent with 23 U.S.C. sec. 135; and

(IV) In the public interest;

(c) The toll road, toll highway, or project sponsor has established a reserve fund, performance bond, or other appropriate mechanism to ensure full payment of the costs of compliance with federal and state air and water quality standards, other federal and state environmental requirements, and mitigation measures included in the toll road, toll highway, or project or required by the transportation commission, a metropolitan planning organization, or a regional planning commission; and



(d) The toll road, toll highway, or project sponsor has entered into enforceable agreements with the department of transportation, or agreements with affected local governments that are acceptable to the transportation commission, to ensure that mitigation measures included in the project or required by the transportation commission, a metropolitan planning organization, or a regional planning commission will be implemented.

(3) The transportation commission may condition its addition of a toll road or toll highway or a toll road or toll highway project into the comprehensive statewide transportation plan upon additional mitigation measures if the commission determines that the mitigation measures are in the best overall public interest taking into consideration:

- (a) The need for fast, safe, and efficient transportation;
- (b) Public services;
- (c) The costs of eliminating or minimizing the adverse effects for which the mitigation measures are proposed;
- (d) Environmental, social, and economic values; and
- (e) The financial feasibility of the toll road, toll highway, or project.

**Source: L. 2006:** Entire article R&RE, p. 1764, § 1, effective June 6.

**7-45-107. Construction safety standards.** When constructing and maintaining a toll road or toll highway or any other element of a toll road or toll highway project, a toll road or toll highway company shall comply with all department of transportation safety standards for state transportation projects.

**Source: L. 2006:** Entire article R&RE, p. 1767, § 1, effective June 6.

**7-45-108. Notice requirements for proposed toll roads and toll highways - removal from titles and voiding of previously filed and recorded documents.** (1) (a) Within ninety days of June 2, 2008:

(I) The county clerk and recorder of each county in which a preexisting toll road or toll highway company filed a disclaimer of interest and map pursuant to paragraph (b) of this subsection (1), as said paragraph (b) existed before June 2, 2008, shall transfer the map, but not the disclaimer of interest, to the board of county commissioners of the county; and

(II) A preexisting toll road or toll highway company shall provide a copy of the map, but not the disclaimer of interest, that the company filed pursuant to paragraph (b) of this subsection (1), as said paragraph (b) existed before June 2, 2008, to the governing body of each municipality that is included within the three-mile corridor specified and mapped in the company's filed formation document.

(b) (I) Any properly authorized written notice, disclaimer of interest, or map filed or recorded by a preexisting toll road or toll highway company as required by subsection (1) of this section, as said subsection (1) existed before June 2, 2008, is hereby declared void and of no effect. The voiding of a written notice, disclaimer of interest, or map pursuant to this paragraph (b) conclusively establishes that the written notice, disclaimer of interest, or map does not affect the title to any property or have any other legal effect, and a title insurance company or title insurance agent shall exclude a void written notice, disclaimer of interest, or map from any documents it prepares on or after June 2, 2008.

(II) No cause of action at law or in equity shall be maintained based upon:

(A) The act of preparing, filing, or recording a written notice, disclaimer of interest, or map filed or recorded by a preexisting toll road or toll highway company pursuant to subsection (1) of this section, as said subsection (1) existed before June 2, 2008, that was subsequently voided pursuant to subparagraph (I) of this paragraph (b);

(B) The voiding of such a written notice, disclaimer of interest, or map; or

(C) The inclusion or exclusion of such a written notice, disclaimer of interest, or map from any document prepared by a title insurance company or title insurance agent.

(2) Within ninety days of the inclusion of a toll road or toll highway or any other element of a toll road or toll highway project proposed by a preexisting or new toll road or toll highway company in the comprehensive statewide transportation plan as required by

section 7-45-105 (1), the toll road or toll highway company shall send written notice to each person who owns real property within the proposed route of the proposed toll road, toll highway, or project of the intent of the toll road or toll highway company to construct the proposed toll road, toll highway, or element of the project. The toll road or toll highway company shall send the notice by certified mail and shall describe the proposed toll road, toll highway, or project, including its location, termini, improvements, and operation.

**Source:** L. 2006: Entire article R&RE, p. 1767, § 1, effective June 6. L. 2008: Entire section R&RE, p. 1710, § 6, effective June 2.

**7-45-109. Use of land by toll road or toll highway company - right to repurchase unneeded condemned property.** Any interest in real property that is obtained by a preexisting toll road or toll highway company, other than a leasehold interest in property or rights-of-way acquired and owned by the department of transportation as authorized in section 7-45-104, within the three-mile corridor specified and mapped in its filed formation document as was required by section 7-45-101 (1) before June 2, 2008, and any interest in real property that is obtained by a new toll road or toll highway company, other than a leasehold interest in property or rights-of-way acquired and owned by the department of transportation as authorized in section 7-45-104, within the proposed route of the toll road or toll highway proposed by the new toll road or toll highway company on or after June 2, 2008, and that is not used for a toll road or toll highway project shall not be used for commercial, residential, or industrial development; except that this limitation on use shall apply only during the period in which the toll road or toll highway company is developing or operating a toll road or toll highway within the corridor or proposed route. If the development or operation of a toll road or toll highway ceases after the department has exercised the power of eminent domain to acquire property deemed at the time of acquisition to be necessary for the completion of the toll road or toll highway as authorized in section 7-45-104, a person from whom the department acquired property through the exercise of eminent domain has an exclusive option to repurchase the property acquired at the price paid for the property as just compensation by the department. The person may exercise the option within eighteen months following the cessation of the development or operation of the toll road or toll highway.

**Source:** L. 2006: Entire article R&RE, p. 1767, § 1, effective June 6. L. 2008: Entire section amended, p. 1711, § 7, effective June 2.

**7-45-110. Sale of interest in or assets of a toll road or toll highway company.** (1) If any interest in a preexisting or new toll road or toll highway company is sold or transferred, the toll road or toll highway company shall continue to comply with the limitations set forth in section 7-45-109.

(2) If a preexisting or new toll road or toll highway company sells or transfers any interest in its real property within the three-mile corridor specified in the filed formation document of the preexisting toll road or toll highway company or within the proposed route of the toll road or toll highway proposed by the new toll road or toll highway company that is not used for the toll road or toll highway, then the purchaser shall comply with the limitations set forth in section 7-45-109.

(3) If a toll road, toll highway, or toll road or toll highway project is included in the comprehensive statewide transportation plan required pursuant to section 43-1-1103 (5), C.R.S., before the toll road or toll highway company completes a subsequent sale or transfer of assets or rights generating more than twenty percent of the current revenue from the toll road, toll highway, or project, the purchaser must demonstrate to the transportation commission, and the commission must determine, that following the sale or transfer the resources needed to comply with federal and state water quality standards and other federal and state environmental requirements and to implement mitigation measures that were included in the toll road or toll highway project description or required by a metropolitan planning organization, a regional planning commission, or the transportation commission will still be available for those purposes.



**Source: L. 2006:** Entire article R&RE, p. 1768, § 1, effective June 6. **L. 2008:** (1) and (2) amended, p. 1712, § 8, effective June 2.

**7-45-111. Public-private initiatives.** Nothing contained in this article shall prohibit a toll road or toll highway company from entering into a public-private initiative with the department of transportation in accordance with the provisions of part 12 of article 1 of title 43, C.R.S., for the purpose of enabling the construction of a toll road, toll highway, or project. Any such project shall comply with the requirements of this article.

**Source: L. 2006:** Entire article R&RE, p. 1768, § 1, effective June 6.

## ARTICLE 46

### Bridge and Ferry Companies

#### 7-46-101 to 7-46-103. (Repealed)

**Source: L. 95:** Entire article repealed, p. 193, § 4, effective April 13.

**Editor's note:** This article was numbered as article 18 of chapter 31, C.R.S. 1963. For amendments to this article prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## ARTICLE 47

### Cemetery Companies

**Cross references:** (1) For definitions applicable to this article, see § 7-90-102.

(2) For preneed funeral contracts, see article 15 of title 10; for mortuaries, see article 54 of title 12.

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|---|--|
| 7-47-101. Who may organize - powers.                | 7-47-106. Property exempt from taxes - attachment. |
| 7-47-102. May acquire land.                         | 7-47-107. Property not exempt - when.              |
| 7-47-103. Land surveyed and platted.                | 7-47-108. Not applicable - when.                   |
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**7-47-101. Who may organize - powers.** (1) Three or more persons may associate themselves together under the provisions of law, for the purpose of procuring and establishing a cemetery or place of sepulture, and they shall, upon association and compliance with the provisions of law, be a body politic and corporate; may sue and be sued; may have a common seal that may be altered at pleasure; may purchase, hold, and convey real and personal estate; may choose a president and other officers; may enact bylaws for regulating the affairs of the corporation, not inconsistent with the law of this state, and compel the observance thereof by suitable penalties; and may do all acts necessary for the well ordering of the affairs of such corporation.

(1.5) (a) A board of directors for a nonprofit cemetery corporation shall include at least one director who owns a lot, grave space, niche, or crypt. If such an owner cannot be found to serve as a director, the board of directors shall maintain a vacancy until the director position can be filled with such an owner. A nonprofit cemetery corporation may wait until the first vacancy on the board of directors occurs after January 1, 2013, before appointing a director who owns a lot, grave space, niche, or crypt.

(b) This subsection (1.5) applies only to cemeteries as defined in section 12-12-101 (1.5), C.R.S.

(2) A nonprofit corporation subject to the "Colorado Revised Nonprofit Corporation



Act", articles 121 to 137 of this title, shall have all of the rights and powers granted by this article to the extent not inconsistent with said act, if such nonprofit corporation otherwise complies with the terms and provisions of this article.

**Source:** G.L. § 236. G.S. § 379. R.S. 08: § 1047. C.L. § 2430. CSA: C. 41, § 227. CRS 53: § 31-26-1. C.R.S. 1963: § 31-22-1. L. 67: p. 659, § 13. L. 97: (2) amended, p. 757, § 14, effective July 1, 1998. L. 2003: (1) amended, p. 2209, § 28, effective July 1, 2004. L. 2012: (1.5) added, (HB 12-1068), ch. 229, p. 1008, § 1, effective August 8.

#### ANNOTATION

**Rules and regulations of a cemetery association are not open to the objection that they are arbitrary and discriminatory** because they are applicable to all who acquire burial sites in

the association's grounds in the same manner and under like circumstances. *Gasser v. Crown Hill Cem. Ass'n*, 103 Colo. 175, 84 P.2d 67 (1938).

**7-47-102. May acquire land.** Any corporation formed under the law of this state to establish and maintain a cemetery or burial place for the dead may acquire suitable and sufficient land therefor in the manner provided by articles 1 to 7 of title 38, C.R.S.

**Source:** L. 1887: p. 70, § 1. R.S. 08: § 1048. C.L. § 2431. CSA: C. 41, § 228. CRS 53: § 31-26-2. C.R.S. 1963: § 31-22-2. L. 2003: Entire section amended, p. 2209, § 29, effective July 1, 2004.

#### ANNOTATION

**Law reviews.** For article, "Eminent Domain in Colorado", see 29 Dicta 313 (1952).

**7-47-103. Land surveyed and platted.** Such corporation shall cause its land, or such portion thereof as may, from time to time, become necessary for that purpose, to be surveyed into lots, avenues, and walks, and to be platted. The plat of ground as surveyed shall be acknowledged by some officer of the corporation and filed in the office of the recorder of the county in which the land is situated. Each lot shall be regularly numbered by the surveyor, and such number shall be marked on the plat.

**Source:** L. 1887: p. 70, § 2. R.S. 08: § 1049. C.L. § 2432. CSA: C. 41, § 229. CRS 53: § 31-26-3. C.R.S. 1963: § 31-22-3.

**7-47-104. Disposition of proceeds of sales of lots.** The net proceeds arising from the sale of lots by such corporation and all other income and revenue thereof, after paying for cemetery ground, shall be exclusively applied, appropriated, and used in improving, preserving, and embellishing the cemetery and its appurtenances, and to paying the necessary expenses of the corporation, and shall not be appropriated for any purpose of profit to the corporation or its members.

**Source:** L. 1887: p. 70, § 3. R.S. 08: § 1050. C.L. § 2433. CSA: C. 41, § 230. CRS 53: § 31-26-4. C.R.S. 1963: § 31-22-4.

**7-47-104.5. Reports.** (1) Each nonprofit cemetery corporation shall keep in its principal office and, upon reasonable request, shall make available for inspection and study to the owner of any grave space, niche, or crypt, or to a duly authorized representative of the owner, the following:

(a) An annual written report setting forth the number of interments and entombments maintained by the nonprofit cemetery corporation, the number of interments and entombments for the preceding year, and any other facts necessary to show the actual financial condition of the nonprofit cemetery corporation;

(b) A complete and current copy of any bylaws or articles of incorporation adopted by the board of directors;

(c) A copy of the minutes of each meeting of the board of directors for the last three years;

(d) A copy of each periodic report filed during the last three years with the Colorado secretary of state in accordance with section 7-90-501;

(e) A copy of internal revenue service form 990 reports, or any successor form or report, for the last three years; and

(f) A copy of the corporation's current balance sheet, income statement, and cash-flow statement.

(2) To comply with this section, the report must be attested to by the accountant, auditor, or other person preparing the report and verified by a vote of the board of directors.

(3) Upon written request for a specific list of documents, the nonprofit cemetery shall provide to any owner of a lot, grave space, niche, or crypt electronic or physical copies of any reports required by this section. The nonprofit cemetery shall fulfill the request within seven days after receipt of the request and payment of a copying charge, if paper copies are required or requested, not to exceed twenty-five cents per physical copied page. The nonprofit cemetery shall not charge for electronic copies.

**Source:** L. 2012: Entire section added, (HB 12-1068), ch. 229, p. 1008, § 2, effective August 8.

**7-47-105. Rights of lot owners.** (1) If the grounds purchased or otherwise acquired for cemetery purposes have been previously used as a burial ground, those who are lot owners at the time of the purchase continue to own the lots and are members of the corporation.

(2) An owner of a lot, grave space, niche, or crypt may attend any meeting of the board of directors. The board of directors shall provide reasonable notice of any board meeting to owners of a lot, grave space, niche, or crypt, who may not participate in meetings of the board of directors without permission of the chairperson.

**Source:** L. 1887: p. 70, § 4. R.S. 08: § 1051. C.L. § 2434. CSA: C. 41, § 231. CRS 53: § 31-26-5. C.R.S. 1963: § 31-22-5. L. 2012: Entire section amended, (HB 12-1068), ch. 229, p. 1009, § 3, effective August 8.

**7-47-106. Property exempt from taxes - attachment.** All the property of such corporation used or owned for the purposes of this article shall be exempt from taxation, assessment, lien, attachment, and levy and sale upon execution, except for the purchase price of the property.

**Source:** L. 1887: p. 71, § 5. R.S. 08: § 1052. C.L. § 2435. CSA: C. 41, § 232. CRS 53: § 31-26-6. L. 59: p. 532, § 7. C.R.S. 1963: § 31-22-6.

**Cross references:** For mortuaries located in cemeteries, see § 12-54-201.

#### ANNOTATION

**Cemeteries not used or held for profit are exempt from taxation** under this section. *Grisard v. Roselawn Cem. Ass'n*, 92 Colo. 289, 19 P.2d 766 (1933).

**As well as assessment, lien, or attachment.** Concerned with the projection of § 5 of art. X, Colo. Const., exempting certain properties from taxation, the Colorado general assembly, as early as 1887, provided that cemetery property not only be exempt from taxation, but from

assessment, lien, or attachment. *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

**Including local assessments.** The law-making body possessing plenary legislative power over the subject of assessments may if it chooses, and as it has done, exempt cemeteries from local assessments. Other states by statutes have exempted cemeteries by a provision that they shall not be subject to "any tax or debt



whatever". City & County of Denver v. Tihen, 77 Colo. 212, 235 P. 777 (1925).

**And where cemetery property is erroneously assessed by a local government, an injunction is proper** to grant relief. Grisard v. Roselawn Cem. Ass'n, 92 Colo. 289, 19 P.2d 766 (1933).

**Use of property as a cemetery, not use and ownership, is the test** of the right of exemption under this statute. City & County of Denver v. Tihen, 77 Colo. 212, 235 P. 777 (1925).

**7-47-107. Property not exempt - when.** The property of any corporation or association formed under the law of this state to establish and maintain a cemetery for the purposes of profit shall not be exempt from taxation, liens, or levy and sale until actually sold or disposed of for cemetery purposes; and when any block, lot, or parcel of land has been disposed of for cemetery purposes or burial sites for the dead, the same, with streets, walks, and avenues leading thereto, shall be exempt as provided by section 7-47-106.

**Source:** L. 1891: p. 58, § 1. R.S. 08: § 1053. C.L. § 2436. CSA: C. 41, § 233. CRS 53: § 31-26-7. C.R.S. 1963: § 31-22-7. L. 2003: Entire section amended, p. 2210, § 30, effective July 1, 2004.

**7-47-108. Not applicable - when.** The provisions of section 7-47-104 shall not apply to any association or corporation formed under the law of this state to maintain a cemetery for profit.

**Source:** L. 1891: p. 58, § 1. R.S. 08: § 1054. C.L. § 2437. CSA: C. 41, § 234. CRS 53: § 31-26-8. C.R.S. 1963: § 31-22-8. L. 2003: Entire section amended, p. 2210, § 31, effective July 1, 2004.

**7-47-109. Abandoned graves - right to reclaim.** (1) If there is a lot, grave space, niche, or crypt in a cemetery in which no remains have been interred, no burial memorial has been placed, and no other improvement has been made for a continuous period of no less than seventy-five years, the corporation that established or maintains the cemetery, referred to in this section as the "corporation", may initiate the process of reclaiming title to the lot, grave space, niche, or crypt in accordance with this section.

(2) A corporation seeking to reclaim a lot, grave space, niche, or crypt shall:

(a) Send written notice of the corporation's intent to reclaim title to the lot, grave space, niche, or crypt to the owner's last-known address by first-class mail; and

(b) Publish a notice of the corporation's intent to reclaim title to the lot, grave space, niche, or crypt in a newspaper of general circulation in the area in which the cemetery is located once per week for four weeks.

(3) The notice required by subsection (2) of this section shall clearly indicate that the corporation intends to terminate the owner's rights and title to the lot, grave space, niche, or crypt and include a recitation of the owner's right to notify the corporation of the owner's intent to retain ownership of the lot, grave space, niche, or crypt.

(4) If the corporation does not receive from the owner of the lot, grave space, niche, or crypt a letter of intent to retain ownership of the lot, grave space, niche, or crypt within sixty days after the last publication of the notice required by paragraph (b) of subsection (2) of this section, all rights and title to the lot, grave space, niche, or crypt shall transfer to the corporation. The corporation may then sell, transfer, or otherwise dispose of the lot, grave space, niche, or crypt without risk of liability to the prior owner of the lot, grave space, niche, or crypt.

(5) A corporation that reclaims title to a lot, grave space, niche, or crypt in accordance with this section shall retain in its records for no less than one year a copy of the notice sent pursuant to paragraph (a) of subsection (2) of this section and a copy of the notice published pursuant to paragraph (b) of subsection (2) of this section.

(6) If a person submits to a corporation a legitimate claim to a lot, grave space, niche, or crypt that the corporation has reclaimed pursuant to this section, the corporation shall



transfer to the person at no charge a lot, grave space, niche, or crypt that, to the extent possible, is equivalent to the reclaimed lot, grave space, niche, or crypt.

(7) Notwithstanding any provision of law to the contrary, on and after August 7, 2006, a corporation shall not convey title to the real property surveyed as a lot in a cemetery for use as a burial space. A corporation may grant interment rights to a lot, grave space, niche, or crypt in a cemetery.

**Source: L. 2006:** Entire section added, p. 441, § 1, effective August 7.

## ARTICLE 48

### Business Development Corporations

7-48-101.	Short title.	7-48-109.	Capital stock - stockholders and members.
7-48-102.	Definitions.	7-48-110.	Directors.
7-48-103.	Incorporation - applicability of "Colorado Business Corporation Act".	7-48-111.	Amendments to articles of incorporation.
7-48-104.	Domestic entity name.	7-48-112.	Earned surplus.
7-48-105.	Approval of governor.	7-48-113.	Members to have rights of stockholders.
7-48-106.	Restrictions on powers.	7-48-114.	Deposit of funds.
7-48-107.	Acquisition or disposition of securities and capital stock.	7-48-115.	Books and records.
7-48-108.	Membership - loans from members.	7-48-116.	Credit of state not pledged.

**7-48-101. Short title.** This article shall be known and may be cited as the "Colorado Business Development Corporation Act".

**Source: L. 65:** p. 447, § 1. **C.R.S. 1963:** § 31-23-1.

**7-48-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Board of directors" means the board of directors of a corporation created under this article.

(2) "Corporation" means a Colorado business development corporation created under the provisions of this article.

(3) "Financial institution" means any bank, trust company, savings and loan association, industrial bank, public or private pension or retirement fund, insurance company or related corporation, partnership, foundation, or other institution engaged in lending or investing funds.

(4) "Loan limit" for any member means the maximum amount permitted to be outstanding at one time on loans made by such member to a corporation as determined under the provisions of this article.

(5) "Member" means any financial institution which undertakes to lend money to a corporation created under this article, upon its call and in accordance with the provisions of this article.

**Source: L. 65:** p. 447, § 1. **C.R.S. 1963:** § 31-23-2.

**Cross references:** For additional definitions applicable to this article, see § 7-90-102.

**7-48-103. Incorporation - applicability of "Colorado Business Corporation Act".** A business development corporation may be incorporated in this state pursuant to the provisions of article 102 of this title, and all the provisions of the "Colorado Business Corporation Act", articles 101 to 117 of this title, not in conflict with or inconsistent with the provisions of this article shall apply to such corporation except as otherwise provided in this article. The purpose clause of the articles of incorporation shall recite that the

purposes for which the corporation is formed are to stimulate and promote the business prosperity and economic welfare of this state and its citizens; to encourage and assist, through financial aid, advice, technical assistance, and other appropriate means, the location of new businesses and industries and the rehabilitation, improvement, and expansion of existing businesses and industries throughout the state; and, in furtherance of these purposes, to cooperate with the division of commerce and development of this state and with other organizations, public and private.

**Source:** L. 65: p. 448, § 1. C.R.S. 1963: § 31-23-3. L. 93: Entire section amended, p. 856, § 10, effective July 1, 1994.

**7-48-104. Domestic entity name.** In addition to complying with part 6 of article 90 of this title, providing for entity names, each corporation created under this article shall have as part of its domestic entity name the words "Business Development".

**Source:** L. 65: p. 448, § 1. C.R.S. 1963: § 31-23-4. L. 2003: Entire section amended, p. 2210, § 32, effective July 1, 2004. L. 2004: Entire section amended, p. 1403, § 14, effective July 1.

**7-48-105. Approval of governor.** The articles of incorporation shall not be filed by the secretary of state unless approved by the governor in writing. This approval shall not be given by the governor until the governor first has sought the advice of the division of commerce and development.

**Source:** L. 65: p. 448, § 1. C.R.S. 1963: § 31-23-5. L. 2004: Entire section amended, p. 1404, § 15, effective July 1.

**7-48-106. Restrictions on powers.** (1) The powers of a corporation shall be subject to the following restrictions:

(a) It shall not approve any application for a loan until the applicant shall have shown that the applicant has applied to a financial institution that could lawfully lend the amount of money sought and that the financial institution has refused in writing to make the requested loan.

(b) It shall not incur any secondary liability for the debts of others but may assume primary liability therefor.

(c) It shall not give security for any loan made to it unless all loans to it are secured ratably in proportion to unpaid balances due.

**Source:** L. 65: p. 449, § 1. C.R.S. 1963: § 31-23-6. L. 2004: (1)(a) amended, p. 1404, § 16, effective July 1.

**7-48-107. Acquisition or disposition of securities and capital stock.** Notwithstanding any other provision of law, any person, corporation, public utility, financial institution, or labor union may acquire, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds, notes, debentures, securities, or other evidences of indebtedness or the shares of capital stock of a corporation created under this article; but the amount of capital stock which may be acquired by any member of such corporation shall not exceed ten percent of the loan limit of that member.

**Source:** L. 65: p. 449, § 1. C.R.S. 1963: § 31-23-7.

**7-48-108. Membership - loans from members.** (1) Any financial institution is authorized to become a member of a corporation by making application to the board of directors on such form and in such manner as the board of directors may require, and membership shall become effective upon acceptance of the application by said board.



Membership shall be for the duration of the corporation; but upon written notice given to the corporation two years in advance, a member may withdraw from membership at the expiration date of the notice and shall not thereafter be obligated to make any loans to the corporation.

(2) Every member shall make loans to the corporation as and when called upon by it to do so, upon such terms and conditions as shall be approved from time to time by the board of directors, subject to the following conditions:

(a) All loans shall be evidenced by negotiable instruments of the corporation and shall bear interest at a rate of not less than one-half of one percent in excess of the rate of interest determined by the board of directors to be the prime rate on unsecured commercial loans as of the date of the loan.

(b) All loan limits shall be established at the thousand dollar amount nearest to the amount computed in accordance with the provisions of this section.

(c) No loan to a development corporation shall be made if immediately thereafter the total amount of the obligations of the said corporation would exceed ten times the amount then paid in on its outstanding capital stock.

(d) The total amount outstanding at any one time on loans to a development corporation made by any member shall not exceed the lesser of twenty percent of the total amount then outstanding on loans to such development corporation by all members thereof, two hundred fifty thousand dollars, or the following limit to be determined as of the time a member becomes a member on the basis of figures contained in the most recent year-end statement prior to its application for membership: Three percent of the capital and permanent surplus of banks, trust companies, and industrial banks; three percent of the total reserve and surplus accounts of a savings and loan association; one percent of the capital and unassigned surplus of stock insurance companies, except fire insurance companies; one percent of the unassigned surplus of mutual insurance companies, except fire insurance companies; one-tenth of one percent of the assets of fire insurance companies; comparable limits for other financial institutions as established by the board of directors of the development corporation. All loan limits shall be recomputed as of the first day of January of each even-numbered year, but no member's loan limit shall be increased as the result of such recomputation without the consent of the member.

(e) Each call for loans made by the corporation shall be prorated among the members of the corporation in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members. The "adjusted loan limit" of a member shall be the amount of such member's loan limit reduced by the balance of outstanding loans made by the member to the corporation and the investment of such member in capital stock of the corporation at the time of the call.

(f) A member of a corporation created under this article shall not be a member of more than one such corporation.

**Source: L. 65: p. 449, § 1. C.R.S. 1963: § 31-23-8.**

**7-48-109. Capital stock - stockholders and members.** (1) Each share of stock of a corporation shall have a par value of one hundred dollars and shall be issued for cash. No preferred stock shall be issued. At least one hundred thousand dollars shall be paid into the treasury for capital stock before the corporation shall be authorized to transact any business other than that which relates to its organization.

(2) Each stockholder shall be entitled to one vote, in person or by proxy, for each share of capital stock held, and each member shall be entitled to one vote, in person or by proxy, for each one thousand dollars of the authorized loan limit of such member as determined under section 7-48-108 (2).

(3) The rights given by the "Colorado Business Corporation Act", articles 101 to 117 of this title, to stockholders to attend meetings and to receive notice thereof and exercise voting rights shall apply to members as well as to stockholders of a corporation created under this article. The voting rights of the members shall be the same as if they were a separate class of stockholders, and stockholders and members shall in all cases vote



separately by classes. A quorum at a meeting shall require the presence in person or by proxy of a majority of the holders of the voting rights of each class.

**Source:** L. 65: p. 451, § 1. C.R.S. 1963: § 31-23-9. L. 2003: (3) amended, p. 2210, § 33, effective July 1, 2004.

**7-48-110. Directors.** The business and affairs of a corporation shall be conducted by a board of directors. The number of directors shall be a multiple of three. Two-thirds of the directors shall be elected by the members and one-third shall be elected by the stockholders. Any vacancy in the office of a director elected by the members shall be filled by the directors elected by the members, and any vacancy in the office of a director elected by the stockholders shall be filled by the directors elected by the stockholders.

**Source:** L. 65: p. 451, § 1. C.R.S. 1963: § 31-23-10.

**7-48-111. Amendments to articles of incorporation.** No amendment to the articles of incorporation shall be made which increases the obligation of a member to make loans to the corporation or which makes any change in the principal amount, interest rate, maturity date, or security or credit position of any outstanding loan made by a member to the corporation or which affects the right of a member to withdraw from membership or the voting rights of such member, without the consent of each member who would be affected by such amendment.

**Source:** L. 65: p. 451, § 1. C.R.S. 1963: § 31-23-11.

**7-48-112. Earned surplus.** Each year the corporation shall set apart as earned surplus not less than ten percent of its net earnings for the preceding fiscal year until such surplus is equal in value to one-half of the amount paid in on the capital stock then outstanding. If the amount of surplus so established becomes impaired, it shall be built up again to the required amount in the manner provided for its original accumulation.

**Source:** L. 65: p. 452, § 1. C.R.S. 1963: § 31-23-12.

**7-48-113. Members to have rights of stockholders.** The rights given to stockholders under the provisions of sections 7-102-106, 7-103-104, 7-110-203, and 7-114-102 shall apply to members as well as to stockholders of a corporation created under this article.

**Source:** L. 65: p. 452, § 1. C.R.S. 1963: § 31-23-13. L. 93: Entire section amended, p. 856, § 11, effective July 1, 1994. L. 2004: Entire section amended, p. 1404, § 17, effective July 1.

**7-48-114. Deposit of funds.** No corporation formed under the provisions of this article shall at any time be authorized to receive money on deposit. The corporation shall not deposit any of its funds in any banking institution unless such institution has been designated as a depository by a vote of a majority of the directors present at an authorized meeting of the board of directors, exclusive of any director who is an officer or director of the depository so designated.

**Source:** L. 65: p. 452, § 1. C.R.S. 1963: § 31-23-14. L. 2003: Entire section amended, p. 2210, § 34, effective July 1, 2004.

**7-48-115. Books and records.** A corporation shall keep, in addition to the books and records required by sections 7-116-101 and 7-116-102, a record showing the names and addresses of all members of the corporation and the current status of loans made by each

to the corporation. Members shall have the same rights with respect to such books and records as are given to stockholders by sections 7-116-101 to 7-116-106.

**Source:** L. 65: p. 452, § 1. C.R.S. 1963: § 31-23-15. L. 93: Entire section amended, p. 856, § 12, effective July 1, 1994.

**7-48-116. Credit of state not pledged.** Under no circumstances is the credit of the state pledged in this article.

**Source:** L. 65: p. 452, § 1. C.R.S. 1963: § 31-23-16.

## ARTICLE 49

### Older Housing

7-49-101.	Legislative declaration.	7-49-110.	Mortgage loans eligible for insurance.
7-49-102.	Definitions.	7-49-111.	Percentage of insurance.
7-49-103.	Corporation authorized.	7-49-112.	Processing loans for insurance.
7-49-104.	Corporate name.	7-49-113.	Eligible properties.
7-49-105.	Approval of governor and state treasurer.	7-49-114.	Working capital fund.
7-49-106.	Election of board of directors.	7-49-115.	Division of housing - assistance.
7-49-107.	Restrictions on powers.	7-49-116.	Nonliability of state for mortgage insurance commitments.
7-49-108.	Membership - loans from members.	7-49-117.	Deposit of funds.
7-49-109.	Loan insurance fund established.	7-49-118.	Books and records.

**7-49-101. Legislative declaration.** (1) The general assembly hereby finds and declares that:

(a) There exists in both the urban and rural areas of the state a substantial quantity of older houses which, while still structurally sound and safe, are in danger of deteriorating due to the lack of available private investment capital which would help ensure their purchase or rehabilitation;

(b) The purchase, repair, and restoration of such houses by interested persons will tend to stabilize the physical and social environment of the area in which such houses are located, preserve the economic base of the community of which they are a part, and help prevent the spread of blighted houses;

(c) A need exists for assistance to individuals and families in securing financing to purchase or rehabilitate such housing; that such purpose can best be met by coordination and cooperation among private lenders and insurers with state and local governments; that such assistance can be provided by stimulating the flow of private investment capital into the financing of such houses by providing a program of mortgage lending and insurance specifically designed to provide loans or insurance to individuals or families who would otherwise qualify for mortgage loans in areas of newer housing; and that local governments can further stimulate the upgrading of endangered older houses by minimizing the problems associated with over-restrictive and narrowly-defined and administered building codes and inspection procedures.

(2) It is further declared that a general law cannot be made applicable to the corporation authorized by this article because of the atypical and special nature of the corporation's powers, duties, privileges, rights, and liabilities.

**Source:** L. 75: Entire article added, p. 264, § 1, effective June 29.

**7-49-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Corporation" means the Colorado older housing preservation corporation authorized to be created in this article.

(2) "Eligible housing structure" or "eligible housing" means a structure occupied by the owner and used primarily for residential purposes, consisting of eight or less units, thirty



years of age or older, and on land located in a recorded subdivision plat in which fifty percent or more of the residential housing structures are thirty years of age or older.

(3) "Financial institution", "member institution", or "institution" means any bank, trust company, savings and loan association, industrial bank, credit union, public or private pension or retirement fund, insurance company or corporation related thereto, partnership, foundation, or any other financial institution authorized to invest in or make mortgage loans or to provide insurance therefor.

(4) "Insured lender" or "lender" means any financial institution which makes a loan which is insured under this article.

(5) "Mortgage" means a written instrument evidencing or creating a lien against real property for the purpose of providing security for the repayment of a debt. For the purposes of this article, the term includes a deed of trust.

**Source:** L. 75: Entire article added, p. 265, § 1, effective June 29.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

**7-49-103. Corporation authorized.** A corporation, for the purposes enumerated in this article, may be incorporated upon approval of the governor and the state treasurer. The provisions of the "Colorado Business Corporation Act", articles 101 to 117 of this title, not in conflict with or inconsistent with the provisions of this article shall apply to such corporation. The purpose clause of the articles of incorporation shall recite that the purposes for which the corporation is formed are to stimulate the flow of private investment capital for the purchase and rehabilitation of eligible housing; to encourage and assist through financial aid, advice, technical assistance, and other appropriate means the improvement of existing housing throughout the state; and, in furtherance of these purposes, to cooperate with the division of housing of the department of local affairs and the Colorado housing and finance authority and with other organizations, public and private.

**Source:** L. 75: Entire article added, p. 265, § 1, effective June 29. L. 87: Entire section amended, p. 1196, § 15, effective May 20. L. 93: Entire section amended, p. 856, § 13, effective July 1, 1994.

**7-49-104. Corporate name.** The corporation shall be called the Colorado older housing preservation corporation.

**Source:** L. 75: Entire article added, p. 265, § 1, effective June 29.

**7-49-105. Approval of governor and state treasurer.** The articles of incorporation shall not be delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title, unless the governor and the state treasurer have approved in writing the method for selection of public members of the board of directors and the creation of the corporation.

**Source:** L. 75: Entire article added, p. 266, § 1, effective June 29. L. 2002: Entire section amended, p. 1812, § 9, effective July 1; entire section amended, p. 1676, § 7, effective October 1.

**7-49-106. Election of board of directors.** (1) The business and affairs of the corporation shall be conducted by a board of directors comprised of:

(a) Four members elected by a vote of the eight participating financial institutions who have made or committed the largest contributions to the loan and insurance funds provided for in sections 7-49-108 and 7-49-109; and

(b) Two members elected by the remaining participating financial institutions; and

(c) Three members, elected under procedures established in the articles of incorporation at the time of incorporation and approved by the governor and state treasurer, representing the general public; and



(d) The executive director of the department of local affairs or the executive director's designee, the chairperson of the banking board, the commissioner of insurance, the executive director of the Colorado housing and finance authority, and the state treasurer, who shall serve as ex officio voting members of the board of directors.

(2) Except for the ex officio members, the terms of office for each member shall be four years; except that, at the time of incorporation, a majority of the members of the initial board shall be elected for four-year terms and the remainder for two-year terms. Any vacancy shall be filled in the same manner as the original election but shall be for the unexpired term.

**Source:** **L. 75:** Entire article added, p. 266, § 1, effective June 29. **L. 87:** (1)(d) amended, p. 1196, § 16, effective May 20. **L. 88:** (1)(d) amended, p. 417, § 8, effective April 11. **L. 2004:** (1)(d) amended, p. 1404, § 18, effective July 1.

**7-49-107. Restrictions on powers.** (1) The powers of the corporation shall be subject to the following restrictions:

(a) It shall not approve any application for a loan until the applicant has shown that the applicant has applied to two or more financial institutions that could lawfully lend the amount of money sought and that the financial institutions have refused in writing to make the requested loan or would only make such loan under conditions substantially different from the prevailing rates and conditions available to persons borrowing for the purchase or remodeling of newer homes;

(b) It shall not give security for any loan made unless all loans are secured ratably in proportion to unpaid balances due.

(2) Nothing in this article shall be construed to empower the board of directors to adopt rules or regulations that are inconsistent with federal law governing financial institutions or any federal rules or regulations promulgated pursuant to such federal law.

**Source:** **L. 75:** Entire article added, p. 266, § 1, effective June 29. **L. 2003:** (2) amended, p. 2210, § 35, effective July 1, 2004. **L. 2004:** (1)(a) amended, p. 1404, § 19, effective July 1.

**7-49-108. Membership - loans from members.** (1) Any financial institution is authorized to become a member of the corporation by making application to the board of directors on such form and in such manner as the board of directors may by rule require, and membership shall become effective upon approval of the application by said board. Membership shall be for the duration of the corporation; but, upon written notice given to the corporation two years in advance, a member may withdraw from membership at the expiration of the notice and shall not thereafter be obligated to make any loans as a member of the corporation.

(2) Every member shall agree to make, pledge, or commit loans to the corporation or to other borrowers as provided in this section when called upon by it to do so, upon such terms and conditions as shall be approved by rule from time to time by the board of directors.

(3) Pursuant to procedures established by rule at the time of incorporation, or as from time to time modified by the board of directors with the approval of a majority of the member institutions, the corporation shall have the right to ask every member to make, pledge, or commit loans up to two-tenths of one percent of its assets (or more if a greater amount is subsequently authorized) for rehabilitation, refinancing, or acquisition loans made under this article. A member's obligation to make, pledge, or commit loans in excess of two-tenths of one percent of its assets arises only with the consent of the individual member.

(b) Such request may be made by the corporation to a member institution asking that the member fulfill its obligations by making an insured loan to finance rehabilitation work, refinancing, or acquisition.

(c) If a member institution has made loans insured under this article, outstanding principal amounts of which equal or exceed two-tenths of one percent of such lending institution's assets or the amount of funds pledged, the institution may assign a loan application qualified under this article to another member institution which has not made loans insured under this article equal to the amount of funds pledged or committed to the corporation or two-tenths of one percent of its assets, and the member institution to which the assignment has been made will, if such member institution approves, make the insured loan.

(d) In the alternative, a member institution which has exceeded its two-tenths of one percent quota may place a loan application qualified under this article with the corporation which shall have the authority to assign such qualified loan application to any member institution which has not exceeded its commitments, and such institution shall make such loan if it approves thereof. The member institution to which such assignment is made need not be located in the municipality in which the housing facility mortgaged or to be mortgaged pursuant to such assigned loan is located.

(e) Each loan shall be subject to reasonable administrative discretion and approval by the lender, under rules established by the corporation, as to the structural soundness of the housing structure and the economic soundness of the proposed loan.

(f) If loans are made directly to the corporation by a member institution for use by the corporation pursuant to procedures established at the time of incorporation, the corporation may transfer amounts to each member institution for the purpose of making loans as provided in this article. Each such loan shall be subject to reasonable administrative discretion by the lender as to the structural soundness of the housing structure and the economic soundness of the proposed loan.

**Source: L. 75:** Entire article added, p. 266, § 1, effective June 29.

**7-49-109. Loan insurance fund established.** (1) The articles of incorporation shall include provisions for the establishment of a loan insurance fund as follows:

(a) At the time of incorporation, and prior to initiating any loans under section 7-49-108, the corporation may call upon each member institution to contribute to the loan insurance fund. The contribution of each institution shall not exceed two-one hundredths of one percent of its assets, unless a greater amount is contributed voluntarily by a member institution or unless a greater amount is stated at the time of incorporation. The corporation may call for contributions to the loan insurance fund only as needed to meet its insurance obligations on loans insured under this article that are in default and for the purpose of maintaining a fund of cash in the loan insurance fund of five hundred thousand dollars. Calls for contributions shall be made upon each of the member institutions in an amount that bears, at the date of the call, the same proportion to the loan insurance fund as such institution's assets bear to the total assets owned by the institutions.

(b) The loan insurance fund may be maintained by mortgage insurance fees not to exceed one-half of one percent above the rate charged for the mortgage or rehabilitation loan.

(2) In the alternative, mortgage insurance may also be provided under the provisions of section 10-4-106, C.R.S.

**Source: L. 75:** Entire article added, p. 267, § 1, effective June 29. **L. 2003:** (1)(a) amended, p. 2211, § 36, effective July 1, 2004.

**7-49-110. Mortgage loans eligible for insurance.** (1) Fund insurance may be made available under the following conditions:

(a) Fund insurance is applicable to loans originated by mortgagees approved by the corporation.

(b) Mortgage loans must be a first lien against subject property.

(c) Mortgage loans involving leaseholds must have a remaining lease term of not less than the mortgage term plus ten years.



(d) Mortgage loans on one- to eight-family properties are eligible only if owner-occupied.

(e) All mortgage loans shall bear interest at the rate agreed upon by the mortgagor and the corporation if the loan is made directly from funds held by the corporation and transferred to a participating lender, or by the mortgagor and the lending institution if the loan is made by the institution on call from the corporation.

(f) No mortgage loan shall be insured for a term in excess of forty years.

(g) The mortgage loan must contain amortization provisions satisfactory to the corporation for the complete amortization of the loan in monthly installments. Generally, the sum of principal and interest payments shall be substantially the same from month to month; however, special amortization programs involving increasing or decreasing monthly payments may be considered for insurance by the corporation.

(h) Mortgage loans submitted for insurance consideration to the corporation must conform to the exhibits, documentation, and eligibility criteria as required under the loan insurance program for which approval is being requested. The corporation may establish, from time to time, the maximum interest rate and term of the loan which it will permit as to any loan it will insure.

**Source: L. 75:** Entire article added, p. 268, § 1, effective June 29.

**7-49-111. Percentage of insurance.** (1) The corporation may insure:

(a) Up to one hundred percent of the unpaid principal amount of loans for the purpose of purchasing, rehabilitating, or repairing eligible housing;

(b) Up to thirty percent of the original principal amount of refinancing loans, if the funds in excess of those required to discharge existing mortgages are used for rehabilitation of all dwelling units in structures refinanced and for no other purpose; and

(c) Up to thirty percent of the original principal amount of acquisition loans, if the insured loan together with other resources of the borrower is sufficient to acquire the property and to complete rehabilitation in accordance with the standards of this article. When the borrower of such an insured loan has repaid to the lender thirty percent of the original principal balance, the loan shall cease to be insured, and thereafter the borrower shall no longer be required to make mortgage insurance payments to the corporation.

**Source: L. 75:** Entire article added, p. 268, § 1, effective June 29.

**7-49-112. Processing loans for insurance.** (1) Insurance on a loan qualifying for mortgage insurance under this article shall be in effect as of the date on which the lender has made a report to the corporation which shall document:

(a) The estimated cost of the rehabilitation work to be done;

(b) In the case of a refinancing loan or acquisition loan, that such loan shall not exceed one hundred percent of the fair market value of the property to be refinanced or acquired after rehabilitation work has been completed;

(c) That the estimated useful life of the housing accommodation, after rehabilitation, in the case of a rehabilitation loan, is greater than the term of the insurable mortgage;

(d) That the housing facility after purchase or rehabilitation will not contain any substantial violation of housing, building, or sanitary codes which would make the housing so unsafe that it presents a danger to the occupants or the public health or safety.

**Source: L. 75:** Entire article added, p. 269, § 1, effective June 29.

**7-49-113. Eligible properties.** (1) Property which is the subject of mortgage insurance or a mortgage or rehabilitation loan must:

(a) Meet the provisions of section 7-49-102 (2);

(b) Be located in this state;

(c) Be primarily residential in nature and use.



(2) If the housing facility includes three or more units, the corporation or lending institution may require appraisal as an investment and include an income and operating statement. Approval may also be subject to satisfactory leases.

**Source: L. 75:** Entire article added, p. 269, § 1, effective June 29.

**7-49-114. Working capital fund.** (1) The corporation shall, at the time of incorporation, establish a general fund, referred to in this article as the “working capital fund”, and shall pay into such working capital fund any other moneys which may be available to the corporation for its general purposes from any source.

(2) All moneys held in the working capital fund, including, without limitation, any cash funds transferred directly to the corporation and any income or interest earned by or increment to such fund, shall be used by the corporation for its general purposes, and, to the extent authorized by it, any such moneys in excess of the amount required to make and keep the corporation self-supporting and to repay loans from member institutions shall be made available for the purposes of loans or for the loan insurance fund.

**Source: L. 75:** Entire article added, p. 269, § 1, effective June 29.

**7-49-115. Division of housing - assistance.** (1) The division of housing of the department of local affairs is hereby authorized to assist individuals and the corporation as to:

(a) The nature, extent, and manner of repairs, remodeling, or rehabilitation financed under this article and the nature, extent, and manner of repairs required to ensure that the dwelling structure will not be structurally unsound and unsafe after such work is completed;

(b) The manner, method, or mode by which the mortgage recipient could undertake all or any portion of the work; and

(c) The progress of the work, including technical assistance regarding the quality of such work.

(2) The corporation may establish rules and regulations providing a schedule of the amount or percentage of the cost or any technical assistance provided by a lender or which may be done under contract to the division of housing of the department of local affairs or by a private firm. Said amount may be included in the loan; except that the total amount to be charged shall not exceed one-half of one percent of the total amount of a loan to finance repair or rehabilitation work only or one-half of one percent of the cost of the repair or rehabilitation work to be undertaken in conjunction with the refinancing of an existing mortgage or the financing of the acquisition of a housing facility.

**Source: L. 75:** Entire article added, p. 270, § 1, effective June 29. **L. 2004:** (1)(b) amended, p. 1405, § 20, effective July 1.

**7-49-116. Nonliability of state for mortgage insurance commitments.** This state shall not be liable for mortgage insurance commitments of the fund beyond the reserves and fee revenues of the fund. The mortgage insurance commitments issued on the fund shall contain a statement to that effect.

**Source: L. 75:** Entire article added, p. 270, § 1, effective June 29.

**7-49-117. Deposit of funds.** The corporation shall not deposit any of its funds in any banking institution unless such institution has been designated as a depository by a vote of a majority of the directors present at an authorized meeting of the board of directors, exclusive of any director who is an officer or director of the depository so designated.

**Source: L. 75:** Entire article added, p. 270, § 1, effective June 29.

**7-49-118. Books and records.** In addition to the books and records required by sections 7-116-101 to 7-116-105, the corporation shall keep a record showing the names and addresses of all members of the corporation and the current status of loans made by each to the corporation. Members shall have the same rights with respect to such books and records as are given to stockholders by sections 7-116-101 to 7-116-106.

**Source:** **L. 75:** Entire article added, p. 270, § 1, effective June 29. **L. 93:** Entire section amended, p. 857, § 14, effective July 1, 1994.

## ARTICLE 49.5

### Foreign-trade Zones

- |   |  |
|---|--|
| 7-49.5-101. Short title.                      | establish, operate, and maintain.      |
| 7-49.5-102. Legislative declaration.          | 7-49.5-105. Foreign-trade zone - site. |
| 7-49.5-103. Definitions.                      | 7-49.5-106. Taxation of merchandise.   |
| 7-49.5-104. Foreign-trade zone - authority to | 7-49.5-107. Severability.              |

**7-49.5-101. Short title.** This article shall be known and may be cited as the “Colorado Foreign-trade Zones Act”.

**Source:** **L. 80:** Entire article added, p. 447, § 1, effective March 26.

**7-49.5-102. Legislative declaration.** The general assembly hereby finds and declares that it is in the best interests of the state of Colorado to maintain this state’s economic and commercial viability in the world of national and international commerce by providing incentives to encourage growth in existing industries and to attract new industry. To that end, foreign-trade zones are established, operated, and maintained pursuant to a grant of privilege from the foreign-trade zones board upon proper application in accordance with the “Foreign-trade Zones Act of 1934”, 19 U.S.C. sec. 81. This article is enacted to allow designated corporations, including the city and county of Denver, to make application for such grant of the privilege to establish such a foreign-trade zone in Colorado.

**Source:** **L. 80:** Entire article added, p. 447, § 1, effective March 26.

**7-49.5-103. Definitions.** As used in this article, unless the context otherwise requires: (1) “Act” means the congressional act commonly known as the “Foreign-trade Zones Act of 1934”, 19 U.S.C. sec. 81.

(2) “Corporation” means a public corporation or a private corporation.

(3) “Foreign merchandise” means merchandise of any class that would be subject to United States customs law if and when entered into United States customs territory.

(4) “Foreign-trade zone” means a foreign-trade zone established under a grant of privilege from the foreign-trade zones board, as defined in the act, and includes foreign-trade subzones as designated by the United States department of commerce.

(5) “Private corporation” means any corporation (other than a public corporation) formed for the purpose of establishing, operating, and maintaining a foreign-trade zone in the state of Colorado under this article, in accordance with the act.

(6) “Public corporation” means the state of Colorado, any political subdivision, municipality, or city and county thereof, any public agency of the state of Colorado, any political subdivision, municipality, or city and county thereof, or any corporate municipal instrumentality of the state of Colorado or of the state of Colorado and one or more other states.

**Source:** **L. 80:** Entire article added, p. 447, § 1, effective March 26. **L. 2003:** (3) and (5) amended, p. 2211, § 37, effective July 1, 2004.



**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

**7-49.5-104. Foreign-trade zone - authority to establish, operate, and maintain.** Any corporation may apply for a grant of the privilege to establish, operate, and maintain a foreign-trade zone. If such grant of privilege is made, such corporation may accept the grant and do all things necessary and proper in furtherance of the establishment, operation, and maintenance of the foreign-trade zone. Any action taken under this section shall be in accordance with the act and any rules and regulations as may be promulgated thereunder.

**Source:** L. 80: Entire article added, p. 448, § 1, effective March 26.

**7-49.5-105. Foreign-trade zone - site.** Any corporation making an application for a grant of the privilege to establish, operate, and maintain a foreign-trade zone may select and describe the site of such foreign-trade zone in accordance with the act and rules and regulations promulgated thereunder.

**Source:** L. 80: Entire article added, p. 448, § 1, effective March 26.

**7-49.5-106. Taxation of merchandise.** Freeport merchandise and stocks of merchandise as defined in section 39-1-102 (15), C.R.S., brought as foreign merchandise into a foreign-trade zone, established pursuant to a grant of privilege under this article, are exempt from taxation by the state of Colorado or any political subdivision thereof to the extent that such taxation is inhibited by provisions of the United States constitution or law enacted thereunder pertaining to goods in international commerce.

**Source:** L. 80: Entire article added, p. 448, § 1, March 26. L. 83: Entire section amended, p. 1487, § 2, effective June 1. L. 2003: Entire section amended, p. 2211, § 38, effective July 1, 2004.

**Editor's note:** Section 39-1-102 (15), which defined "stocks of merchandise", was repealed by section 11 of chapter 425, Session Laws of Colorado 1983.

**Cross references:** For exemption from property tax of inventories of merchandise and materials and supplies that are held for consumption by a business or are held primarily for sale, see § 39-3-119.

**7-49.5-107. Severability.** If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

**Source:** L. 80: Entire article added, p. 448, § 1, effective March 26.

## Religious and Benevolent Organizations

### ARTICLE 50

#### Religious, Educational, and Benevolent Societies

**Cross references:** For definitions applicable to this article, see § 7-90-102.

7-50-101. How organized.

7-50-102. Affidavit of chairperson.

7-50-103. Bylaws.

7-50-104. Trustees of educational institution.

7-50-105. Educational institution may confer degrees.

7-50-106. Property vests in corporation.

7-50-107. May take, hold, and convey property.

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|-----------|---|-----------|--|
| 7-50-108. | New corporation formed - when.                      | 7-50-112. | Amendment filed before effective.            |
| 7-50-109. | Incorporation of Christian governing organizations. | 7-50-113. | Articles of amendment evidence of amendment. |
| 7-50-110. | Quorum of directors.                                | 7-50-114. | Dissolution.                                 |
| 7-50-111. | Amendment of articles.                              |           |  |

**7-50-101. How organized.** (1) Any church, congregation, or society for religious, educational, or benevolent purposes may also become incorporated under this article by electing, appointing, or selecting, at a meeting held for the purpose, two or more of its members as directors, trustees, wardens, vestrymen, or other officers whose powers and duties are similar to those of trustees or directors of a corporation organized for profit, referred to in this article as the "governing board". Said organization may adopt a domestic entity name that complies with part 6 of article 90 of this title and a seal, and, upon the filing of an affidavit with the secretary of state substantially as provided in section 7-50-102, shall become a body politic and corporate by the domestic entity name adopted.

(2) The provisions of this article shall not apply to any religious, educational, or benevolent society formed after December 31, 1967, nor to any religious, educational, or benevolent society or corporation formed prior to January 1, 1968, which has elected to accept the provisions of articles 121 to 137 of this title.

**Source:** G.L. § 229. G.S. § 372. R.S. 08: § 1018. C.L. § 2384. CSA: C. 41, § 177. CRS 53: § 31-21-1. L. 55: p. 240, § 1. C.R.S. 1963: § 31-20-1. L. 67: p. 658, § 11. L. 68: p. 2, § 3. L. 97: (2) amended, p. 758, § 15, effective July 1, 1998. L. 2000: (1) amended, p. 948, § 1, effective July 1. L. 2003: (1) amended, p. 2211, § 39, effective July 1, 2004.

#### ANNOTATION

**Law reviews.** For article, "Summary of Denver Bar-Sponsored Bills Passed by General Assembly", see 28 Dicta 173 (1951). For article, "Nonprofit and Charitable Corporations in Colorado", see 36 U. Colo. L. Rev. 9 (1963).

**Societies availing themselves of this section become civil corporations,** as distinguished from ecclesiastical corporations in the sense of the English Law and, as such, are subject to the principles of the common law and the practice and procedure applicable to corporations under the general incorporation laws, so far as the same are pertinent. Horst v. Traudt, 43 Colo. 445, 96 P. 259 (1908).

**And a society originally organized under this section must be held to be a charitable organization.** In re Estate of Forrester, 86 Colo. 221, 279 P. 721 (1929).

**But the question of a charity's capacity as an existing corporation** is a matter for the state. Tomay v. Crist, 75 Colo. 437, 226 P. 156 (1924).

**Trustees, wardens, vestrymen, or other officers are the managing officers and trustees**

**of a religious corporation** in the same sense that the directors and officers of a bank or a railroad company are officers and trustees of such corporation, and thus they are invested, in regard to the temporal affairs of the church or society, with the powers conferred by the statute and with the ordinary discretionary powers of similar corporate officers. Horst v. Traudt, 43 Colo. 445, 96 P. 259 (1908).

**And the members are similar to stockholders.** In incorporated religious societies the members thereof occupy the same relation to the incorporated body, insofar as its temporal affairs are concerned, as the shareholders or stockholders of a corporation organized for profit under the general incorporation laws occupy to it. Horst v. Traudt, 43 Colo. 445, 96 P. 259 (1908).

**Thus, to entitle a member of an incorporated religious society to relief in the courts,** it must appear that he has exhausted all the means within the corporation itself and to obtain redress a showing must be made in the complaint that such efforts were unavailing. Horst v. Traudt, 43 Colo. 445, 96 P. 259 (1908).

**7-50-102. Affidavit of chairperson.** (1) The chairperson or secretary of such meeting, within a reasonable time after the meeting, shall file in the office of the secretary of state an affidavit substantially in the following form:



STATE OF COLORADO )

) ss.

County of ..... )

I do solemnly swear (or affirm) that at a meeting of the members of the (here insert the name used by the church, congregation, or society before the incorporation) held at ....., in the county of ....., and State of Colorado, on the ..... day of ....., A.D. 20...., the following persons (here insert the names) were elected, appointed, or selected as members of the governing board (under whatever title the organization designates said members, whose powers and duties are similar to those of trustees or directors of a corporation organized for profit), adopted as its corporate name (here insert the name), and at said meeting this affiant acted as chairperson (or secretary, as the fact may be).

.....  
(Name of affiant)

Subscribed and sworn to before me this ..... day of ....., A.D. 20.... .

(2) A fee that shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., shall be charged for filing the affidavit of incorporation. When a true copy of such affidavit is presented to the secretary of state, the secretary of state shall certify it for a fee that shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., as a true copy of the original affidavit on file in the records of the secretary of state, showing the date the original affidavit was filed.

(3) A certified copy of such affidavit shall be recorded in the office of the clerk and recorder of the county in which the corporation was organized and also in every county in which the corporation owns real estate. The affidavit of incorporation may also contain other provisions for the management and conduct of the affairs of the corporation, creating, defining, limiting, and regulating the powers of the corporation, the governing board, officers, and members thereof.

**Source:** G.L. § 230. L. 1879: p. 32, § 1. G.S. § 373. R.S. 08: § 1019. C.L. § 2385. L. 31: p. 249, § 24. CSA: C. 41, § 178. CRS 53: § 31-21-2. L. 55: p. 240, § 2. C.R.S. 1963: § 31-20-2. L. 83: (2) amended, p. 870, § 22, effective July 1. L. 2003: (2) and (3) amended, p. 2212, § 40, effective July 1, 2004. L. 2004: (1) and (2) amended, p. 1405, § 21, effective July 1.

ANNOTATION

The affidavit prescribed by this section does not require mention of the purpose of the organization. Thus it is wholly different from that of a corporation formed for business purposes, in which the purpose must be stated. Tomay v. Crist, 75 Colo. 437, 226 P. 156 (1924).

Where the affidavit required by this section shows that affiant was acting as secretary, his signature without further designation is sufficient. Tomay v. Crist, 75 Colo. 437, 226 P. 156 (1924).

**7-50-103. Bylaws.** The directors, trustees, wardens, or vestrymen of any such corporation shall adopt necessary bylaws to provide for the election of directors, trustees, wardens, or vestrymen and other officers and for the proper government in all respects of the congregation, church, or society, unless such corporation, in its articles of incorporation, reserves to itself the right to make and adopt such prudential bylaws as it deems necessary to provide for the election of directors, trustees, wardens, or vestrymen and other officers and for the proper government in all respects of such congregation, church, or society.

**Source:** G.L. § 231. L. 1881: p. 66, § 1. G.S. § 374. R.S. 08: § 1020. C.L. § 2386. CSA: C. 41, § 179. CRS 53: § 31-21-3. C.R.S. 1963: § 31-20-3.

**Cross references:** For bylaws of joint stock companies incorporated for religious, educational, and benevolent purposes, see § 7-51-103.

**7-50-104. Trustees of educational institution.** Any corporation existing for educational purposes under the law of this state that maintains one or more institutions of higher education of the grade of a university or college shall be governed and controlled by its board of trustees, wardens, or directors, as the case may be, who shall have power at any time, by a vote of two-thirds of the full board of trustees elected, to increase the board of directors, trustees, or wardens to any number that they see fit and shall also have the power to decrease the same to any number not less than three. The terms of office of such directors, wardens, or trustees may be determined by said board of trustees, wardens, or directors as shall be adopted by them by a bylaw in which two-thirds of the whole number shall concur before the same shall be binding upon the board of trustees, directors, or wardens, as the case may be.

**Source:** L. 1893: p. 92, § 1. R.S. 08: § 1021. C.L. § 2387. CSA: C. 41, § 180. CRS 53: § 31-21-4. C.R.S. 1963: § 31-20-4. L. 2003: Entire section amended, p. 2212, § 41, effective July 1, 2004.

**7-50-105. Educational institution may confer degrees.** Any corporation existing for educational purposes under the law of this state that maintains one or more institutions of higher education of the grade of a university or college shall have authority, by its directors, board of trustees, or such person or persons as may be designated by its constitution or bylaws, to confer degrees and grant diplomas and other marks of distinction as are usually conferred and granted by other universities and colleges of like grade.

**Source:** L. 1889: p. 121, § 1. R.S. 08: § 1022. C.L. § 2388. CSA: C. 41, § 181. CRS 53: § 31-21-5. C.R.S. 1963: § 31-20-5. L. 2003: Entire section amended, p. 2212, § 42, effective July 1, 2004.

**7-50-106. Property vests in corporation.** Upon the due and lawful incorporation of any congregation, parish, church, or society, such corporation shall be entitled to all the real and personal property held by any person or trustees in trust for the use of the members thereof and immediately upon incorporation shall be entitled to a deed of conveyance to be executed by the person holding such property in trust, in order to vest the title thereto in the corporation. Such deed of conveyance shall state the object and purposes of the trust to be carried out according to the purpose and intent of its creation, which deed shall be recorded after the manner of conveyances in general, so that the title and trust declared may duly appear of record. Any self-supporting congregation, parish, church, or society may vest its real estate and personal property in such general incorporations as are provided for in section 7-50-109; except that, if the authorities of any church, sect, or religious body have caused a corporation to be formed for general missions and other purposes, as provided in this article, and it is in accordance with the usages and customs of the church, sect, or religious body to vest the property of mission stations in such corporation, then all such property that may have been held by any person or trustees for the use of the mission stations shall be vested in said general corporation; and whenever any mission station, from change of population or other cause, is suspended or abandoned, the general corporation, in its discretion, may sell or otherwise dispose of all such mission property, the proceeds of such sale or disposal to be used for the benefit of said church, sect, or religious body in the state of Colorado.

**Source:** G.L. § 232. L. 1881: p. 65, § 1. G.S. § 375. R.S. 08: § 1023. C.L. § 2389. CSA: C. 41, § 182. CRS 53: § 31-21-6. C.R.S. 1963: § 31-20-6. L. 2003: Entire section amended, p. 2212, § 43, effective July 1, 2004.

#### ANNOTATION

**“Formal title” approach to resolving church property disputes.** In resolving church property disputes, the appellate court applies the neutral principles approach, specifically the



"formal title" approach. On this basis, the court can determine ownership by studying deeds, reverter clauses, and general state corporation

laws. *Dickey v. Snodgrass*, 673 P.2d 51 (Colo. App. 1983).

**7-50-107. May take, hold, and convey property.** Domestic and foreign religious, educational, charitable, and literary corporations or associations operating within the state may take by gift, devise, or purchase, and hold and convey real and personal property. All gifts, devises, and grants made prior to March 14, 1877, to such corporations or associations are hereby ratified.

**Source:** G.L. § 235. G.S. § 378. R.S. 08: § 1024. C.L. § 2390. CSA: C. 41, § 183. CRS 53: § 31-21-7. C.R.S. 1963: § 31-20-7.

#### ANNOTATION

**Law reviews.** For article, "Restrictions on Charitable Gifts in Colorado", see 23 Rocky Mt. L. Rev. 434 (1951).

**"Formal title" approach to resolving church property disputes.** In resolving church property disputes, the appellate court applies the neutral principles approach, specifically the "formal title" approach. On this basis, the court can determine ownership by studying deeds, reverter clauses, and general state corporation laws. *Dickey v. Snodgrass*, 673 P.2d 51 (Colo. App. 1983).

**A library association is educational and therefore within the terms of this section;** consequently, it may take property under a will. *Tomay v. Crist*, 75 Colo. 437, 226 P. 156 (1924).

**Foreign corporation may act as trustee of charitable trust.** A foreign corporation, if it

possesses by the law of its creation the requisite power so to do, may act as trustee of a charitable trust where the subject matter thereof is personalty and may take lands as such trustee where not prohibited by the law of the state wherein the land is located. This section contains no such prohibition; rather, this section on its face is one of authorization to foreign as well as domestic corporations operating within the state. *Galiger v. Armstrong*, 114 Colo. 397, 165 P.2d 1019 (1946).

**Charitable organization may execute charitable trust.** A charitable organization, being authorized to take, receive, and hold gifts for charitable purposes, is also capable of executing a charitable trust. *Clayton v. Hallett*, 30 Colo. 231, 70 P. 429 (1902); *In re Estate of Forrester*, 86 Colo. 221, 279 P. 721 (1929).

**7-50-108. New corporation formed - when.** Any congregation, church, or society incorporated prior to March 14, 1877, under the provisions of any law for the incorporation of religious, educational, or benevolent societies may become incorporated under the provisions of articles 30 to 52 and 121 to 137 or articles 101 to 117 of this title, relative to religious, educational, and benevolent societies in the same manner as if it had not previously been incorporated, in which case the new corporation shall be entitled to and invested with all the real and personal estate of the old corporation, in like manner and to the same extent as the old corporation, subject to all the debts, contracts, and liabilities. The word "trustees", as used in articles 30 to 52 and 121 to 137 or articles 101 to 117 of this title relative to religious bodies, shall be construed to include wardens, vestrymen, or such other officers as perform the duties of trustees.

**Source:** G.L. § 233. G.S. § 376. R.S. 08: § 1025. C.L. § 2391. CSA: C. 41, § 188. CRS 53: § 31-21-8. C.R.S. 1963: § 31-20-8. L. 93: Entire section amended, p. 857, § 15, effective July 1, 1994. L. 97: Entire section amended, p. 758, § 16, effective July 1, 1998.

**Cross references:** For joint stock companies for religious, educational, and benevolent purposes, see § 7-51-112.

**7-50-109. Incorporation of Christian governing organizations.** If any body of Christians has an organization according to its order or mode of government, whether known as synod, presbytery, conference, episcopate, or other name, with ecclesiastical or spiritual jurisdiction over its members throughout this state, and its authorities desire to

engage in works of education, benevolence, charity, and missions, which works shall be of like extensive operation and benefit and not of limited or local service, and they shall deem an incorporation convenient for the more successful administration of said works, its said authorities, with such persons as they may associate with them, may cause such incorporation to be formed in the manner and with the powers provided for the incorporation of a church, congregation, or society.

**Source:** G.L. § 234. G.S. § 377. R.S. 08: § 1026. C.L. § 2392. CSA: C. 41, § 189. CRS 53: § 31-21-9. C.R.S. 1963: § 31-20-9.

**Cross references:** For the incorporation of joint stock companies for religious, educational, and benevolent purposes, see § 7-51-113.

**7-50-110. Quorum of directors.** The bylaws of any such charitable corporation organized under the law of this state may declare the number of trustees or managers necessary to constitute a quorum at any meeting of the board.

**Source:** L. 1883: p. 115, § 4. G.S. § 383. R.S. 08: § 1030. C.L. § 2396. CSA: C. 41, § 193. CRS 53: § 31-21-10. C.R.S. 1963: § 31-20-10. L. 2003: Entire section amended, p. 2213, § 44, effective July 1, 2004.

**7-50-111. Amendment of articles.** Any corporation organized under this article may amend its affidavit of incorporation at any regular or special meeting of its governing board by a two-thirds vote of the board members present.

**Source:** L. 07: p. 312, § 1. R.S. 08: § 1031. C.L. § 2397. CSA: C. 41, § 194. CRS 53: § 31-21-11. L. 55: p. 241, § 3. C.R.S. 1963: § 31-20-11.

**7-50-112. Amendment filed before effective.** (1) When the affidavit of incorporation is amended, a copy of the amendment shall be delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title, and upon such filing, the amendment shall become effective.

(2) (Deleted by amendment, L. 2002, p. 1812, § 10, effective July 1, 2002; p. 1676, § 8, effective October 1, 2002.)

(3) A certified copy of the amendment shall be recorded in the office of the clerk and recorder of the county in which the organization was organized and also in each county in which the corporation owns real estate.

**Source:** L. 07: p. 312, § 2. R.S. 08: § 1032. C.L. § 2398. L. 31: p. 251, § 25. CSA: C. 41, § 195. CRS 53: § 31-21-12. L. 55: p. 242, § 4. C.R.S. 1963: § 31-20-12. L. 83: (2) amended, p. 870, § 23, effective July 1. L. 2002: Entire section amended, p. 1812, § 10, effective July 1; entire section amended, p. 1676, § 8, effective October 1. L. 2003: (3) amended, p. 2213, § 45, effective July 1, 2004.

**7-50-113. Articles of amendment evidence of amendment.** The articles of amendment, or copy thereof, duly certified by the secretary of state or by the recorder, shall be received as evidence of the change, alteration, or amendment of the articles of incorporation of the corporation.

**Source:** L. 07: p. 313, § 3. R.S. 08: § 1033. C.L. § 2399. CSA: C. 41, § 196. CRS 53: § 31-21-13. C.R.S. 1963: § 31-20-13. L. 2002: Entire section amended, p. 1812, § 11, effective July 1; entire section amended, p. 1677, § 9, effective October 1. L. 2008: Entire section amended, p. 23, § 16, effective August 5.

**7-50-114. Dissolution.** When a majority of the members of any corporation organized pursuant to this article vote to dissolve the corporation, the corporation shall deliver to the



secretary of state, for filing pursuant to part 3 of article 90 of this title, an affidavit of dissolution. Such affidavit shall state that all the debts of the corporation are fully paid or provided for. When such affidavit has been filed, the corporation shall be forever dissolved. The president shall obtain from the secretary of state a certified copy of the affidavit showing the filing date and shall record a copy thereof in the office of the clerk and recorder of the county in which the corporation was organized and also in every county in which the corporation owns real estate.

**Source:** L. 55: p. 242, § 5. CRS 53: § 31-21-14. C.R.S. 1963: § 31-20-14. L. 83: Entire section amended, p. 870, § 24, effective July 1. L. 2002: Entire section amended, p. 1812, § 12, effective July 1; entire section amended, p. 1677, § 10, effective October 1. L. 2003: Entire section amended, p. 2213, § 46, effective July 1, 2004.

## ARTICLE 51

### Joint Stock Religious or Benevolent Associations

**Cross references:** For definitions applicable to this article, see § 7-90-102.

7-51-101.	How organized.	7-51-108.	Election of directors.
7-51-102.	Affidavit of chairperson - where filed - effect.	7-51-109.	Liability of stockholders.
7-51-103.	Bylaws.	7-51-110.	Certificate of full paid stock.
7-51-104.	Property vests in corporation.	7-51-111.	Purchase of property.
7-51-105.	Powers of corporation.	7-51-112.	Any church may incorporate.
7-51-106.	Shares of stock.	7-51-113.	Incorporation of religious organization.
7-51-107.	Board of directors.		

**7-51-101. How organized.** (1) Any joint stock company or association organized in this state for religious, educational, or benevolent purposes may be incorporated under this article by electing or appointing, according to its usages or customs at any meeting held for that purpose, two or more of its members as directors, trustees, wardens, or vestrymen, or other officers whose powers and duties are similar to those of trustees, who shall be agreeable to the usages and customs and rules and regulation of the congregation, church, or society, and may adopt a corporate name, and upon the filing of the affidavit as provided in section 7-51-102, it shall be a body politic and corporate by the name so adopted.

(2) The provisions of this article shall not apply to any joint stock religious, educational, or benevolent association formed after December 31, 1967, nor to any joint stock religious, educational, or benevolent association formed prior to January 1, 1968, which is subject to the provisions of articles 121 to 137 of this title.

**Source:** L. 1879: p. 33, § 1. G.S. § 384. R.S. 08: § 1034. C.L. § 2400. CSA: C. 41, § 197. CRS 53: § 31-22-1. C.R.S. 1963: § 31-21-1. L. 67: p. 658, § 12. L. 68: p. 2, § 4. L. 97: (2) amended, p. 758, § 17, effective July 1, 1998.

## ANNOTATION

**Law reviews.** For article, "Nonprofit and Charitable Corporations in Colorado", see 36 U. Colo. L. Rev. 9 (1963).

**7-51-102. Affidavit of chairperson - where filed - effect.** (1) The chairperson or secretary of the meeting, as soon as may be after such meeting, shall make and file, in the office of the recorder of deeds in the county in which the congregation, church, or society is organized, an affidavit, substantially in the following form:

STATE OF COLORADO )

) ss.

County of ..... )

I do solemnly swear (or affirm, as the case may be) that at a meeting of the members of the (here insert the name of the society as known before the incorporation), held at ....., in the county of ....., and State of Colorado, on the ..... day of ....., A.D., 20...., for that purpose the following persons were elected (or appointed) trustees (or wardens, vestrymen or other officers of whatever name they choose to adopt), with powers and duties similar to trustees, according to the rules and usages of such society, church, or congregation, viz.: (here insert the names); that at such a meeting, such society, church, or congregation adopted as its corporate name (here insert the name); that the amount of the capital stock of such society, church, or congregation is ..... dollars, divided into ..... shares of ..... dollars each, and that at such meeting this affiant acted as chairperson (secretary, as the case may be).

.....

(Name of affiant)

Subscribed and sworn to before me this ..... day of....., A.D., 20... .

(2) Such certificate, or a copy thereof duly certified by the recorder, shall be received as evidence of the due incorporation of such society, church, or congregation.

**Source:** L. 1879: p. 34, § 2. G.S. § 385. R.S. 08: § 1035. C.L. § 2401. CSA: C. 41, § 198. CRS 53: § 31-22-2. C.R.S. 1963: § 31-21-2. L. 2004: (1) amended, p. 1405, § 22, effective July 1.

**7-51-103. Bylaws.** The directors, trustees, wardens, or vestrymen of any such corporation shall adopt necessary bylaws to provide for the election of directors, trustees, wardens, or vestrymen and other officers and for the proper government in all respects of the congregation, church, or society.

**Source:** L. 1879: p. 34, § 3. G.S. § 386. R.S. 08: § 1036. C.L. § 2402. CSA: C. 41, § 199. CRS 53: § 31-22-3. C.R.S. 1963: § 31-21-3.

**Cross references:** For bylaws of regular religious, educational, or benevolent societies, see § 7-50-103.

**7-51-104. Property vests in corporation.** Upon the incorporation of any such congregation, church, or society, all real and personal property held by any person or trustee for the use of the members thereof shall immediately vest in such corporation and be subject to its control, and may be used, mortgaged, sold, and conveyed the same as if it had been conveyed to such corporation by deed.

**Source:** L. 1879: p. 35, § 4. G.S. § 387. R.S. 08: § 1037. C.L. § 2403. CSA: C. 41, § 200. CRS 53: § 31-22-4. C.R.S. 1963: § 31-21-4.

**7-51-105. Powers of corporation.** (1) Corporations formed under this article:

- (a) Shall be bodies corporate and politic in fact and in name, by the name stated in the affidavit, and by that name have succession for the period for which they are organized;
- (b) May sue and be sued in any court in this state;
- (c) May have a common seal which they may alter or renew at pleasure by filing an impression of the same in the office of the clerk and recorder of the county in which any such corporation may be formed under this article;
- (d) May own, possess, and enjoy so much real and personal property as is necessary for the transaction of their business, whether acquired by purchase, grant, devise, gift, or otherwise;



(e) May from time to time sell and dispose of real and personal property or any part thereof when not required for the use of the corporation; and

(f) May borrow money and pledge their franchises and property, both real and personal, to secure the payment thereof and may exercise all the powers necessary and requisite to carry into effect the object for which they may be formed under this article.

**Source:** L. 1879: p. 35, § 5. G.S. § 388. R.S. 08: § 1038. C.L. § 2404. CSA: C. 41, § 201. CRS 53: § 31-22-5. C.R.S. 1963: § 31-21-5.

**7-51-106. Shares of stock.** The shares of stock shall not be less than ten dollars nor more than one hundred dollars each and shall be deemed personal property and transferable as such in the manner provided by the bylaws. Subscriptions therefor shall be made payable in such installments and at such time as shall be determined by the directors, trustees, or other similar officers. The bylaws may provide for a forfeiture or sale of stock on failure to pay the installments or assessments that may from time to time become due; but no forfeiture of stock or of the amounts paid thereon shall be declared against any estate or stockholder before demand has been made for the amount due.

**Source:** L. 1879: p. 35, § 6. G.S. § 389. R.S. 08: § 1039. C.L. § 2405. CSA: C. 41, § 202. CRS 53: § 31-22-6. C.R.S. 1963: § 31-21-6.

#### ANNOTATION

**The stock in ditch companies is personal property and subject to execution** and sale the same as other personal property. *Conway v. John*, 14 Colo. 30, 23 P. 170 (1890); *Strickler v.*

*City of Colo. Springs*, 16 Colo. 61, 26 P. 313 (1891); *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93, 31 P. 495 (1892).

**7-51-107. Board of directors.** The corporate powers of any such corporation shall be exercised by a board of directors, trustees, or other similar officers in the manner and for the time that may be prescribed in the constitution and bylaws of the corporation, but the same shall not be in conflict with any of the provisions of this article or the law of this state.

**Source:** L. 1879: p. 36, § 7. G.S. § 390. R.S. 08: § 1040. C.L. § 2406. CSA: C. 41, § 203. CRS 53: § 31-22-7. C.R.S. 1963: § 31-21-7. L. 2003: Entire section amended, p. 2213, § 47, effective July 1, 2004.

**7-51-108. Election of directors.** If an election of directors, trustees, or other similar officers is not held on the day designated by the constitution or bylaws, the company shall not be dissolved for that reason, but it shall be proper to elect such directors, trustees, or other officers on any subsequent day as shall be prescribed by the constitution or bylaws.

**Source:** L. 1879: p. 36, § 8. G.S. § 391. R.S. 08: § 1041. C.L. § 2407. CSA: C. 41, § 204. CRS 53: § 31-22-8. C.R.S. 1963: § 31-21-8.

**7-51-109. Liability of stockholders.** Each stockholder shall be liable for the debts of the corporation to the extent of the amount unpaid upon the stock held by the stockholder, to be collected in the manner provided in this section. If any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more of the stockholders at the same time, to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, as in cases of garnishment.

**Source:** L. 1879: p. 36, § 9. G.S. § 392. R.S. 08: § 1042. C.L. § 2408. CSA: C. 41, § 205. CRS 53: § 31-22-9. C.R.S. 1963: § 31-21-9. L. 2004: Entire section amended, p. 1406, § 23, effective July 1.

**7-51-110. Certificate of full paid stock.** The president and a majority of the board of trustees, directors, or other similar officers, after the payment of the last installment of capital stock so fixed and limited by the company as required by this article, shall make a certificate stating the amount of the capital stock so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the board of trustees, directors, or other similar officers, and record the same in the office of the clerk and recorder of the county within which the corporation is formed; and from the date of the recording of such certificate, the stockholders of that company shall not be liable for any of the debts of such corporation.

**Source:** L. 1879: p. 36, § 10. G.S. § 393. R.S. 08: § 1043. C.L. § 2409. CSA: C. 41, § 206. CRS 53: § 31-22-10. C.R.S. 1963: § 31-21-10.

**7-51-111. Purchase of property.** The directors, trustees, or other similar officers of any such corporation may purchase real and personal property necessary for their business and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared to be full-paid stock and not liable to any further calls or assessments thereon nor for any debt of the corporation.

**Source:** L. 1879: p. 37, § 11. G.S. § 394. R.S. 08: § 1044. C.L. § 2410. CSA: C. 41, § 207. CRS 53: § 31-22-11. C.R.S. 1963: § 31-21-11.

**7-51-112. Any church may incorporate.** Any congregation, church, or society incorporated prior to February 20, 1879, under the provisions of any law for the incorporation of religious, educational, or benevolent societies may become incorporated under the provisions of this article in the same manner as if it had not been previously incorporated. The new corporation shall be entitled to and invested with all the real and personal property of the old corporation, subject to all its debts, contracts, and liabilities. The words "directors" and "trustees", as used in this article, shall be construed to include wardens, vestrymen, or such other officers as perform the duties of trustees or directors.

**Source:** L. 1879: p. 37, § 12. G.S. § 395. R.S. 08: § 1045. C.L. § 2411. CSA: C. 41, § 208. CRS 53: § 31-22-12. C.R.S. 1963: § 31-21-12.

**Cross references:** For religious, educational, and benevolent societies, see § 7-50-108.

**7-51-113. Incorporation of religious organization.** If any body of Christians or other religious denomination has an organization according to its mode of government, whether known as synod, presbytery, conference, episcopate, or other name, with ecclesiastical or spiritual jurisdiction over its members throughout this state and its authorities desire to engage in works of education, benevolence, charity, and missions and deem an incorporation convenient for the more successful administration of such works, its said authorities, with such persons as they may associate with them, may cause such incorporation to be formed in the manner and with the powers provided in this article for the incorporation of a church, congregation, or society.

**Source:** L. 1879: p. 37, § 13. G.S. § 396. R.S. 08: § 1046. C.L. § 2412. CSA: C. 41, § 209. CRS 53: § 31-22-13. C.R.S. 1963: § 31-21-13.

**Cross references:** For religious, educational, and benevolent societies, see § 7-50-109.

## ARTICLE 52

### Officials of Churches and Religious Societies

**Cross references:** For definitions applicable to this article, see § 7-90-102.



7-52-101.	Execution of articles of incorporation.	7-52-105.	ration sole.
7-52-102.	Filing articles - corporate existence.		Succession to property on death, resignation, or removal of person not incorporated as corporation sole.
7-52-103.	Corporate powers.	7-52-106.	Applicability of revised nonprofit corporation act.
7-52-104.	Succession to property upon death, resignation, or removal of person incorporated as corpo-		

**7-52-101. Execution of articles of incorporation.** The archbishop, bishop, president, trustee in trust, president of stake, president of congregation, overseer, presiding elder, or clergyman of any church or religious society who has been duly chosen, elected, or appointed in conformity with the constitutions, canons, rites, regulations, or discipline of said church or religious society and in whom shall be vested the legal title to the property of such church or religious society may deliver articles of incorporation to the secretary of state for filing pursuant to part 3 of article 90 of this title. The articles shall contain the name of the corporation, the purpose of the corporation, and the name and title of the person in whom is vested the legal title to the property.

**Source:** L. 67: p. 866, § 1. C.R.S. 1963: § 31-25-1. L. 2003: Entire section amended, p. 2214, § 48, effective July 1, 2004. L. 2004: Entire section amended, p. 1406, § 24, effective July 1.

**7-52-102. Filing articles - corporate existence.** Upon the filing of the articles of incorporation with the secretary of state, the person subscribing the articles and the person's successor in office by the name or title stated in the articles is a corporation sole, with perpetual succession.

**Source:** L. 67: p. 866, § 2. C.R.S. 1963: § 31-25-2. L. 2003: Entire section amended, p. 2214, § 49, effective July 1, 2004. L. 2004: Entire section amended, p. 1406, § 25, effective July 1.

**7-52-103. Corporate powers.** A corporation sole may hold and maintain real, personal, and mixed property; contract in the same manner and to the same extent as an individual; sue and be sued; acquire real and personal property by purchase, devise, bequest, gift, or otherwise and hold, own, use, lease, assign, convey, or otherwise dispose of the same in like manner and to the same extent as an individual; borrow money, issue notes or other negotiable paper, and secure the money borrowed by mortgage or by deed of trust on said real or personal property or any part thereof; borrow money without security; and perform all other acts in furtherance of the objects and purposes of the corporation not inconsistent with the statutes of this state.

**Source:** L. 67: p. 866, § 3. C.R.S. 1963: § 31-25-3. L. 2004: Entire section amended, p. 1407, § 26, effective July 1.

**7-52-104. Succession to property upon death, resignation, or removal of person incorporated as corporation sole.** In the event of the death or resignation of the archbishop, bishop, president, trustee in trust, president of stake, president of congregation, overseer, presiding elder, or clergyman who has been incorporated as a corporation sole under sections 7-52-101 and 7-52-102, or such person's removal from office by the person or body having the authority for such removal, the person's successor in office as the corporation sole shall be vested with the title of all property held by the successor's predecessor with the same power and authority over the property, subject to all the legal liabilities and obligations with reference to the property, upon the filing by the secretary of state, pursuant to part 3 of article 90 of this title, of a certificate of the successor's commission or certified copy of the successor's letter of election or appointment. In the interim between the appointment of a successor in office to the corporation sole, the person

who is charged by the church or religious society pursuant to its constitution, canons, rites, regulations, or discipline to administer the church or religious society shall be vested with the title to any property held by the corporation sole with like powers and authority upon the filing by the secretary of state, pursuant to part 3 of article 90 of this title, of a certificate of the successor's commission or certified copy of the successor's letter of appointment as such administrator.

**Source:** L. 67: p. 867, § 4. C.R.S. 1963: § 31-25-4. L. 2002: Entire section amended, p. 1813, § 13, effective July 1; entire section amended, p. 1677, § 11, effective October 1. L. 2004: Entire section amended, p. 1407, § 27, effective July 1.

**7-52-105. Succession to property on death, resignation, or removal of person not incorporated as corporation sole.** Upon the death, resignation, or removal of an archbishop, bishop, president, trustee in trust, president of stake, president of congregation, overseer, presiding elder, or clergyman who at the time of death, resignation, or removal was holding the title to trust property for the use or benefit of a church or religious society but was not incorporated under this article as a corporation sole, the title to all such property held by such person shall not revert to the grantor nor pass to the heirs of the deceased person but shall be held in abeyance until the person's successor is appointed to fill the vacancy. Upon the appointment of the successor, the title of all the property held by the predecessor immediately vests in the person appointed to fill the vacancy.

**Source:** L. 67: p. 867, § 5. C.R.S. 1963: § 31-25-5. L. 2004: Entire section amended, p. 1407, § 28, effective July 1.

**7-52-106. Applicability of revised nonprofit corporation act.** Except as this article is specifically in conflict therewith, the provisions of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title, shall be applicable to this article.

**Source:** L. 67: p. 867, § 6. C.R.S. 1963: § 31-25-6. L. 2003: Entire section amended, p. 2214, § 50, effective July 1, 2004.

## ASSOCIATIONS

### ARTICLE 55

#### Cooperatives - General

**Editor's note:** This article was numbered as article 1 of chapter 30, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1973, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1973, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Cross references:** (1) For definitions applicable to this article, see § 7-90-102.

(2) For provisions concerning cooperative housing corporations, see article 33.5 of title 38; for provisions concerning regulation of cooperative electric associations, see article 9.5 of title 40.

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**7-55-101. Cooperative association defined.** (1) The terms “cooperative association” and “association” include any cooperative organization, association, company, or corporation formed under this article and may be further defined as follows:

(a) The distribution of its earnings is made wholly or in part on the basis of, or in proportion to, the amount of property bought from or sold to members, or to members and other patrons, or of labor performed or other service rendered by the association, but such association shall not deal in products, handle supplies, or provide services for nonmembers in an amount greater in value than as are handled by it for members.

(b) Dividends on stock or interest on equity capital shall be limited, as prescribed in the bylaws of the association.

(c) Voting rights shall be limited to members of the association.

(d) Such association and its business shall not be carried on for profit but for the mutual benefit of all the members. Any person, firm, or corporation of any other cooperative association may become a member of such association upon meeting uniform terms and conditions stated in its bylaws. The association shall issue a certificate of membership to all who become members, which shall not be assignable or transferable except upon consent of the board of directors. The association shall have the right by the bylaws to limit transfer or assignment of membership and the terms and conditions upon which transfer shall be allowed.

(e) Any association formed pursuant to this article may admit to membership any other association so formed or formed under the law of any other jurisdiction upon such terms and conditions as may be provided by the bylaws. Any association formed under the provisions of this article may acquire membership in any other association likewise formed under the provisions of this article when, in the judgment of the directors, such membership shall promote the interest and purpose for which such association is formed.

**Source:** L. 73: R&RE, p. 428, § 1. C.R.S. 1963: § 30-1-1. L. 96: IP(1) amended, p. 543, § 4, effective July 1. L. 2003: IP(1), (1)(a), (1)(d), and (1)(e) amended, p. 2214, § 51, effective July 1, 2004. L. 2004: IP(1) amended, p. 1408, § 29, effective July 1.

#### ANNOTATION

**This section does not prohibit a cooperative association from owning a for-profit sub-**

**siary.** Bontrager v. La Plata Elec. Ass’n, 68 P.3d 555 (Colo. App. 2003).

**7-55-101.5. Patronage capital for cooperative electric associations and cooperative telephone associations defined.** The term “patronage capital” includes any capital credit, patronage dividend, or patronage refund allocated by a cooperative electric association or cooperative telephone association to a member or patron thereof.

**Source:** L. 90: Entire section added, p. 413, § 1, effective March 9. L. 94: Entire section amended, p. 330, § 1, effective March 29.

#### ANNOTATION

**This section describes the allocation of patronage capital to members based on their consumption of electric services and does not**

**limit the board of directors’ use of patronage capital.** Bontrager v. La Plata Elec. Ass’n, 68 P.3d 555 (Colo. App. 2003).

**7-55-102. Articles of incorporation - filing.** (1) Five persons or more, except as specified elsewhere in this article, a majority of whom are residents of Colorado, may be associated and incorporated pursuant to this article for the cooperative transaction of any lawful business, except banking. Persons desiring to avail themselves of the provisions of this article shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of incorporation stating:

- (a) The domestic entity name of the association, which domestic entity name shall comply with part 6 of article 90 of this title;
- (b) The purposes for which the association was formed;
- (c) The principal office address of the association's principal office;
- (c.5) The registered agent name and registered agent address of the association's initial registered agent;
- (d) Repealed.
- (e) The number and terms of directors, which number shall be not less than three;
- (f) The authorized capital stock, the number of shares into which said stock is divided, and the par value of each;
- (g) The number of memberships authorized, the capital subscription of each, and the method of determining property rights and interests of each member without capital stock;
- (h) The true name and mailing address of each incorporator.
- (1.5) The articles of incorporation may state a provision eliminating or limiting the personal liability of a director as provided in section 7-55-107 (1) (h).

**Source:** L. 73: R&RE, p. 429, § 1. C.R.S. 1963: § 30-1-2. L. 87: (1.5) added, p. 370, § 12, effective May 20. L. 96: IP(1) amended, p. 543, § 5, effective July 1. L. 2000: (1)(a) amended, p. 948, § 2, effective July 1. L. 2003: IP(1), (1)(a), (1)(c), and (1.5) amended and (1)(c.5) added, p. 2215, § 52, effective July 1, 2004. L. 2004: (1)(c) and (1)(d) amended, p. 1408, § 30, effective July 1. L. 2008: (1)(h) amended, p. 18, § 1, effective August 5. L. 2009: (1)(d) repealed, (HB 09-1248), ch. 252, p. 1128, § 2, effective December 1.

#### ANNOTATION

**The phrase in subsection (1), granting a cooperative association the right to engage in "any lawful business, except banking", shall not be narrowly construed** so as to put a

restriction on an association from engaging in businesses other than banking. *Bontrager v. La Plata Elec. Ass'n*, 68 P.3d 555 (Colo. App. 2003).

**7-55-103. Bylaws.** (1) Each association formed under this article shall, within thirty days after filing its articles of incorporation with the secretary of state, adopt bylaws for the government and management of its affairs that are not inconsistent with this article. Such bylaws may be amended or modified in such manner as the bylaws may provide. Such bylaws may include:

- (a) The time, place, and manner of conducting its meetings;
- (b) The number and term of directors and the time of their election;
- (c) The mode and manner of removal of directors and the mode and manner of filling vacancies in the board caused by death, resignation, or removal;
- (d) The power and authority of directors and number which shall constitute a quorum, which must be at least a majority;
- (e) The compensation of directors and officers;
- (f) The number of officers other than directors, if any, their term of office, the mode of removal, and the method of filling a vacancy;
- (g) The mode and manner of conducting business;
- (h) The mode and manner of conducting elections and provisions for voting by ballots forwarded by mail or otherwise;
- (i) The qualifications for membership, manner of succession, and conditions for withdrawal or expulsion;



(j) The amount of membership fee, conditions of membership, procedures for acquiring capital, and the limitations of dividends on stock or interest on equity capital;

(k) The manner of collection or enforcement procedures and the forfeiture of property rights and interests for nonpayment or nonperformance;

(l) The method of determination of property rights and interests and time by which it shall be paid or delivered to such member or the member's representative upon withdrawal, expulsion, or death;

(m) Such other things as may be proper to carry out the purpose for which the association was formed.

**Source:** L. 73: R&RE, p. 429, § 1. C.R.S. 1963: § 30-1-3. L. 96: IP(1) amended, p. 543, § 6, effective July 1. L. 2004: (1)(l) amended, p. 1408, § 31, effective July 1.

**7-55-104. Board of directors.** The board of directors of a cooperative association shall be stockholders or members of such association or the representatives duly authorized in writing of a legal entity which is a stockholder or member of said cooperative association; except that the articles of incorporation and bylaws may permit the election of any number of directors, less than a majority, who are not stockholders or members, to be elected as stated in the bylaws.

**Source:** L. 73: R&RE, p. 430, § 1. C.R.S. 1963: § 30-1-4.

**7-55-105. Election of officers.** The officers of an association formed under this article shall consist of a president, one or more vice-presidents as may be prescribed by the bylaws, a secretary, and a treasurer, each of whom shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws, and none of whom are required to be directors of such association unless the bylaws so provide. The bylaws may provide that any of such officers may not be directors of such an association. The bylaws may provide for the election by the board of directors, from among their number, of a chair of the board of directors and one or more vice-chairs. Such other officers and assistant officers and agents as are necessary may be elected or appointed by the board of directors or chosen in such manner as may be prescribed by the bylaws. The board may combine the offices of secretary and treasurer and designate the combined office as secretary-treasurer, or unite both functions and titles in one person. The treasurer may be a bank or any depository, and, as such, shall not be considered as an officer but as a function of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer; except that the funds shall be deposited only as authorized by the board of directors. All officers and agents of the association, as between themselves and the association, shall have such authority and perform such duties in the management of the association as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws.

**Source:** L. 73: R&RE, p. 430, § 1. C.R.S. 1963: § 30-1-5. L. 2003: Entire section amended, p. 2215, § 53, effective July 1, 2004. L. 2004: Entire section amended, p. 1408, § 32, effective July 1.

**7-55-106. Power of directors.** A majority of the board of directors of a cooperative association has full power or authority to authorize the execution and delivery of mortgages or deeds of trust upon, or the pledging of or encumbering of any or all of the property, assets, licenses, franchises, and permits or other things of value of, such association or corporation, whether acquired or to be acquired and wherever situated, as well as any revenues and incomes therefrom, all upon such terms and conditions as such board of directors determines, to secure any indebtedness of such corporation.

**Source:** L. 73: R&RE, p. 430, § 1. C.R.S. 1963: § 30-1-6.

**7-55-107. Powers.** (1) Every cooperative association has the power:

- (a) To have succession by its domestic entity name;
- (b) To sue and be sued and to complain and defend in courts of law and equity;
- (c) To make and use a common seal, and alter the same at its pleasure;
- (d) To hold such real and personal property as may be necessary for the legitimate business of the corporation;
- (e) To regulate and limit the right of stockholders or members to transfer their stock or member equity;
- (f) To appoint such subordinate officers and agents as the business of the corporation shall require and to allow them suitable compensation therefor;
- (g) To adopt bylaws for the management of its affairs and to provide therein for the terms and limitations of stock ownership or membership and for the distribution of its earnings;
- (h) If so provided in the articles of incorporation, to eliminate or limit the personal liability of a director to the association or to its members or stockholders for monetary damages for breach of fiduciary duty as a director; except that such provision shall not eliminate or limit the liability of a director for: Any breach of the director's duty of loyalty to the association or its members or stockholders; acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director to the association or to its members or stockholders for monetary damages for any act or omission occurring prior to the date when such provision becomes effective.

(2) Every cooperative electric association or cooperative telephone association formed pursuant to this article and any cooperative electric association or cooperative telephone association that is subject to articles 121 to 137 of this title has the power to use patronage capital that has been declared by such association to be distributable or payable to a member or patron for expenditures associated with the provision of electric service or telephone service, as the case may be, as directed by the board of directors of the association after the association has given notice thereof. Such notice may consist of a negotiable instrument that has not been claimed within three years of issuance or publication.

**Source:** **L. 73:** R&RE, p. 431, § 1. **C.R.S. 1963:** § 30-1-7. **L. 87:** (1)(h) added, p. 370, § 13, effective May 20. **L. 90:** (2) added, p. 413, § 2, effective March 9. **L. 94:** (2) amended, p. 330, § 2, effective March 29. **L. 97:** (2) amended, p. 758, § 18, effective July 1, 1998. **L. 2000:** (1)(a) amended, p. 948, § 3, effective July 1. **L. 2003:** (2) amended, p. 2216, § 54, effective July 1, 2004.

**7-55-107.5. Indemnification and personal liability of directors, officers, employees, and agents.** The association shall have the same powers, rights, and obligations and shall be subject to the same limitations as apply to domestic corporations as set forth in article 109 of this title. Association directors, officers, employees, and agents shall have the same rights as directors, officers, employees, and agents, respectively, of domestic corporations as set forth in article 109 of this title. Association directors and officers shall have the benefit of the same limitations on personal liability for any injury to person or property arising out of a tort as set forth in section 7-108-402 (2) for directors and officers, respectively, of domestic corporations. Any reference in said sections to shareholders shall be construed to refer to voting members or voting stockholders, if any, for the purpose of this section.

**Source:** **L. 87:** Entire section added, p. 371, § 14, effective May 20. **L. 93:** Entire section amended, p. 857, § 16, effective July 1, 1994. **L. 2003:** Entire section amended, p. 2216, § 55, effective July 1, 2004.

**7-55-108. Application of powers.** The powers enumerated in section 7-55-107 shall vest in every cooperative association in this state except those formed under or subject to article 56 of this title, although such powers may not be stated in its charter or in its articles of incorporation.



**Source:** L. 73: R&RE, p. 431, § 1. **C.R.S. 1963:** § 30-1-8. **L. 96:** Entire section amended, p. 544, § 7, effective July 1. **L. 2003:** Entire section amended, p. 2216, § 56, effective July 1, 2004.

**7-55-109. Amendment of articles.** The articles of incorporation of a cooperative association or corporation may be amended at any regular or special meeting of the stockholders or members of such association. The proposed amendment must be first approved by a two-thirds majority of the directors. The notice of such meeting shall state or have attached thereto the proposed amendment and shall be mailed to each member of record at least ten days prior to the meeting date; except that cooperative associations with less than one hundred members may post notice of such meeting in a conspicuous place at its normal place of business for at least thirty days prior to such meeting. The proposed amendment shall be approved by an affirmative vote of a majority of the stockholders or members present or voting by mail. A certificate stating such amendment and the adoption thereof shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title.

**Source:** L. 73: R&RE, p. 431, § 1. **C.R.S. 1963:** § 30-1-9. **L. 83:** Entire section amended, p. 871, § 25, effective July 1. **L. 2003:** Entire section amended, p. 2216, § 57, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1409, § 33, effective July 1.

#### ANNOTATION

**The statutory notice provision does not require a cooperative association to explain potential future applications of an amendment**

**to the articles of incorporation.** *Bontrager v. La Plata Elec. Ass'n*, 68 P.3d 555 (Colo. App. 2003).

**7-55-110. Vote of stockholders or members.** Stockholders or members of a cooperative association may vote either in person or by mail as provided in the bylaws. Proxy or cumulative voting shall be prohibited except as permitted by the articles of incorporation and the bylaws of organizations incorporated prior to July 6, 1973.

**Source:** L. 73: R&RE, p. 431, § 1. **C.R.S. 1963:** § 30-1-10.

**7-55-111. Use of the term "cooperative" - penalty for unlawful use - repeal. (Repealed)**

**Source:** L. 73: R&RE, p. 431, § 1. **C.R.S. 1963:** § 30-1-11. **L. 80:** (1) amended, p. 706, § 4, effective July 1. **L. 96:** Entire section amended, p. 544, § 8, effective July 1. **L. 2000:** (1) and (4) amended, p. 948, § 4, effective July 1. **L. 2003:** (5) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-55-112. Merger, conversion, or consolidation.** Two or more corporations formed under articles 30 to 55 or subject to articles 121 to 137 or articles 101 to 117 of this title, or a similar law of any jurisdiction, may be merged or consolidated as a cooperative association, or any cooperative association may convert into any form of entity permitted by section 7-90-201, upon such terms and for such purpose and by such domestic entity name as may be agreed upon, which domestic entity name shall comply with part 6 of article 90 of this title. Such agreement shall also state all the matters necessary to a statement of merger, statement of conversion, or articles of consolidation and shall be approved by a two-thirds majority of the members of the boards of directors and a two-thirds majority vote of the members or stockholders of each association, nonprofit corporation, or corporation present and voting in person or by mail ballot at any regular or

special meeting at which prior notice, with mail ballot attached, had been mailed to each member or stockholder stating the plan of merger, conversion, or consolidation; except that cooperative associations with less than one hundred members may post notice of such plan of merger or consolidation in a conspicuous place at its normal place of business for at least thirty days prior to such meeting. A statement of merger complying with section 7-90-203.7, a statement of conversion complying with section 7-90-201.7, or articles of consolidation shall be delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title, and a certificate of the secretary of state as to the fact of such filing shall be recorded in the office of each county in which each party to the merger, conversion, or consolidation is situated. From and after the filing of articles of consolidation, the former associations, nonprofit corporations, or corporations comprising the component parts shall cease to exist, and the consolidated cooperative association shall succeed to all rights, duties, and powers prescribed in the agreement of consolidated associations, nonprofit corporations, or corporations, not inconsistent with this article, and shall be subject to all liabilities and obligations of the former component associations, nonprofit corporations, or corporations and succeed to all property and interest thereof and may adopt bylaws and do all things permitted by this article. The effect of a conversion shall be as provided in section 7-90-202. The effect of a merger shall be as provided in section 7-90-204.

**Source:** **L. 73:** R&RE, p. 432, § 1. **C.R.S. 1963:** § 30-1-12. **L. 83:** Entire section amended, p. 871, § 26, effective July 1. **L. 93:** Entire section amended, p. 858, § 17, effective July 1, 1994. **L. 96:** Entire section amended, p. 544, § 9, effective July 1. **L. 97:** Entire section amended, p. 759, § 19, effective July 1, 1998. **L. 2000:** Entire section amended, p. 949, § 5, effective July 1. **L. 2002:** Entire section amended, p. 1813, § 14, effective July 1; entire section amended, p. 1678, § 12, effective October 1. **L. 2003:** Entire section amended, p. 2217, § 58, effective July 1, 2004. **L. 2007:** Entire section amended, p. 218, § 1, effective May 29.

**7-55-113. Adoption of provisions of this article.** Every cooperative association, as defined in section 7-55-101 or formed or incorporated under any repealed Colorado statute pertaining to cooperative associations, except corporations or associations formed or incorporated under or subject to article 56 of this title, shall be conclusively presumed to have accepted and adopted the provisions of this article and shall be governed by the provisions of this article, unless such corporation or association or agricultural or livestock association has delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a copy of a resolution adopted by its board of directors, its members, or its stockholders stating that it has elected not to become subject to the provisions of this article. This section shall not apply to cooperative associations formed and incorporated under or subject to article 56 of this title.

**Source:** **L. 73:** R&RE, p. 432, § 1. **C.R.S. 1963:** § 30-1-13. **L. 75:** Entire section R&RE, p. 272, § 1, effective June 29. **L. 83:** Entire section amended, p. 872, § 27, effective July 1. **L. 96:** Entire section amended, p. 545, § 10, effective July 1. **L. 2002:** Entire section amended, p. 1814, § 15, effective July 1; entire section amended, p. 1678, § 13, effective October 1. **L. 2003:** Entire section amended, p. 2217, § 59, effective July 1, 2004.

**7-55-114. Dissolution of association.** Any association formed under this article may be dissolved and its affairs terminated voluntarily by a two-thirds majority vote of the members present and voting in person or by mail ballot at a regular or special meeting, if the meeting notice, with a mail ballot attached, stated that dissolution would be discussed; except that cooperative associations with less than one hundred members may post notice of the discussion of such dissolution in a conspicuous place at their normal place of business for at least thirty days prior to such meeting. The board of directors by a two-thirds majority vote of its members shall first adopt a resolution recommending dissolution and submit it to the members, stating the reasons why the termination of the affairs of the association is



deemed advisable, the time by which it should be accomplished, and shall also name three persons who are members of the association to act as trustees in liquidation who shall have full power to do all things necessary in liquidation and termination of the affairs of the association. Upon approval of the resolution to dissolve by the members, the association shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of dissolution. A certified copy of the articles of dissolution shall be filed with the county clerk in the county in which the principal business is transacted. All power of the directors shall cease and the persons appointed shall proceed to terminate the affairs of the association and realize upon its assets, pay its debts, and divide the remaining money among the members and holders of equity, as stated in the bylaws or, if not stated, in proportion to their property interests.

**Source:** L. 73: R&RE, p. 433, § 1. C.R.S. 1963: § 30-1-14. L. 83: Entire section amended, p. 872, § 28, effective July 1. L. 96: Entire section amended, p. 545, § 11, effective July 1. L. 2002: Entire section amended, p. 1814, § 16, effective July 1; entire section amended, p. 1679, § 14, effective October 1. L. 2003: Entire section amended, p. 2218, § 60, effective July 1, 2004. L. 2004: Entire section amended, p. 1409, § 34, effective July 1.

**7-55-115. Exemption from securities laws.** Any security, patronage refund, per unit retain certificate, or evidence of membership issued or sold by a cooperative association as an investment in its stock or capital to the members of a cooperative association formed under this article or a similar law of any other state and authorized to transact business or conduct activities in this state is exempt from securities laws as contained in article 51 of title 11, C.R.S. Such securities, patronage refunds, per unit retain certificates, or evidence of membership may be sold lawfully by the issuer or its members or salaried employees without the necessity of being registered as a broker or dealer under the “Colorado Securities Act”, article 51 of title 11, C.R.S.

**Source:** L. 73: R&RE, p. 433, § 1. C.R.S. 1963: § 30-1-15. L. 75: Entire section amended, p. 272, § 2, effective June 29. L. 84: Entire section amended, p. 1116, § 1, effective June 7. L. 90: Entire section amended, p. 740, § 2, effective July 1. L. 96: Entire section amended, p. 546, § 12, effective July 1. L. 2003: Entire section amended, p. 2218, § 61, effective July 1, 2004.

**7-55-116. Application of corporation laws.** The provisions of articles 30 to 52, 101 to 117, and 121 to 137 of this title and all powers and rights thereunder shall apply to the associations organized under this article, except where such provisions are in conflict with or inconsistent with an express provision of this article.

**Source:** L. 73: R&RE, p. 433, § 1. C.R.S. 1963: § 30-1-16. L. 93: Entire section amended, p. 858, § 18, effective July 1, 1994. L. 97: Entire section amended, p. 759, § 20, effective July 1, 1998. L. 2007: Entire section amended, p. 219, § 2, effective May 29.

**7-55-117. Associations not in restraint of trade.** No association formed under this article shall be deemed to be in restraint of trade or an illegal monopoly, or an attempt to lessen competition or to fix prices, nor shall the membership agreements or marketing contracts between the association and its members be illegal or in unlawful restraint of trade, or in any combination thereof to accomplish an improper or illegal purpose.

**Source:** L. 73: R&RE, p. 433, § 1. C.R.S. 1963: § 30-1-17. L. 2003: Entire section amended, p. 2219, § 62, effective July 1, 2004.

**7-55-118. Associations of other jurisdictions.** Any cooperative corporation or association formed under generally similar law of another jurisdiction may carry on any proper

activities, operations, and functions in this state upon compliance with part 8 of article 90 of this title, with all rights of cooperative associations formed pursuant to this article.

**Source:** L. 73: R&RE, p. 433, § 1. **C.R.S. 1963:** § 30-1-18. **L. 2003:** Entire section amended, p. 2219, § 63, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1410, § 35, effective July 1.

**7-55-119. Quorum.** A quorum for the election of directors, amending of the articles of incorporation, and conducting normal business at all meetings of the stockholders or members shall be five percent of the stockholders or members or fifty members or stockholders present in person, whichever is less. Nothing shall prevent the articles of incorporation or the bylaws of such association from requiring a larger percent as a quorum.

**Source:** L. 73: R&RE, p. 433, § 1. **C.R.S. 1963:** § 30-1-19.

**7-55-120. Incorporation fees.** The fee for the incorporation of cooperative corporations or associations shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., if formed with or without capital stock, payable to the secretary of state except as otherwise set forth in this article.

**Source:** L. 73: R&RE, p. 434, § 1. **C.R.S. 1963:** § 30-1-20. **L. 81:** Entire section amended, p. 430, § 5, July 1. **L. 2003:** Entire section amended, p. 2219, § 64, effective July 1, 2004.

**7-55-121. Periodic report.** Part 5 of article 90 of this title, providing for periodic reports from reporting entities, applies to associations formed under or subject to this article.

**Source:** L. 73: R&RE, p. 434, § 1. **C.R.S. 1963:** § 30-1-21. **L. 83:** Entire section amended, p. 873, § 29, effective July 1. **L. 2003:** Entire section amended, p. 2219, § 65, effective July 1, 2004. **L. 2010:** Entire section amended, (HB 10-1403), ch. 404, p. 1993, § 2, effective August 11.

ARTICLE 56

Cooperatives

**Editor’s note:** This article was numbered as article 3 of chapter 30, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1996, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1996, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated.

**Law reviews:** For article, “The New Colorado Cooperative Act: A Setting for a Business Structure”, see 25 Colo. Law. 3 (December 1996); for article, “Colorado Choice of Entity 1998”, see 27 Colo. Law. 5 (June 1998); for article, “Colorado Choice of Form of Organization and Structure 2001”, see 30 Colo. Law. 11 (October 2001); for article, “Worker Cooperatives: Their Time Has Arrived”, see 40 Colo. Law. 33 (September 2011).

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## PART 1

## GENERAL PROVISIONS

**7-56-101. Short title.** This article shall be known and may be cited as the "Colorado Cooperative Act".

**Source:** L. 96: Entire article R&RE, p. 478, § 1, effective July 1.

**Editor's note:** This section is similar to former § 7-56-101 as it existed prior to 1996.

**7-56-102. Legislative declaration.** (1) The general assembly finds and declares that:

(a) The cooperative form of doing business provides an efficient and effective method for persons to market their goods and services and to obtain services and supplies and it is in the best interests of the people of the state of Colorado to promote, foster, and encourage the utilization of cooperatives in appropriate instances;

(b) The cooperative marketing law of the state of Colorado has provided for the promotion, fostering, and encouragement of the intelligent and orderly marketing of agricultural products through cooperation; has eliminated speculation and waste; has made distribution of agricultural products between producer and consumer more efficient; has stabilized the marketing of agricultural products; and has provided for the organization and incorporation of cooperative marketing associations for the marketing of such products, all as contemplated at the time of the original adoption of the cooperative marketing law;



(c) It is in the best interests of the people of the state of Colorado to preserve the provisions of the cooperative marketing law as it has been in force and interpreted in the state and to continue the provisions thereof for agriculture, but also to expand the provisions of the law to provide greater direction and flexibility in its provisions and to enable all types of industries and enterprises to avail themselves of the benefits of the cooperative form of doing business in accordance with the provisions of this article;

(d) It is in the best interests of the people of the state of Colorado to allow those cooperatives that have been formed under or are subject to other articles of this title, such as article 55, to remain under said article or to elect to come under this article.

**Source:** L. 96: Entire article R&RE, p. 478, § 1, effective July 1. L. 2003: (1)(d) amended, p. 2219, § 66, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-56-102 as it existed prior to 1996.

### ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**The basic conception of a cooperative marketing association** is that of a group of farmers who reside in the same vicinity acting together for their mutual benefit in the cultivating, harvesting, and marketing of their agricultural products, the association itself being merely a convenient instrumentality in the hands of the farmers for carrying on such activities. *Indus. Comm'n v. United Fruit Growers Ass'n*, 106 Colo. 223, 103 P.2d 15 (1940).

A cooperative marketing association is not required to pay contributions on the wages of individuals employed by it, under the provisions of title 8, since the labor involved in the activities of the association is "agricultural labor"

and exempt from the operation of the federal unemployment tax act by § 8-70-103. *Indus. Comm'n v. United Fruit Growers Ass'n*, 106 Colo. 223, 103 P.2d 15 (1940).

**But a different result might attain** where farm crops are marketed by a commercial profit corporation or are not marketed in an unmanufactured state. *Indus. Comm'n v. United Fruit Growers Ass'n*, 106 Colo. 223, 103 P.2d 15 (1940).

**Legislative declaration does not provide association members with an express right to purchase goods and services from an association store.** Therefore, this section does not support a breach of contract claim. *Arnold v. Anton Coop. Ass'n*, \_\_ P.3d \_\_ (Colo. App. 2011).

**7-56-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Agricultural cooperative" means a cooperative in which the members, including landlords and tenants, are all producers of agricultural products.

(2) "Agricultural products" means agronomic, horticultural, viticultural, aquacultural, forestry, dairy, livestock, poultry, bee, and any other farm or ranch products.

(3) "Articles" means the articles of incorporation of a cooperative and includes amended articles of incorporation, restated articles of incorporation, and other organizational documents of other entities.

(4) "Board" or "board of directors" means the board of directors or other governing body of a cooperative or other entity.

(5) "Bylaws" means the bylaws adopted by a cooperative and includes amended bylaws and restated bylaws.

(6) "Cooperative" means any entity formed under or subject to this article by election or otherwise, including a cooperative formed under comparable law of another jurisdiction doing business in this state, and having the following characteristics:

(a) The business of the cooperative is operated at cost by adjusting the prices charged for goods or services or by returning any net margins at the end of a fiscal year on a patronage basis to members and other persons qualified to share in the net margins pursuant to the articles or bylaws;

(b) Dividends on stock or interest on equity capital is limited, as prescribed in the articles pursuant to section 7-56-201 or bylaws pursuant to section 7-56-208 of the cooperative;

(c) Voting rights are limited to members of the cooperative as prescribed in the articles or bylaws of the cooperative;

(d) The cooperative's business is carried on for the mutual benefit of its members; and

(e) Members are not liable for any debt, obligation, or liability of the cooperative.

(7) (Deleted by amendment, L. 2003, p. 2219, § 67, effective July 1, 2004.)

(8) "Domestic", when referring to a cooperative or other entity, means an entity formed under the law of this state.

(9) "Equity capital" means all investments in the cooperative except loans or other types of indebtedness, whether made by direct investment, such as investment in stock or memberships, or by retention of amounts of net savings, net margins, or net profits allocated to members and other patrons of the cooperative, or charged to them as part of the transactions between them and the cooperative.

(10) "Foreign", when referring to a cooperative or other entity, means an entity formed under law other than the law of this state.

(11) "Member" means a person who has been received into the membership of a cooperative without common stock or a person who has acquired common stock in a cooperative formed with common stock and, in either case, is authorized to vote. This subsection (11) shall not preclude a cooperative from designating persons as both members and stockholders.

(12) "Net margins" means the receipts from operations less the expenses thereof.

(13) "Patron" means a person who may, but need not, be a member of a cooperative who utilizes the services of the cooperative through the purchase or sale of property or services to or from the cooperative.

(14) "Patronage" means the volume or dollar value of business transacted with the cooperative.

(15) "Patronage refund" means a portion of a cooperative's net margins paid or allocated to a patron based on the patron's patronage.

(16) "Per unit retain" means a deduction authorized by a patron to be made by the cooperative from proceeds of sale of a product or service by the patron to the cooperative or by the cooperative on behalf of the patron where the deduction is based on the value or quantity of the product or service sold to the cooperative or on behalf of the patron and is deducted as a contribution or investment by the patron in the capital of the cooperative.

(17) (Deleted by amendment, L. 2003, p. 2219, § 67, effective July 1, 2004.)

**Source:** L. 96: Entire article R&RE, p. 479, § 1, effective July 1. L. 2003: IP(6), (7), (8), (10), (11), and (17) amended, p. 2219, § 67, effective July 1, 2004. L. 2004: (10) amended, p. 1410, § 36, effective July 1.

**Editor's note:** This section is similar to former §§ 7-55-101 and 7-56-103 as they existed prior to 1996.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

**7-56-104. Filings by the secretary of state.** (1) Part 3 of article 90 of this title, providing for the filing of documents, applies to any document filed or to be filed by the secretary of state pursuant to this article.

(2) Repealed.

(3) to (6) (Deleted by amendment, L. 2002, p. 1815, § 17, effective July 1, 2002; p. 1679, § 15, October 1, 2002.)

**Source:** L. 96: Entire article R&RE, p. 481, § 1, effective July 1. L. 2002: Entire section amended, p. 1815, § 17, effective July 1; entire section amended, p. 1679, § 15, effective October 1. L. 2003: (1) amended, p. 2220, § 68, effective July 1, 2004. L. 2004: (2) repealed, p. 1410, § 37, effective July 1.

**Editor's note:** This section is similar to former §§ 7-56-104 and 7-56-132 as they existed prior to 1996.



**7-56-105. Effective time and date of documents. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 482, § 1, effective July 1. L. 2002: Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-56-106. Periodic and other reports.** (1) Part 5 of article 90 of this title, providing for periodic reports from reporting entities, applies to cooperatives formed under or subject to this article.

(2) The commissioner of agriculture may, by regulation, require reports from any cooperative formed pursuant to this article that limits its membership to agricultural producers.

(3) Upon the dissolution of an agricultural cooperative formed under this article, the cooperative shall provide a copy of the articles of dissolution of the cooperative to the commissioner of agriculture.

**Source:** L. 96: Entire article R&RE, p. 483, § 1, effective July 1. L. 2003: Entire section amended, p. 2220, § 69, effective July 1, 2004. L. 2004: (1) and (3) amended, p. 1410, § 38, effective July 1. L. 2010: (1) amended, (HB 10-1403), ch. 404, p. 1993, § 3, effective August 11.

**Editor's note:** This section is similar to former § 7-56-122 as it existed prior to 1996.

**7-56-107. Cooperative records.** (1) A cooperative shall keep as permanent records minutes of all meetings of its members and of the board, a record of all actions taken by the members or the board without a meeting by a written unanimous consent in lieu of a meeting, and a record of all waivers of notices of meetings of the members and of the board.

(2) A cooperative shall maintain appropriate accounting records.

(3) A cooperative shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(4) A cooperative shall keep a copy of each of the following records at its principal office:

(a) Its articles of incorporation or other governing instrument;

(b) Its bylaws or other similar instrument;

(c) A record of the names and addresses of its members, in a form that permits preparation of a list of members that is alphabetical and that shows each member's address and the investment qualifying a member to vote held by each member;

(d) The minutes of members' meetings, and records of all actions taken by members without a meeting by unanimous written consent in lieu of a meeting, for the past three years;

(e) All written communications within the past three years to members as a group or to any class of members as a group;

(f) A list of the names and business addresses of its current board of directors and officers;

(g) A copy of its most recent periodic report delivered to the secretary of state pursuant to part 5 of article 90 of this title; and

(h) All financial statements prepared for periods ending during the last fiscal year.

(5) Except as otherwise limited by this article, the board of directors of a cooperative shall have discretion to determine what records are appropriate for the purposes of the cooperative, the length of time records are to be retained, and policies relating to the confidentiality, disclosure, inspection and copying of the records of the cooperative.

**Source:** L. 96: Entire article R&RE, p. 483, § 1, effective July 1. L. 2000: (4)(g) amended, p. 950, § 6, effective July 1. L. 2003: (4)(g) amended, p. 2220, § 70, effective July 1, 2004. L. 2010: (4)(g) amended, (HB 10-1403), ch. 404, p. 1994, § 4, effective August 11.

**Editor's note:** This section is similar to former § 7-56-122 as it existed prior to 1996.

## PART 2

## INCORPORATION

**7-56-201. Articles of incorporation.** (1) A cooperative may be formed pursuant to this article for the transaction of any lawful business. One or more persons may act as the incorporator or incorporators of a cooperative by delivering articles for the cooperative to the secretary of state for filing pursuant to part 3 of article 90 of this title. An incorporator who is an individual shall be eighteen years of age or older.

(2) The articles shall state:

(a) The domestic entity name of the cooperative, which domestic entity name shall comply with part 6 of article 90 of this title;

(b) The principal office address of the cooperative's principal office;

(c) The registered agent name and registered agent address of the cooperative's initial registered agent;

(d) Repealed.

(e) If formed without common voting stock, whether the property rights and interests of each member are equal or unequal and, if unequal, the general rule or rules applicable to all members by which the property rights and interests of each member are determined and fixed; provisions for the admission of new members who are entitled to share in the property of the cooperative with the old members in accordance with such general rules; and whether the cooperative is authorized to issue one or more classes of preferred stock or other equity interests and, if so authorized, a statement as to the number of shares of stock of each class or other equity interests and the nature and extent of the preferences, limitations, relative rights, and privileges granted to each;

(f) If formed with stock, the classes of shares and the number of shares of each class the cooperative is authorized to issue. The stock may be divided into preferred and common stock, voting and nonvoting stock, or into any other class of stock. If so divided, the articles must contain a statement as to the number of shares of stock in each class and the nature and extent of the preferences, limitations, relative rights, and privileges granted to each.

(g) The true name and mailing address of each incorporator.

(3) The articles may state:

(a) A provision eliminating or limiting the personal liability of a director as provided in this article;

(b) A provision permitting proportional voting rights based solely upon the patronage of a member with the cooperative, the amount of equity held by the member in the cooperative, or some combination of these methods, as provided in section 7-56-305 (3);

(c) The number and terms of the board of directors, which number shall be not less than three; together with the names and the street addresses of the initial directors. If the names of the initial directors are not stated in the articles, the initial board of directors shall be designated by the incorporator or incorporators following the delivery of the articles to the secretary of state for filing.

(d) The purpose or purposes for which the cooperative is incorporated which may state any lawful business;

(e) A par value for authorized shares of stock or classes of shares;

(f) Provisions defining, limiting, and regulating the powers of the cooperative, its board, and its members;

(g) Provisions limiting membership to producers of agricultural products;

(h) A limitation on the handling of products or services for its own members only, or for members and nonmembers, and whether nonmembers are entitled to share in allocations of net margins or are subject to per unit retains;

(i) Provisions for the removal for cause of any director by the members at any regular or special members' meeting;

(j) A provision eliminating or limiting the indemnification of directors, officers, employees, or agents of the cooperatives as otherwise provided in this article;

(k) Any provision that under this article is required or permitted to be stated in the bylaws;



(1) Any other provision not inconsistent with law.

(4) (Deleted by amendment, L. 2004, p. 1410, § 39, effective July 1, 2004.)

(5) When incorporated, no member or shareholder as such shall be liable directly or indirectly, including by way of indemnification, contribution, or otherwise, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of or chargeable to the cooperative.

(6) A member does not have any vested property right resulting from any provision in the articles that may exist from time to time or at any time, including any provision relating to management, control, capital structure, dividend entitlement, purpose, or duration of the cooperative.

**Source:** L. 96: Entire article R&RE, p. 484, § 1, effective July 1. L. 98: (3)(c) amended, p. 611, § 2, effective July 1. L. 2000: (2)(a) amended, p. 950, § 7, effective July 1. L. 2002: (1) amended, p. 1816, § 18, effective July 1; (1) amended, p. 1680, § 16, effective October 1. L. 2003: (1), IP(2), (2)(a) to (2)(f), IP(3), (3)(c), and (3)(k) amended, p. 2221, § 71, effective July 1, 2004. L. 2004: (1), (2)(b), (2)(d), (2)(g), and (4) amended, p. 1410, § 39, effective July 1. L. 2009: (2)(d) repealed, (HB 09-1248), ch. 252, p. 1129, § 3, effective December 1.

**Editor's note:** This section is similar to former § 7-56-109 as it existed prior to 1996.

**7-56-202. Amendment of articles.** (1) A cooperative may amend its articles at any time to add or change a provision that is required or permitted in the articles or to delete a provision not required in the articles. Whether a provision is required or permitted in the articles is determined as of the effective date of the amendment.

(1.5) If a cooperative has not issued memberships or shares of stock, its board of directors or, if no directors have been designated or elected, its incorporators may adopt one or more amendments to the articles of incorporation.

(2) The articles of a cooperative may be amended at any regular or special meeting of the members of the cooperative. The proposed amendment must be first approved by a two-thirds majority of the directors. The notice of the meeting of members shall state or have attached to it the proposed amendment and shall be mailed to each member of record at least ten days prior to the meeting date. The proposed amendment shall be approved by an affirmative vote of a majority of the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1), unless a higher percentage of approval is required in the articles.

(3) Unless otherwise provided in the articles, the board may adopt, without shareholder action, one or more amendments to the articles to:

(a) Delete the statement of names and addresses of the incorporators or of the initial directors;

(b) Delete the statement of the registered agent name and registered agent address of the initial registered agent or registered office, if a statement of change is on file in the records of the secretary of state containing the registered agent name and registered agent address of the cooperative's registered agent;

(b.5) Delete the statement of the names and addresses of any or all of the individuals named in the articles, pursuant to section 7-90-301 (6), as being individuals who caused the articles to be delivered for filing;

(c) Except as otherwise provided in section 9 of article XV of the state constitution, change each issued and unissued share of a class into a greater number of whole shares if the cooperative has only shares of that class outstanding; or

(d) Change the cooperative's domestic entity name by substituting the word "cooperative", "association", "incorporated", "company", or "limited", or any abbreviation thereof for a similar word or abbreviation in the domestic entity name, or by adding, deleting, or changing a geographical designation.

(4) (Deleted by amendment, L. 2004, p. 1411, § 40, effective July 1, 2004.)

(5) A cooperative amending its articles shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment stating:

- (a) The domestic entity name of the cooperative; and
- (b) The text of each amendment adopted.
- (c) to (f) (Deleted by amendment, L. 2004, p. 1411, § 40, effective July 1, 2004.)
- (6) Any amendment to the articles may not be invalidated because of the manner of its adoption unless an action to do so is commenced within two years after the date of filing.

**Source:** L. 96: Entire article R&RE, p. 486, § 1, effective July 1. L. 2000: (3)(d) and (5)(a) amended, p. 950, § 8, effective July 1. L. 2002: (3)(b) and IP(5) amended, p. 1816, § 19, effective July 1; (3)(b) and IP(5) amended, p. 1681, § 17, effective October 1. L. 2003: (2), (3)(a), (3)(b), and IP(5) amended and (3)(b.5) added, p. 2222, § 72, effective July 1, 2004. L. 2004: (1.5) added and (3)(b), (3)(d), (4), and (5) amended, p. 1411, § 40, effective July 1.

**Editor's note:** This section is similar to former § 7-56-110 as it existed prior to 1996.

**7-56-203. Restated articles.** (1) The board may restate the articles at any time with or without membership action.

(2) The restatement may include one or more amendments to the articles. If the restatement includes an amendment requiring approval by the members, it shall be adopted as provided in section 7-56-202.

(3) If the board submits a restatement for action by the members, the cooperative shall give notice, in accordance with section 7-56-202, to each member entitled to vote on the restatement at the members' meeting at which the restatement will be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the restatement, and the notice shall contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles.

(4) A cooperative restating its articles shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of restatement stating:

- (a) The domestic entity name of the cooperative; and
- (b) The text of the restated articles of incorporation.
- (c) and (d) (Deleted by amendment, L. 2004, p. 1412, § 41, effective July 1, 2004.)
- (e) (Deleted by amendment, L. 2002, p. 1817, § 20, effective July 1, 2002; p. 1681, § 18, effective October 1, 2002.)

**Source:** L. 96: Entire article R&RE, p. 487, § 1, effective July 1. L. 2000: (4)(a) amended, p. 950, § 9, effective July 1. L. 2002: IP(4) and (4)(e) amended, p. 1817, § 20, effective July 1; IP(4) and (4)(e) amended, p. 1681, § 18, effective October 1. L. 2003: IP(4) amended, p. 2222, § 73, effective July 1, 2004. L. 2004: (4) amended, p. 1412, § 41, effective July 1.

**7-56-204. Cooperatives desiring to relinquish provisions of this article.** (1) Any cooperative formed under or that has elected to be subject to this article may relinquish being bound by the provisions of this article by amending its articles in the manner provided in section 7-56-202 (2); except that the amendment shall be approved by a two-thirds majority of all the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1) unless a greater vote is required by the articles or bylaws.

(2) The board shall present to the members for approval, as described in subsection (1) of this section, a plan to relinquish the provisions of this article, including:

- (a) A statement as to what type of business entity the cooperative is to become after the plan has been adopted;
- (b) A statement as to what will be the effect on equities of the cooperative after the plan has been adopted; and
- (c) A statement as to the procedures and mechanisms for changing the cooperative to another type of entity.



(3) Amendments to the articles shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title.

**Source:** L. 96: Entire article R&RE, p. 488, § 1, effective July 1. L. 2002: (3) amended, p. 1817, § 21, effective July 1; (3) amended, p. 1681, § 19, effective October 1.

**7-56-205. Entities formed under other law but subject to this article.** Any domestic entity or foreign entity authorized to transact business or conduct activities in this state and engaged in any of the activities enumerated in this article but formed under any other law may be considered for all purposes as subject to this article by amending its constituent operating document as necessary to conform to this article and delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement that the entity has determined to accept the benefits of and to be bound by the provisions of this article and has amended its constituent operating document as necessary to conform to this article by amendments adopted in accordance with applicable law and its constituent operating document.

**Source:** L. 96: Entire article R&RE, p. 488, § 1, effective July 1. L. 2002: Entire section amended, p. 1817, § 22, effective July 1; entire section amended, p. 1681, § 20, effective October 1. L. 2003: Entire section amended, p. 2222, § 74, effective July 1, 2004. L. 2004: Entire section amended, p. 1412, § 42, effective July 1.

**Editor's note:** This section is similar to former § 7-56-133 as it existed prior to 1996.

#### ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**This section recognizes two classes of corporations:** First, those originally organized under this article, and second, those that have adopted its provisions as provided in this section. Colo. Wheat Growers' Ass'n v. Thede, 80 Colo. 529, 253 P. 30 (1927).

**Association cannot accept benefits of article without being bound.** This section conjoins the words "that the corporation or association has determined to accept the benefits and be bound by the provisions of this article", and one cannot untwine these interlaced words and accord the benefits of this article to an association out of the fold, without disregarding this proviso, which cannot be done. Colo. Wheat Growers' Ass'n v. Thede, 80 Colo. 529, 253 P. 30 (1927).

**Hence, a corporation is not entitled to make a marketing contract without first com-**

**plying with this section** as a matter of public policy. Colo. Wheat Growers' Ass'n v. Thede, 80 Colo. 529, 253 P. 30 (1927).

**And such a contract is void where there has been no compliance.** An instrument in the form of a standing marketing contract which is entered into after this article took effect, but with an association not organized under it, and which at the time the association enters into the agreement with its member it has not complied with or taken advantage of this section is void. Colo. Wheat Growers' Ass'n v. Thede, 80 Colo. 529, 253 P. 30 (1927).

**Moreover, a provision such as this section cannot legalize retroactively previously invalid contracts.** Oliver v. Wilder, 27 Colo. App. 337, 149 P. 275 (1915); Atkinson v. Colo. Wheat Growers' Ass'n, 77 Colo. 559, 238 P. 1117 (1925); Moore v. Chalmers-Galloway Live Stock Co., 90 Colo. 548, 10 P.2d 950 (1932).

#### 7-56-206. Cooperative name. (Repealed)

**Source:** L. 96: Entire article R&RE, p. 489, § 1, effective July 1. L. 97: (1)(f) amended, p. 759, § 21, effective July 1, 1998. L. 2000: Entire section repealed, p. 990, § 109, effective July 1.

#### 7-56-207. Use of the term "cooperative" - penalty for unlawful use. (Repealed)

**Source:** L. 96: Entire article R&RE, p. 490, § 1, effective July 1. L. 2000: IP(1) amended, p. 950, § 11, effective July 1. L. 2003: (1)(a) and (2) amended, p. 2223, § 75,

effective July 1, 2004. **L. 2004:** (2) amended, p. 1412, § 43, effective July 1; (1)(a) amended, p. 1010, § 18, effective August 4. **L. 2008:** Entire section repealed, p. 18, § 2, effective August 5.

**Editor's note:** This section is similar to former §§ 7-55-111 and 7-56-124 as they existed prior to 1996.

**7-56-208. Bylaws.** (1) The initial board of each cooperative formed under this article shall, within thirty days after the articles become effective, adopt bylaws for the government and management of its affairs that are not inconsistent with law or the articles of the cooperative. Such bylaws may be amended or modified in such manner as the bylaws may provide. If the bylaws do not provide a manner for their amendment, the bylaws may be amended at any time upon a majority vote of the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1) at a regular or special meeting, the notice of which meeting shall have stated that consideration would be given at the meeting to amending the bylaws and stating the proposed amendment or amendments.

(2) The bylaws of the cooperative shall prohibit the transfer of the voting common stock or membership in the cooperative to persons not eligible to be a member of the cooperative and, if the cooperative issues certificates of common stock or of membership, the restrictions must be printed upon every certificate of stock or certificate of membership subject to the restrictions. At the election of the cooperative, the restrictions may also be included in the articles.

(3) If not stated in the articles, the bylaws of the cooperative shall include:

(a) The qualifications for membership, manner of succession, and conditions for suspension, withdrawal, or expulsion;

(b) The amount of any membership fee or capital subscription required by the cooperative to become a member, conditions of membership, and procedures for acquiring and repayment of membership capital;

(c) Any limitations on dividends on stock or interest on equity capital;

(d) The time, place, and manner of conducting or determining membership meetings of the cooperative which shall be at least annually;

(e) The number, terms, and time of the election of directors, or the manner for determining the same;

(f) The number of directors that shall constitute a quorum for a meeting of the board, which must be at least a majority;

(g) The number, terms, and titles of officers, their authority and duties as well as the manner of election or appointment, the filling of vacancies, or removal of officers; and

(h) A requirement that the cooperative's business shall be conducted on a cooperative basis for the mutual benefit of the cooperative's members.

(4) In addition to the provisions set forth in subsection (3) of this section, the bylaws may include:

(a) The time, place, and manner of conducting its meetings;

(b) The mode and manner of removal of directors and the mode and manner of filling vacancies on the board caused by death, resignation, or removal;

(c) The compensation of directors and officers or the manner for determining compensation;

(d) The mode and manner of conducting business;

(e) The mode and manner of conducting elections and provisions for voting by ballots forwarded by mail or otherwise;

(f) The manner of assignment and transfer of interests in the cooperative;

(g) The manner of collection and enforcement for member nonpayment or nonperformance, including forfeiture of property rights and interests;

(h) The method of determination of property rights and interests in the cooperative and the value thereof;

(i) Methods and procedures for acquiring and returning equity capital to members and other patrons of the cooperative;



(j) Procedures pursuant to section 7-56-501 (1) (q) for the handling of unclaimed equity capital and other funds declared payable by the cooperative and unclaimed by the holder; and

(k) Such other things as may be proper to carry out the purpose for which the cooperative was formed or the governance of the cooperative.

**Source:** L. 96: Entire article R&RE, p. 490, § 1, effective July 1. L. 2003: (1) and IP(3) amended, p. 2223, § 76, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-56-111 as it existed prior to 1996.

**7-56-209. Agricultural marketing cooperatives.** (1) It is hereby recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting producers of agricultural products to bring to their industry the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; that the public interest urgently needs to prevent the migration from rural to urban communities in order to enhance production of agricultural products and to preserve the agricultural supply of the nation; that the public interest demands that producers of agricultural products be encouraged to attain a more efficient system of marketing their products and procurement of the necessary equipment and supplies through cooperatives.

(2) Upon written request to the commissioner of agriculture by any three persons, the commissioner or a duly authorized representative of the commissioner may supply a written summary of the most current survey prepared by the department of agriculture, if any exists, of the business conditions affecting the proposed purposes of the cooperative, particularly the commodities to be handled. When such a summary is supplied, the commissioner or a representative of the commissioner may separately set forth an opinion, stating the reasons therefor, regarding the viability of the proposed venture.

(3) In addition, the department of agriculture may, at the discretion of the commissioner or a representative of the commissioner, provide other assistance to persons who seek to organize an agricultural cooperative.

**Source:** L. 96: Entire article R&RE, p. 492, § 1, effective July 1.

**Editor's note:** This section is similar to former §§ 7-56-105 and 7-56-106 as they existed prior to 1996.

**7-56-210. Renewable energy cooperatives.** (1) It is the policy of this state to encourage local ownership of renewable energy generation facilities to improve the financial stability of rural communities.

(2) Subject to the provisions of this article, a renewable energy cooperative may be organized for the purpose of promoting electric energy efficiency technologies to its members, generating electricity from renewable resources and technologies, and transmitting and selling the electricity at wholesale.

(3) For purposes of this section, "renewable resources or technologies" means biomass, geothermal energy, solar energy, small hydroelectricity, and wind energy. Hydrogen derived from biomass, geothermal energy, solar energy, small hydroelectricity, and wind energy is also considered to be renewable energy for the purposes of this article. "Renewable resources or technologies" does not include pumped storage facilities; hydroelectricity other than small hydroelectricity; coal, natural gas, oil, propane, or any other fossil fuel; or nuclear energy. "Renewable resources or technologies" also does not include hydrogen derived from pumped storage facilities; hydroelectricity other than small hydroelectricity; coal, natural gas, oil, propane, or any other fossil fuel; or nuclear energy.

**Source:** L. 2004: Entire section added, p. 1121, § 1, effective May 27.

## PART 3

## MEMBERS AND OWNERSHIP

**7-56-301. Members.** (1) Subject to the provisions of this section and under the terms and conditions prescribed in the articles or bylaws adopted by it, a cooperative may limit admission as members or issue common stock only to persons engaged in the particular business or utilizing the goods or services provided by or through the cooperative, including any entity formed under the law of this state or any other jurisdiction, or may admit as members or issue common stock to any person meeting uniform terms and conditions stated in its articles or bylaws.

(2) When any required membership fee or payment for stock as required in the articles, the bylaws, or a resolution of the board has been paid in full or a promissory note executed for the required membership fee or capital subscription, a cooperative may issue a certificate of membership or common stock evidencing the membership or ownership of the stock or may evidence the same on the books or other records of the cooperative as determined by the articles, the bylaws, or the board. Except for a cooperative formed with stock, promissory notes of members may not be accepted by the cooperative as full or partial payment for stock unless permitted by the bylaws and adequately secured. The cooperative shall hold the stock as security for the payment of the note, but such retention as security shall not affect the member's right to vote.

(3) No member shall have a right to vote until the required membership fee or payment for stock has been paid in full.

(4) A cooperative, in its articles or bylaws, may limit the amount of common stock that a member may own.

(5) No member shall be liable directly or indirectly, including by way of indemnification, contribution, or otherwise, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of or chargeable to the cooperative while it is incorporated for an amount exceeding the sum remaining unpaid on the member's membership fee or the member's subscription to the stock, including any unpaid balance on any promissory note given in payment thereof; except that this subsection (5) shall not affect the liability of a member who is also a member of the board or an officer for such member's negligence, wrongful act, or misconduct in that capacity.

(6) A cooperative formed with or without capital stock under this article may issue or accept investments in nonvoting stock or equity that may have such rights and preferences, including being subject to per unit retains or allocations of net margins, as may be provided in the articles, the bylaws, or by the board. Such nonvoting stock or equity may be issued and sold by the cooperative to any person, including those persons not otherwise qualified to be members, and may be redeemable or retireable by the cooperative on such terms and conditions as are provided for in the articles, the bylaws, or a resolution of the board providing for the issuance of or the investment in the nonvoting stock or equity. The terms and conditions of redemption shall be printed on any certificate evidencing the stock or equity.

(7) A cooperative shall impose restrictions on the transfer of voting common stock or membership in the cooperative in its bylaws in accordance with section 7-56-208 (2), and may also impose such restrictions in its articles, and may impose restrictions on the transfer of other equity investments in the cooperative in its articles, bylaws, or by resolution of its board. Any such restriction shall be printed upon any certificate or other written evidence of the membership, voting common stock, or other equity investment if one is issued.

(8) Subject to the provisions of section 7-56-406 (2) (c), a cooperative may, at any time as stated in its articles, bylaws, or resolution of the board adopted at the time of issuance, acquire, recall, redeem, exchange, or reissue its common stock, memberships, preferred stock, preferred equity, memberships, or other equity capital. Consideration paid for stock, memberships, or other equity capital acquired, recalled, redeemed, exchanged, or reissued by the cooperative shall be the par value, stated value, price originally paid, or book value, whichever is less, as conclusively determined by the board, plus any accrued and unpaid dividends, if any, and, if the price originally paid for the stock, memberships, or other equity



capital included an additional amount based upon the right of the holder to engage in business with the cooperative, the consideration shall include the additional amount. If stock, memberships, or other equity capital acquired, recalled, redeemed, or exchanged does not have a par value, then the par value shall not be considered in determining the consideration. The cooperative may set off against the consideration to be paid obligations to it of the holder of stock, membership, or other equity capital and shall have a continuing perfected security interest in the stock, membership, and other equity capital of a member, stockholder, or holder of other equity capital to secure payment of any indebtedness to the cooperative of the stockholder, member, or holder of other equity capital, whenever indebtedness is incurred. Notwithstanding any other provision of law, the security interest shall take priority over all other perfected security interests. No acquisition, recall, or redemption shall be made if the result of it would be to bring the value of the remaining assets of the cooperative below the aggregate of its indebtedness. The articles or bylaws may provide other limitations on the right of a cooperative to acquire, recall, redeem, exchange, or reissue its stock, memberships, or other equity capital.

(9) If a member of a cooperative is other than an individual, such member may be represented by any individual, associate, officer, manager, member, shareholder, or other equity holder thereof duly authorized in writing by the member's board or other governing body having the right to authorize the representation.

(10) If so prescribed in its articles or bylaws, a cooperative may group its members in districts, or other units, or by types of goods or services utilized, for administration or otherwise achieving the purposes of the cooperative.

(11) A cooperative, in its articles or bylaws, may limit the amount of common stock or other equity capital held by members or other persons.

(12) Repealed.

**Source:** L. 96: Entire article R&RE, p. 493, § 1, effective July 1. L. 98: (12) repealed, p. 612, § 3, effective July 1. L. 2003: (1), (2), (6), and (8) amended, p. 2224, § 77, effective July 1, 2004. L. 2004: (9) amended, p. 1413, § 44, effective July 1.

**Editor's note:** This section is similar to former §§ 7-56-108 and 7-56-116 as they existed prior to 1996.

#### ANNOTATION

**The relation between a cooperative marketing association and its members** is that existing between a trustee and his beneficiary or

a principal and his agent. *Mountain States Beet Growers' Mkt. Ass'n v. Monroe*, 84 Colo. 300, 269 P. 886 (1928).

**7-56-302. Member meetings - how called - notice.** (1) In its bylaws, each cooperative shall provide for one or more regular member meetings annually. Either the board or such officers as are designated in the bylaws shall have the right to call a special meeting of the members at any time, and the president, or other officer designated in the bylaws, shall call a special meeting to be held within sixty days upon petition by ten percent of the total number of members stating the specific business to be brought before the meeting. The board or the person calling the special meeting shall determine the date, time, and place of the meeting.

(2) Written notice of all member meetings shall be mailed to each member at that member's last-known address or transmitted to each member in such other manner as may be provided in the bylaws at least ten days prior to the meeting. Notice of any special meeting shall include a statement of the purpose for the meeting. At all regular meetings of members of the cooperative, any and all lawful business may be brought before the meeting regardless of whether stated in the notice of the meeting; except that amendments to the articles or the bylaws of the cooperative or other action required to be stated in the notice of the meeting by this article shall not be subject to action unless notice thereof is stated in the notice of the meeting. At all special meetings of the members of the cooperative, business brought before the meeting shall be limited to the purpose stated in the notice.

(3) Actions taken or agreed to be taken during a member meeting shall not be invalidated on account of any member's failure to receive notice of a meeting if reasonable effort has been made to give notice in accordance with this section.

(4) Lawful actions or other membership votes may be taken by the cooperative in lieu of or without a member meeting if all members entitled to act or vote with respect to the action agree to that action by unanimous written consent.

**Source:** L. 96: Entire article R&RE, p. 495, § 1, effective July 1. L. 2003: (2) amended, p. 2225, § 78, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-56-112 as it existed prior to 1996.

**7-56-303. Members' list for meeting.** (1) After fixing a record date for a meeting of the membership, the cooperative shall prepare a list of the names and addresses of all its members who are entitled to be given notice of the meeting. The members' list shall be available for inspection by any member or member's agent or attorney, for a proper corporate purpose, beginning the earlier of ten days before the meeting for which the list was prepared or two business days after notice of the meeting is given and continuing through the meeting, and any adjournment thereof. Section 7-56-307 is not applicable to this section.

(2) The cooperative shall make the members' list available at the meeting, and any member or member's agent or attorney is entitled to inspect the list at any time and for a proper corporate purpose during the meeting or any adjournment.

(3) If the cooperative refuses to allow a member or the member's agent or attorney to inspect the members' list before or at the meeting, as permitted by subsection (1) or (2) of this section, the member may apply to the district court for the county in this state in which the street address of the cooperative's principal office is located or, if the cooperative has no principal office in this state, to the district court for the county in which the street address of its registered agent is located or, if the cooperative has no registered agent, to the district court for the city and county of Denver for an order permitting the member or the member's agent or attorney to inspect the members' list.

(4) The court may order inspection of the members' list pursuant to subsection (3) of this section, unless the cooperative proves that it refused inspection or copying of the list in good faith because it had a reasonable basis for doubt about the right of the member or the agent or attorney of the member to inspect or copy the members' list. The court may also postpone or adjourn the meeting for which the list was prepared until the inspection ordered by the court is complete. In any such action:

(a) The court may order the losing party to pay the prevailing party's reasonable costs, including reasonable attorney fees;

(b) The court may order the losing party to pay the prevailing party for any damages the prevailing party shall have incurred by reason of the subject matter of the litigation;

(c) If inspection or copying is ordered pursuant to subsection (3) of this section, the court may order the cooperative to pay the member's inspection and copying expenses; and

(d) The court may grant either party any other remedy provided by law.

(5) If a court orders inspection of the members' list pursuant to subsection (3) of this section, the court may impose reasonable restrictions on the use or distribution of the list by the member.

(6) Failure to prepare or make available the members' list does not affect the validity of action taken at the meeting.

**Source:** L. 96: Entire article R&RE, p. 495, § 1, effective July 1. L. 2003: (3) amended, p. 2225, § 79, effective July 1, 2004.

**Cross references:** Section 7-56-307 (6) provides that the provisions of said section do not apply to this section.



**7-56-304. Quorum.** (1) A quorum for conducting business at all meetings of the members shall be five percent of the total number of members or thirty members present in person at the meeting, whichever is less. Members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1) shall be counted toward the quorum with respect to that matter. Nothing shall prevent the articles or the bylaws of a cooperative from requiring a greater number of members or percentage thereof as a quorum.

(2) An action by a cooperative is not valid in the absence of a quorum at the meeting at which the action was taken, unless the action taken is subsequently ratified by the required number of members.

**Source: L. 96:** Entire article R&RE, p. 497, § 1, effective July 1.

**7-56-305. Member voting.** (1) (a) Members of a cooperative may vote either in person or, if provided in the articles or the bylaws of the cooperative or a resolution of the board with respect to a particular issue, by any of the following methods:

(I) Mail or electronic transmission if a means is provided to verify that a member so voting has received the exact wording of the matter upon which the vote is to be taken;

(II) Telecommunication; or

(III) Any other means by which all persons in the meeting may communicate with each other during the meeting.

(b) Whenever in this article reference is made to voting by membership, the vote may be taken in any manner established pursuant to this section unless specifically provided otherwise in this article or by the board with respect to a particular matter upon which the vote is to be taken.

(c) With respect to a matter where a vote has been cast by an authorized means other than the person being present and voting in person, the person casting the vote shall be counted as present and voting for purposes of those provisions in this article that refer to persons "present and voting".

(d) Proxy or cumulative voting shall be prohibited except as permitted by the articles or bylaws of organizations incorporated prior to July 6, 1973; except that, where a member is other than an individual, its vote may be cast by a representative authorized pursuant to this article.

(2) Except as otherwise provided in subsection (3) of this section, each member of a cooperative formed under this article shall be entitled to one vote only.

(3) Any cooperative formed under this article may provide in its articles for proportional voting rights allowing members more than one vote based upon the patronage of a member with the cooperative, the amount of patronage equity held in the cooperative, or any combination of these methods. However, no member may be entitled to more than one vote in any case where a law of this state specifically requires otherwise. In no event shall any member have less than one vote and no member may have more than two and one-half percent of the total votes of members of the cooperative. If the number of members in the cooperative is such that, solely by virtue of the number of members, one member may have more than two and one-half percent based on proportional voting, then each member of the cooperative shall be entitled to one vote only.

(4) Unless otherwise provided in this article or in the cooperative's articles, when a cooperative has provided for proportional voting, it shall be deemed to have intended that the references in this article to a vote of a specified proportion of members or similar terminology as necessary for approval of a matter submitted to a membership vote shall mean a determination based on a proportion of the total votes entitled to be cast or actually cast by members as applicable in the particular reference.

**Source: L. 96:** Entire article R&RE, p. 497, § 1, effective July 1. **L. 2003:** (2) and (3) amended, p. 2225, § 80, effective July 1, 2004. **L. 2004:** (1)(d) amended, p. 1413, § 45, effective July 1.

**7-56-306. Reserves, distributions, and patronage refunds.** (1) A cooperative shall periodically set aside a portion of net margins, per unit retains, or other funds that is reasonable as determined by the board or in accordance with the articles or bylaws, for reserves, distributions, patronage refunds, capital, or other lawful business purposes.

(2) Net margins, after deductions for reasonable reserves and for allowances for income tax, shall be calculated and allocated on a patronage basis at least once every twelve months to members or to members and other qualified persons on an equitable basis as determined by the board or in accordance with the articles or bylaws. This section shall not be construed as prohibiting the retention of net margins, excess per unit retains, or other funds allocated to members as a means of providing capital for the cooperative.

(3) If a cooperative has retained net margins or other funds allocated to members, the board shall have the right in accordance with the articles, bylaws, and policies established by the board to redeem or retire the net margins or other funds so retained. All decisions relating to the redemption or retirement of such funds shall be made solely by the board.

**Source: L. 96:** Entire article R&RE, p. 498, § 1, effective July 1.

**7-56-307. Inspection of cooperative records by member.** (1) A member is entitled to inspect and copy, at the member's expense, during regular business hours at a reasonable location stated by the cooperative, any of the records described in section 7-56-107 (4) if the member meets the requirements of subsection (2) of this section and gives the cooperative written demand at least five business days before the date on which the member wishes to inspect and copy such records. Notwithstanding the provisions of this subsection (1) or any provisions of section 7-56-107 (4), no member shall have the right to inspect or copy any records of the cooperative relating to the amount of equity capital in the cooperative held by any person or any accounts receivable or other amounts due the cooperative from any person.

(2) To be entitled to inspect and copy permitted records, the member shall meet the following requirements:

(a) The member has been a member for at least one year immediately preceding the demand to inspect or copy or is a member holding at least five percent of all of the outstanding equity interests in the cooperative as of the date the demand is made;

(b) The demand is made in good faith and for a proper corporate business purpose;

(c) The member describes with reasonable particularity the purpose and the records the member desires to inspect; and

(d) The records are directly connected with the described purpose.

(3) The right of inspection granted by this section may not be abolished or limited by the articles, bylaws, or any actions of the board or the members.

(4) This section does not affect:

(a) The right of a member to inspect records to the same extent as any other litigant if the member is in litigation with the cooperative; or

(b) The power of a court to compel the production of the cooperative's records for examination.

(5) Notwithstanding any other provision in this section, if the records of the cooperative to be inspected or copied are in active use or storage and, therefore, not available at the time otherwise provided for inspection or copying, the cooperative shall notify the member of this fact and shall set a date and hour within three business days of the date otherwise set in this section for the inspection or copying.

(6) This section shall not apply to section 7-56-303.

**Source: L. 96:** Entire article R&RE, p. 499, § 1, effective July 1. **L. 2003:** (1) amended, p. 2226, § 81, effective July 1, 2004.

**7-56-308. Scope of member's inspection right.** (1) A member's agent or attorney has the same inspection and copying rights as the member.



(2) The right to copy records under section 7-56-307 includes, if reasonable, the right to receive copies made by photographic, xerographic copying, or other means.

(3) The cooperative may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. The charge may not exceed the estimated cost of production and reproduction of the records.

**Source: L. 96:** Entire article R&RE, p. 500, § 1, effective July 1.

**7-56-309. Court-ordered inspection.** (1) If a cooperative refuses to allow a member, or the member's agent or attorney, who complies with section 7-56-307 to inspect or copy any records that the member is entitled to inspect or copy by said section within a prescribed time limit or, if none, within a reasonable time, the district court for the county in this state in which the street address of the cooperative's principal office is located or, if the cooperative has no principal office in this state, the district court for the county in which the street address of its registered agent is located or, if the cooperative has no registered agent, the district court for the city and county of Denver, may, on application of the member, summarily order the inspection or copying of the records demanded at the cooperative's expense.

(2) If a court orders inspection or copying of the records demanded, unless the cooperative proves that it refused inspection or copying in good faith because it had a reasonable basis for doubt about the right of the member or the member's agent or attorney to inspect or copy the records demanded:

(a) The court may order the losing party to pay the prevailing party's reasonable costs, including reasonable attorney fees;

(b) The court may order the losing party to pay the prevailing party for any damages the prevailing party shall have incurred by reason of the subject matter of the litigation;

(c) If inspection or copying is ordered pursuant to subsection (1) of this section, the court may order the cooperative to pay the member's inspection and copying expenses notwithstanding the provisions of section 7-56-307 (1); and

(d) The court may grant either party any other remedy provided by law.

(3) If a court orders inspection or copying of records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member.

**Source: L. 96:** Entire article R&RE, p. 500, § 1, effective July 1. **L. 2003:** (1) amended, p. 2226, § 82, effective July 1, 2004.

## PART 4

### OFFICERS AND ELECTIONS

**7-56-401. Directors - elections - remuneration - vacancy.** (1) The affairs of a cooperative formed under or subject to this article shall be managed by a board of not less than three directors as provided in the articles or bylaws elected by and from the members of the cooperative or designated representatives of members who are not individuals. If authorized by the articles or the bylaws, up to twenty percent of the board may consist of directors who are neither members nor representatives of members. Directors who are not members of the cooperative or representatives of members may be elected by a vote of two-thirds of the cooperative members present and voting. Nominations for the position of director shall be conducted in a manner provided in the bylaws or in a resolution of the board or of the members.

(2) The articles or bylaws may provide that the territory in which the cooperative has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In that case the articles or bylaws shall state the number of directors to be elected by each district and the manner and method of reapportioning the directors and of redistricting the territory covered by the cooperative. The bylaws may provide that primary elections shall be held in each district to elect the directors apportioned to such districts and that the result

of all such primary elections shall be ratified at the next regular meeting of the cooperative or be considered final as to the cooperative.

(3) A cooperative may provide a reasonable remuneration for the time actually spent by its officers and directors in its service. No director, during the term of the director's office, shall be a party to a contract for profit with the cooperative differing in any way from the business relations accorded members of the cooperative.

(4) The articles or bylaws may limit directors from occupying any position in the cooperative on a regular salary or substantially full-time pay. The articles or bylaws may provide for an executive committee and may allot to the committee all the functions and powers of the board, subject to the general direction and control of the board.

(5) When a vacancy on the board occurs other than by expiration of term, the remaining members of the board, even though not a quorum, by a majority vote, shall fill the unexpired term, unless the articles or bylaws provide for an election of directors by district, in which event, unless the articles or bylaws provide for a different procedure, the board shall immediately call a special meeting of the members in the district to fill the vacancy.

**Source:** L. 96: Entire article R&RE, p. 501, § 1, effective July 1. L. 2003: (1) and (2) amended, p. 2226, § 83, effective July 1, 2004. L. 2004: (1) amended, p. 1413, § 46, effective July 1.

**Editor's note:** This section is similar to former § 7-56-113 as it existed prior to 1996.

**7-56-402. Officers - titles - election - duties and authority - removal.** (1) (a) The bylaws shall provide for one or more officers and the titles of those officers. The offices may include a board chair, one or more vice-chairs, a president, one or more vice-presidents, a secretary, a treasurer, and assistant officers or other officers. The officers shall be elected by the board or in any other manner prescribed in the bylaws. At least one officer shall be an individual at least eighteen years of age. At least one officer shall be a member of the board. One individual may simultaneously hold more than one office, but may not concurrently hold the offices of president and secretary.

(b) The bylaws or board of each cooperative shall designate one or more officers responsible for preparing and maintaining the minutes of board and membership meetings and all records required to be kept by section 7-56-107 and for authenticating records.

(2) All officers and agents of the cooperative, as between themselves and the cooperative, shall have such authority and perform such duties in the management of the cooperative as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with federal, state, and local law, the articles, and the bylaws.

(3) Unless otherwise provided in the articles or bylaws, the board may remove any officer at any time with or without cause.

**Source:** L. 96: Entire article R&RE, p. 502, § 1, effective July 1. L. 2004: (1)(a) amended, p. 1413, § 47, effective July 1.

**Editor's note:** This section is similar to former § 7-56-114 as it existed prior to 1996.

**7-56-403. Procedures for meetings of the board of directors.** (1) The board shall meet at least annually. The board may establish a time and place for regular board meetings and then may hold regular board meetings at such times without notice.

(2) Special meetings of the board shall require at least two days notice of the date, time, and place. Unless otherwise provided by the articles or bylaws, purposes of a special meeting do not have to be stated in the notice of any special meeting.

(3) A director's attendance at a special meeting constitutes waiver of the notice requirement for that meeting unless the director objects to the lack of or method of notice and does not thereafter participate in the meeting or if notice of the purpose of the meeting



was required but not given and the director objects to the transaction of business for that purpose and does not thereafter participate in the meeting with respect to that purpose.

(4) A director is considered to have assented to an action of the board unless:

(a) The director votes against it or abstains and causes the abstention to be recorded in the minutes of the meeting;

(b) The director objects at the beginning of the meeting and does not vote for it later;

(c) The director causes the director's dissent to be recorded in the minutes;

(d) The director does not attend the meeting at which the vote is taken; or

(e) The director gives notice of the director's objection in writing to the secretary within twenty-four hours after the meeting.

(5) Unless otherwise provided by the articles or bylaws:

(a) The board may permit any or all directors to participate in a regular or special meeting through the use of any means of communication by which all directors participating are able to communicate simultaneously with each other during the meeting;

(b) Actions of the board may be taken without a meeting if the action is agreed to by all members of the board and is evidenced by one or more written consents together signed by all directors and filed with the corporate records reflecting the action taken;

(c) Purposes of a special meeting do not have to be stated in the notice of any special meeting, but at least two days notice of the date, time, and place shall be given.

**Source: L. 96:** Entire article R&RE, p. 502, § 1, effective July 1. **L. 2004:** (4)(c) and (4)(e) amended, p. 1413, § 48, effective July 1.

**7-56-404. Removal of director by the membership or the board.** (1) At a meeting called expressly for that purpose, as well as any other proper purpose, a director may be removed by the members in the manner provided in this section upon an affirmative vote of a majority of the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1) or, if removal of a director is by the board, then by a majority of the members of the board not subject to removal.

(2) The board may remove a director who does not meet the qualifications for board membership stated in the articles and bylaws of the cooperative.

(3) The members may remove one or more directors only for cause unless the articles or bylaws allow directors to be removed without cause.

(4) Removal of directors by the vote of the members shall be initiated by written petition signed by at least ten percent of the members stating the alleged causes or reasons for removing the director. No petition shall seek removal of more than one director.

(5) Within ninety days after receipt of a petition meeting the requirements of subsection (4) of this section, the board shall schedule the removal vote at a regular or special meeting of the membership upon determination by the board, if necessary, that cause has been stated. Any determination of cause shall be made by a majority of the directors not subject to removal petitions. If more than a majority of the board is subject to removal petitions, then the matter shall be promptly referred to an attorney who has been duly licensed to practice law in Colorado for at least five years and who has not previously represented the cooperative. The attorney's determination of whether cause has been stated shall be final for the purpose of whether to schedule a vote on removal.

(6) Any director subject to a removal petition under any provision of this section shall be promptly informed in writing by the board and shall have the opportunity, in person and by counsel, to be heard and present evidence at the meeting called for the vote. The persons seeking removal shall have the same opportunity.

**Source: L. 96:** Entire article R&RE, p. 503, § 1, effective July 1. **L. 2003:** (2) amended, p. 2227, § 84, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-56-117 as it existed prior to 1996.

**7-56-405. Removal of director by judicial proceeding.** (1) A director may be removed by the district court for the county in this state in which the street address of the cooperative's principal office is located or, if the cooperative has no principal office in this state, by the district court for the county in which the street address of its registered agent is located or, if the cooperative has no registered agent, by the district court for the city and county of Denver, in a proceeding commenced either by the cooperative or by at least ten percent of the members, if the court finds that the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the cooperative, and that removal is in the best interests of the cooperative.

(2) If the members commence a proceeding under subsection (1) of this section, they shall make the cooperative a party defendant.

(3) The court that removes a director may bar the director from reelection for a period prescribed by the court.

**Source:** **L. 96:** Entire article R&RE, p. 504, § 1, effective July 1. **L. 2003:** (1) amended, p. 2227, § 85, effective July 1, 2004. **L. 2004:** (1) amended, p. 1414, § 49, effective July 1.

**7-56-406. Indemnification and personal liability of directors, officers, employees, and agents.** (1) Unless limited in the cooperative's articles, the cooperative shall have the same powers, rights, and obligations and shall be subject to the same limitations with respect to indemnification and personal liability of directors, officers, employees, and agents as apply to domestic corporations as set forth in article 109 of this title. Cooperative directors, officers, employees, and agents shall have the same rights as directors, officers, employees, and agents of domestic corporations as set forth in article 109 of this title. For purposes of this section, any reference to shareholders having the right to vote in article 109 of this title shall be construed to refer to members of the cooperative having the right to vote.

(2) (a) The articles may eliminate or limit the liability of a director of the cooperative to the cooperative or its members for monetary damages for any breach of the duty of care arising after the date the provision in the articles became effective, including the effective date of any provision adopted under a prior statute, except any acts or omissions in bad faith or that involve intentional misconduct or a knowing violation of law; any transaction from which the director derived an improper personal benefit; any unlawful liquidating distributions of assets to members, unlawful loans to directors, or unlawful guarantees of loans to directors; unlawful dividends; unlawful stock or other equity repurchases; or any other unlawful distribution that was voted for or assented to if the director did not act in conformance with the standard of care as set forth in section 7-108-401.

(b) No provision pursuant to paragraph (a) of this subsection (2) shall eliminate or limit the liability of a director or officer to the cooperative or its members for monetary damages for any act or omission occurring prior to the date when such provision becomes effective.

(c) A distribution of stock or other equity repurchase is unlawful if it renders the cooperative unable to pay its debts as they become due in the usual course of business or, unless the articles permit otherwise, causes the assets to be less than the liabilities plus the amount necessary to satisfy the interests of the holders of securities or other equity capital preferential to those receiving the distribution, if dissolved at the time of the distribution.

(d) No director or officer shall be personally liable for any tort committed by an employee unless the director or officer was personally involved.

(e) Unless otherwise provided in the articles or bylaws, each director shall discharge the duties as a director, including duties as a member of a committee, in accordance with the provisions of section 7-108-401. Unless otherwise provided in the articles or bylaws, each officer with discretionary authority shall discharge such officer's duties under that authority in accordance with the provisions of section 7-108-401. For purposes of this subsection (2), references to "corporation" and "shareholders" in section 7-108-401 shall be construed as referring to "cooperative" and "members" respectively.



**Source: L. 96:** Entire article R&RE, p. 504, § 1, effective July 1. **L. 98:** (2)(e) added, p. 612, § 4, effective July 1. **L. 2003:** (1) amended, p. 2227, § 86, effective July 1, 2004. **L. 2004:** (2)(e) amended, p. 1414, § 50, effective July 1.

**Editor's note:** This section is similar to former § 7-56-107.5 as it existed prior to 1996.

**7-56-407. Persons to be bonded.** At the discretion of the board of a cooperative, any officer, employee, or agent handling funds or negotiable instruments or property of or for the cooperative may be bonded for the faithful performance of the person's duties and obligations.

**Source: L. 96:** Entire article R&RE, p. 505, § 1, effective July 1.

**Editor's note:** This section is similar to former § 7-56-115 as it existed prior to 1996.

#### **7-56-408. Registered office and registered agent - repeal. (Repealed)**

**Source: L. 96:** Entire article R&RE, p. 505, § 1, effective July 1. **L. 2002:** IP(2), (3)(a), and (4) amended, p. 1817, § 23, effective July 1; IP(2), (3)(a), and (4) amended, p. 1682, § 21, effective October 1. **L. 2003:** (5) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-56-409. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, applies to cooperatives formed under or subject to this article.

**Source: L. 2003:** Entire section added, p. 2227, § 87, effective July 1, 2004.

### **PART 5**

#### **POWERS AND PURPOSES: APPLICATION OF OTHER LAWS**

**7-56-501. Powers.** (1) Every cooperative has the power, except as specifically limited by this article or by its own articles or bylaws:

(a) To have perpetual existence and succession by its domestic entity name unless limited by the articles;

(b) To sue and be sued and to complain and defend in courts of law and equity;

(c) To make and use a common seal, alter the same at its pleasure, and to use such seal or a facsimile thereof, including a rubber stamp, by impressing or affixing it or by reproducing it in any other manner;

(d) To purchase, receive, lease, and otherwise acquire, and to own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located;

(e) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(f) To purchase, receive, subscribe for, and otherwise acquire shares and other interests in, and obligations of, any other entity, including any other cooperative, and to own, hold, vote, use, sell, mortgage, lend, pledge, and otherwise dispose of, and deal in and with, the same;

(g) To make contracts and guarantees; incur liabilities; borrow money; issue notes, bonds, and other obligations; which may be convertible into or include the option to purchase other securities of the cooperative; and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(h) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(i) To be a partner, member, associate, trustee, promoter, or manager of, or to hold any similar position with, any entity;

(j) To conduct its business, locate offices, and exercise the powers granted by this article within or outside this state;

(k) To elect directors and officers and appoint employees and agents of the cooperative, define their duties, fix their compensation, and lend them money and credit;

(l) To pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share options and rights plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;

(m) To make payments or donations for the public welfare or for charitable, scientific, or educational purposes;

(n) To regulate and limit the right of members to transfer their memberships, stock, or other equity;

(o) To make and amend its articles and bylaws for the management of its affairs and to make provisions in its articles for the terms and limitations of stock ownership or membership and for the distribution of its earnings;

(p) To indemnify its directors, officers, employees, and agents to the extent provided or permitted in this article and to eliminate or limit the personal liability of a director, officers, employees, or agents of the cooperative, as provided in accordance with section 7-56-406; however, no such provision shall eliminate or limit the liability of a director or officer to the association or to its members for monetary damages for any act or omission occurring prior to the effective date of such provision;

(q) To establish in its bylaws procedures for the disposition of funds when declared payable by the cooperative and unclaimed by the holder three years after notification has been mailed to the holder's last-known address of record on the books of the cooperative, which disposition may consist of transferring the funds to the general operating account of the cooperative;

(r) To establish, secure, own, and develop patents, trademarks, and copyrights;

(s) To make advance payments and advances to members;

(t) To act as the agent or representative of any member for any lawful purpose or in any lawful transaction of the cooperative;

(u) To purchase or otherwise acquire and to hold, own, and exercise all rights of ownership in, and to sell, transfer, or pledge or guarantee the payment of dividends or interest on, or the retirement or redemption of shares of the stock or bonds of any person engaged in any lawful activity;

(v) To allocate earnings and pay patronage dividends;

(w) To use per unit retains;

(x) To prohibit or place limitations on amounts or rates of dividends payable on any class of capital stock or other equity investment in the cooperative;

(y) To engage in any activity in connection with the purchase, hiring, or use by its members or other patrons of goods, services, products, equipment, supplies, utilities, telecommunications, housing, or health care;

(z) To establish amounts for reasonable and necessary reserves for bad debts, obsolescence, grain, quality and grade, contingent losses, working capital, debt retirement, buildings and equipment, and ownership retirement and to provide that no member or other person entitled to share in the allocation of the cooperative's net margins or other funds shall have any rights except upon dissolution when the entire reserve funds of the cooperative shall be distributed in accordance with applicable federal, state, and local law and the articles and bylaws of the cooperative;

(aa) To manufacture, sell, or supply goods, machinery, equipment, supplies, or services to its members and to other patrons or persons;

(aa.5) To adopt a trade name;

(bb) To finance one or more of the activities in this section; and

(cc) To perform every other form or type of act that is necessary or proper for accomplishing any lawful purpose of the cooperative not prohibited to it by law or its



articles and bylaws or that is conducive to or expedient for the interest or benefit of the cooperative.

(2) In addition to the powers granted in subsection (1) of this section, each agricultural cooperative incorporated under this article has the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, raising, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling, and utilization of any products, by-products, or services produced or delivered to the cooperative by its members or other patrons;

(b) To engage in any activity in connection with agricultural education and research and to represent its members' interests in legislative and administrative forums.

(3) In addition to the powers specifically given in this article, a cooperative has all powers, rights, and privileges granted by the law of this state to domestic corporations or domestic nonprofit corporations that are not inconsistent with the provisions of this article.

(4) The powers enumerated in this article shall vest in every cooperative in this state formed under this article, or that has elected to be subject to this article, although they may not be stated in its charter or in its articles.

**Source:** **L. 96:** Entire article R&RE, p. 507, § 1, effective July 1. **L. 98:** (1)(aa.5) added, p. 612, § 5, effective July 1. **L. 2000:** (1)(a) amended, p. 951, § 12, effective July 1. **L. 2003:** (3) and (4) amended, p. 2228, § 88, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-56-107 as it existed prior to 1996.

**7-56-502. Marketing or purchasing contracts.** Cooperatives limiting membership to agricultural producers may make and execute marketing or purchasing contracts requiring the members to sell or purchase, for any period of time not over ten years, all or any specified part of their agricultural products or specified commodities, goods, services, or input supplies exclusively to or through the cooperative or any facilities utilized or to be created by the cooperative. If such producers contract to sell to the cooperative, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the cooperative upon delivery or at any other specified time if expressly and definitely agreed to in the contract. The contract may provide, among other things, that the cooperative may sell or resell the products delivered by its members with or without taking title to the products and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest or dividends on stock which shall not exceed eight percent per annum, and reserves for proper purposes.

**Source:** **L. 96:** Entire article R&RE, p. 510, § 1, effective July 1.

**Editor's note:** This section is similar to former § 7-56-119 as it existed prior to 1996.

## ANNOTATION

**Annotator's note:** Since § 7-56-502 is similar to § 7-56-119 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Standard cooperative marketing agreements made before they were authorized by this article have been held to be void as in contravention of public policy because in restraint of trade or competition.** *Burns v. Wray Farmers' Grain Co.*, 65 Colo. 425, 176 P. 487 (1918); *Campbell v. People*, 72 Colo. 213, 210 P. 841 (1922); *Johnson v. People*, 72 Colo. 218,

210 P. 843 (1922); *Atkinson v. Colo. Wheat Growers' Ass'n*, 77 Colo. 559, 238 P. 1117 (1925); *Colo. Wheat Growers' Ass'n v. Thede*, 80 Colo. 529, 253 P. 30 (1927); *Mountain States Beet Growers' Mkt. Ass'n v. Monroe*, 84 Colo. 300, 269 P. 886 (1928).

**But such contracts are valid where there is a concurrence of the following conditions:** The agreement was made after this article was passed; it was authorized by this law and executed in compliance therewith; it was made by and between an association formed under this article and a member of such association. *Rifle*

Potato Growers' Coop. Ass'n v. Smith, 78 Colo. 171, 240 P. 937 (1925); Colo. Wheat Growers' Ass'n v. Thede, 80 Colo. 529, 253 P. 30 (1927).

**Rejection of a contract for the growing of a crop is held within the discretionary powers of the marketing association** of which the growers are members, where such power is not arbitrarily exercised. *Mountain States Beet Growers' Mkt. Ass'n v. Monroe*, 84 Colo. 300, 269 P. 886 (1928).

**But rejection by a marketing association of a growing contract and its refusal to release a member from his obligations under his membership contract was arbitrary** and without just grounds or excused where the association, in its negotiations, had stated that the tendered contract was acceptable in all its terms and would be approved by the association on condition that another contract be entered into with it for the purchase of its members' crops for the three subsequent years, which the purchaser declined to do. *Mountain States Beet Growers' Mkt. Ass'n v. Monroe*, 84 Colo. 300, 269 P. 886 (1928).

**Marketing contract based on good consideration.** A marketing contract between an association and producer by which the former agrees to buy, resell, and give the latter something out of the proceeds is based on a good consideration. *Rifle Potato Growers' Coop. Ass'n v. Smith*, 78 Colo. 171, 240 P. 937 (1925).

**And a marketing contract was not breached by a marketing association because**

**it turned sales over to brokers**, the contract giving it power to sell to dealers, shippers, or otherwise. *Rifle Potato Growers' Coop. Ass'n v. Smith*, 78 Colo. 171, 240 P. 937 (1925).

**An assignment of a claim in a marketing contract by a member** is not against public policy or unconstitutional, for an assignment of a chose in action is neither against public policy nor unconstitutional; and although the cooperative contract itself might be against public policy and unconstitutional, that matter is of no concern, for whether other parts of a contract are open to these objections is irrelevant to the propriety of such an assignment. *Austin v. Colo. Dairymen's Coop. Ass'n*, 81 Colo. 546, 256 P. 640 (1927).

**A tenant who leases with the knowledge that his landlord has entered into a contract with a cooperative association** for the marketing of his products is charged with knowledge of the provisions of this article concerning such contracts. *Wilson v. Monte Vista Potato Growers' Coop. Ass'n*, 82 Colo. 428, 260 P. 1080 (1927).

**For the provisions of this article constitute an essential part of a lease** between the owner of land, who is a party to such a contract, and his tenant, who has knowledge of the contract, as much so as if its provisions were incorporated in the lease. *Wilson v. Monte Vista Potato Growers' Coop. Ass'n*, 82 Colo. 428, 260 P. 1080 (1927).

**7-56-503. Remedies for breach of marketing or purchasing contract.** (1) The bylaws or the marketing or purchasing contracts of an agricultural cooperative may fix as liquidated damages specific sums to be paid by a member to the cooperative upon the breach by the member of any provision of the marketing or purchasing contract regarding the sale, purchase, receipt, or delivery or withholding of products or other goods and may further provide that the member will pay all costs, premiums for bonds, expenses, and fees if any action is brought upon the contract by the cooperative. All such provisions shall be valid and enforceable in the courts of this state, and clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(2) In the event of any breach or threatened breach of a marketing or purchasing contract by a member, the cooperative shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance of the contract. Pending the adjudication of the action and upon filing a sufficient bond and verified complaint showing the breach or threatened breach, the cooperative shall be entitled to a temporary restraining order and preliminary injunction against the member.

(3) In any action upon a marketing contract, it shall be conclusively presumed that a landowner, landlord, or lessor is able to control the delivery of products or other goods produced on such landowner's, landlord's, or lessor's land by tenants or others whose tenancy or possession or work on such land or the terms of whose tenancy or possession or labor on such land was created or changed after execution by the landowner, landlord, or lessor of such marketing contract. The remedies provided in this section for nondelivery or breach shall lie and be enforceable against such landowner, landlord, or lessor in any such action upon a marketing contract.

**Source:** L. 96: Entire article R&RE, p. 510, § 1, effective July 1.

**Editor's note:** This section is similar to former § 7-56-120 as it existed prior to 1996.



## ANNOTATION

- I. General Consideration.
- II. Liquidated Damages.
- III. Injunctions and Specific Performance.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "One Year Review of Cases on Contracts", see 33 Dicta 57 (1956).

**Annotator's note:** Since § 7-56-503 is similar to § 7-56-120 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

## II. LIQUIDATED DAMAGES.

This section provides that the bylaws or the marketing contract may fix as liquidated damages for the breach of marketing contracts specific sums to be paid by the members or stockholders to the association upon the breach of any of the provisions of the marketing contract regarding the sale, delivery, or withholding of products. *Marvin v. Pueblo Dairymen's Coop.*, 131 Colo. 601, 284 P.2d 238 (1955).

And the term "liquidated damages" indicates the amount which the contracting parties agree to be in satisfaction on account of the

breach, with the amount thus agreed upon being enforceable. *Marvin v. Pueblo Dairymen's Coop., Inc.*, 131 Colo. 601, 284 P.2d 238 (1955).

Thus, since the payment or collection of the amount of liquidated damages specified puts an end to all claims in connection therewith, the matter of the right to a restraining order or injunction would depend entirely upon the conditions of the marketing agreement. *Marvin v. Pueblo Dairymen's Coop.*, 131 Colo. 601, 284 P.2d 238 (1955).

## III. INJUNCTIONS AND SPECIFIC PERFORMANCE.

**Contract not invalid for permitting injunction or specific performance.** A marketing contract drawn under the provisions of this article is not invalid because it permits an injunction or specific performance for the enforcement of its terms. *Rifle Potato Growers' Coop. Ass'n v. Smith*, 78 Colo. 171, 240 P. 937 (1925).

If there is a conspiracy between a party to a marketing association contract and another to escape the obligations of the contract, then an injunction is properly granted against both of them. *Monte Vista Potato Growers' Coop. Ass'n v. Bond*, 80 Colo. 516, 252 P. 813 (1927).

**7-56-504. Inducing breach of marketing or purchasing contract.** Any person who knowingly induces any member of an agricultural cooperative formed under this article, or under similar statutes of another jurisdiction with similar restrictions and rights and operating in this state, to break the member's marketing or purchasing contract or agreement with the cooperative shall be subject to all available civil remedies, including but not limited to injunctive relief.

**Source:** L. 96: Entire article R&RE, p. 511, § 1, effective July 1. L. 2003: Entire section amended, p. 2228, § 89, effective July 1, 2004. L. 2004: Entire section amended, p. 1414, § 51, effective July 1.

**Editor's note:** This section is similar to former § 7-56-128 as it existed prior to 1996.

## ANNOTATION

**Annotator's note:** Since § 7-56-504 is similar to § 7-56-128 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**The intent to protect cooperative marketing associations against unlawful interference is clear,** and this section is intended to cover just such situations. *Rinnander v. Denver Milk Producers*, 114 Colo. 506, 116 P.2d 984 (1946).

**For one who carries on a lawful business has a property right therein and is entitled to protection** against unlawful interference with that right. *Fort v. Coop. Farmers' Exch.*, 81 Colo. 431, 256 P. 319 (1927).

**The provision as to liability in a civil suit in a penal sum is deemed a civil statute.** *Rinnander v. Denver Milk Producers*, 114 Colo. 506, 166 P.2d 984 (1946).

**And thus this provision is not to be strictly construed.** *Rinnander v. Denver Milk Producers*, 114 Colo. 506, 166 P.2d 984 (1946).

**Such interference is actionable civilly.** The general assembly has power to make solicitation from, and interference with, members of a cooperative marketing association by another actionable civilly. *Fort v. Coop. Farmers' Exch.*, 81 Colo. 431, 256 P. 319 (1927).

**And may be restrained by court order.** Knowingly to induce or to attempt to induce a

member of a cooperative marketing association to break his marketing contract with the association is a misdemeanor, and being an unlawful interference such act may be restrained by order of court. *Fort v. People ex rel. Coop. Farmers' Exch.*, 81 Colo. 420, 256 P. 325 (1927); *Fort v. Coop. Farmers' Exch.*, 81 Colo. 431, 256 P. 319 (1927).

**Where facts reveal that one "knowingly" induces an association member to breach his contract,** the association is entitled to recover.

*Rinnander v. Denver Milk Producers*, 114 Colo. 506, 166 P.2d 984 (1946).

**Furthermore, one may not escape liability on ground he is not an association member.** One may not knowingly and designedly join in an attempt to breach a marketing contract and escape liability on the grounds that he is not a member of the association and not a party to the contract. *Monte Vista Potato Growers' Coop. Ass'n v. Bond*, 80 Colo. 516, 252 P. 813 (1927).

**7-56-505. Purchases of property or other interests.** If a cooperative with preferred stock or preferred equity purchases or otherwise acquires any interest in any property, stock, or interest in another entity, it may, with the consent of the person or persons from whom the property or interests are being acquired, discharge the obligations incurred in the purchase or other acquisition, wholly or in part, by exchanging for the acquired property, stock, or interest shares or amounts of its preferred stock or preferred equity in an amount that, at par or stated value, would equal the value of the property, stock, or interest so purchased, as determined by the board. A transfer to the cooperative of the property, stock, or interest purchased or otherwise acquired shall be equivalent to payment in cash for the shares or amounts of preferred stock or preferred equity issued by the cooperative.

**Source:** L. 96: Entire article R&RE, p. 511, § 1, effective July 1.

**7-56-506. Warehouse receipts - interest in warehouse entities.** If a cooperative formed under or that has elected to be subject to this article organizes, forms, operates, owns, controls, has an interest in, owns stock of, or is a member of any commodities warehouse, the warehouse may issue legal warehouse receipts to the cooperative against the commodities delivered by it or to any other person, and any legal warehouse receipt shall be considered as adequate collateral to the extent of the usual and current value of the commodity represented by the receipt. If the warehouse is licensed or licensed and bonded under the law of this state, any other state, or the United States, its warehouse receipt delivered to the cooperative on commodities of the cooperative or its members or delivered by the cooperative or its members shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the cooperative.

**Source:** L. 96: Entire article R&RE, p. 511, § 1, effective July 1. L. 2003: Entire section amended, p. 2228, § 90, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-56-125 as existed prior to 1996.

**Cross references:** For other duties and liabilities of warehouses, see article 16 of title 12 and article 7 of title 4.

**7-56-507. Application of other laws.** (1) If a matter is not addressed in this article, the "Colorado Business Corporation Act", articles 101 to 117 of this title, shall apply to the cooperatives formed under or subject to this article; except that a cooperative may elect to have the provisions of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title, apply to it if such cooperative does so in its articles or by a resolution of its members that is delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title that states that the cooperative elects to have the provisions of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title, apply to it. A cooperative may revoke such election by amending its articles or by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of change that states that the cooperative revokes its election to have the provisions of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title, apply to it and that the revocation of such election has been approved by resolution of its members.



(2) Any exemptions under any existing law applying to goods or agricultural products in the possession or under the control of an individual producer shall apply similarly and completely to such goods or products when delivered by its members to, and in the possession or under the control of, the cooperative.

**Source:** L. 96: Entire article R&RE, p. 511, § 1, effective July 1. L. 97: (1) amended, p. 760, § 22, effective July 1, 1998. L. 2002: (1) amended, p. 1818, § 24, effective July 1; (1) amended, p. 1682, § 22, effective October 1. L. 2003: Entire section amended, p. 2228, § 91, effective July 1, 2004.

**Editor's note:** This section is similar to former §§ 7-55-116 and 7-56-130 as they existed prior to 1996.

**7-56-508. Cooperatives not in restraint of trade.** No cooperative formed under or subject to this article shall solely by its organization and existence be deemed to be a conspiracy or a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or to fix prices arbitrarily, nor shall the marketing or purchasing contracts and agreements between any cooperative and its members or any agreements authorized in this article be considered illegal as such, in unlawful restraint of trade, or as part of a conspiracy or combination to accomplish an improper or illegal purpose.

**Source:** L. 96: Entire article R&RE, p. 512, § 1, effective July 1. L. 2003: Entire section amended, p. 2229, § 92, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-56-129 as it existed prior to 1996.

#### ANNOTATION

**Annotator's note:** Since § 7-56-508 is similar to § 7-56-129 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**This section exempts cooperative marketing associations** from the penalties and restrictions of the state's anti-trust law. *Rifle Potato Growers' Coop. Ass'n v. Smith*, 78 Colo. 171,

240 P. 937 (1925); *Beatrice Creamery Co. v. Cline*, 9 F.2d 176 (D. Colo. 1925).

**And the general assembly does have the power to exempt such combinations** from prosecution and dissolution as unlawful trusts. *Rifle Potato Growers' Coop. Ass'n v. Smith*, 78 Colo. 171, 240 P. 937 (1925); *Beatrice Creamery Co. v. Cline*, 9 F.2d 176 (D. Colo. 1925).

**7-56-509. Exemption from securities laws.** Any security, patronage refund, per unit retain certificate, capital credit, evidence of membership, preferred equity certificate, or other equity instrument issued, sold, or reported by a cooperative as an investment in its stock or capital to the patrons of a cooperative formed under or subject to this article or a similar law of any other jurisdiction and authorized to transact business or conduct activities in this state is exempt from the securities laws contained in the "Colorado Securities Act", article 51 of title 11, C.R.S. Such securities, patronage refunds, per unit retain certificates, capital credits, or evidences of membership, preferred equity certificates or other equity instruments may be issued, sold, or reported lawfully by the issuer or its directors, officers, members, or salaried employees without the necessity of the issuer or its directors, officers, members, or employees being registered as brokers or dealers under the "Colorado Securities Act", article 51 of title 11, C.R.S.

**Source:** L. 96: Entire article R&RE, p. 512, § 1, effective July 1. L. 2003: Entire section amended, p. 2229, § 93, effective July 1, 2004.

**Editor's note:** This section is similar to former § 7-55-115 as it existed in 1996.

**7-56-510. Renewable energy cooperatives - powers.** (1) In addition to the powers granted in this article, renewable energy cooperatives may generate electricity from

renewable resources or technologies and transmit and sell electricity at wholesale.

(2) No renewable energy cooperative shall sell electricity at retail or have a certificated territory in the state except as allowed for its own service or pursuant to public utility law or other legal authority.

**Source: L. 2004:** Entire section added, p. 1122, § 2, effective May 27.

## PART 6

### PROPERTY ENCUMBRANCES, BUSINESS COMBINATIONS, AND PROPERTY SALES

**7-56-601. Encumbering property.** The board of a cooperative has full power and authority, without approval of its members, to mortgage, pledge, encumber, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of the cooperative's property, whether or not in the usual and regular course of business, and to execute and deliver mortgages, deeds of trust, security agreements, or other instruments for such purposes.

**Source: L. 96:** Entire article R&RE, p. 512, § 1, effective July 1.

**7-56-602. Merger, conversion, or consolidation or share or equity capital exchange.** (1) One or more cooperatives formed under or that have elected to be subject to this article may be merged, consolidated, or shares or equity capital exchanged with another domestic cooperative or another domestic entity, or may convert to any form of entity permitted by section 7-90-201, upon such terms, for such purpose, and by such domestic entity name as may be agreed upon, which domestic entity name shall comply with part 6 of article 90 of this title.

(2) (a) With respect to a cooperative that is a party to a plan of merger, conversion, consolidation, or share or equity capital exchange, unless a different vote is required by the articles or bylaws, the plan shall be approved by a two-thirds majority of all the members of the board of the cooperative and by a two-thirds majority of the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1). If a higher or lower percentage vote of members is required by the articles or bylaws for approval, not less than a majority of those present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1) nor more than a two-thirds majority of all voting members of the cooperative shall be required.

(b) A cooperative shall not permit proportional voting to apply to a vote of members on a plan of merger, conversion, consolidation, or share or equity capital exchange pursuant to this section.

(c) If voting by mail is permitted, the notice of the meeting shall be mailed to each member and have a mail ballot attached to it.

(d) A cooperative may establish different requirements for plans between or among two or more cooperatives and for plans where a noncooperative entity is a party to the plan.

(e) The vote required for approval of a plan by an entity that is a party to the plan and that is not a cooperative entity shall be governed by the law applicable to the noncooperative entity.

(3) If a party to the merger, conversion, consolidation, or share or equity capital exchange is the owner of real property in the state of Colorado and the merger, conversion, consolidation, or share or equity capital exchange would affect the title to the real property, a copy of a statement of merger, conversion, consolidation, or share or equity capital exchange, certified by the secretary of state, shall be filed for record in the office of the county clerk and recorder in the county or counties in which the real property is situated.

**Source: L. 96:** Entire article R&RE, p. 512, § 1, effective July 1. **L. 2002:** (3) amended, p. 1818, § 25, effective July 1; (3) amended, p. 1682, § 23, effective October 1.



**L. 2003:** (1) and (2)(e) amended, p. 2229, § 94, effective July 1, 2004. **L. 2004:** (3) amended, p. 1414, § 52, effective July 1. **L. 2006:** (3) amended, p. 848, § 2, effective July 1. **L. 2007:** (1), (2)(a), (2)(b), and (3) amended, p. 219, § 3, effective May 29.

**Editor's note:** This section is similar to former §§ 7-55-112, 7-56-108, 7-56-121, and 7-56-126 as they existed prior to 1996.

**7-56-603. Procedure for consolidation, share or equity capital exchange, conversion, and merger.** (1) A plan for consolidation or share or equity capital exchange shall state the following:

(a) The entity name of each entity planning to consolidate or exchange shares or equity capital and the principal office address of its principal office;

(b) The entity name of the surviving entity, or of the acquiring entity, and the principal office address of its principal office;

(c) A statement that the consolidating entities are consolidated with the surviving entity, or that the acquiring entity is acquiring shares or equity capital of the other entities, and the section of this article pursuant to which the consolidation or share exchange is effected;

(d) Any amendments to the articles of the surviving party to be effected by the consolidation or share or equity capital exchange; and

(e) With respect to agricultural and other cooperatives exempted from the operation of laws such as the federal and state securities or antitrust laws, any steps necessary to maintain such exemption if the cooperative wishes to maintain such status.

(2) The plan of consolidation or share or equity capital exchange may state any other provisions relating to the consolidation or share or equity capital exchange.

(2.3) A plan of conversion shall comply with section 7-90-201.3.

(2.7) A plan of merger shall comply with section 7-90-203.3.

(3) Nothing in this section shall be deemed to limit the power of a cooperative or other entity to acquire all or part of the shares or equity capital of another cooperative through a voluntary exchange or through an agreement with the members of such other cooperative.

**Source:** **L. 96:** Entire article R&RE, p. 513, § 1, effective July 1. **L. 2003:** IP(1), (1)(a) to (1)(d), and (2) amended, p. 2230, § 95, effective July 1, 2004. **L. 2004:** (1)(d) RC&RE, p. 1415, § 53, effective July 1. **L. 2007:** IP(1), (1)(a), (1)(c), (1)(d), and (2) amended and (2.3) and (2.7) added, p. 220, § 4, effective May 29.

**Editor's note:** This section is similar to former §§ 7-55-112, 7-56-108, 7-56-121, and 7-56-126 as they existed prior to 1996.

**7-56-604. Merger of parent and subsidiary.** (1) Notwithstanding the provisions of sections 7-56-602 and 7-56-603, by complying with the provisions of this section, any parent cooperative owning one hundred percent of the voting shares, memberships, or interests and having a right to vote of a subsidiary may either merge such subsidiary into itself or merge itself into such subsidiary.

(2) The boards of the parent cooperative and of the subsidiary shall adopt by resolution, and the members of both the parent cooperative and the subsidiary shall approve, a plan of merger that states the following:

(a) The entity names of the parent cooperative and subsidiary and the entity name of the surviving party;

(b) The terms and conditions of the proposed merger;

(c) The manner and basis of converting the shares of the parent cooperative and subsidiary into shares, obligations, or other securities of the surviving party or any other cooperative into money or other property in whole or part;

(d) Any amendments to the articles of the surviving party to be effected by the merger; and

(e) Any other provisions relating to the merger as are deemed necessary or desirable.

(3) The members of the parent cooperative shall not be required to vote on the merger unless the articles, bylaws, or the board requires otherwise; except that if, as a result of the

merger, the voting shares, memberships, or other interests of members of the parent cooperative would be materially altered, then the members of the parent cooperative shall have the right to vote on the plan of merger. If the members of the parent cooperative have the right to vote on the plan of merger, the parent cooperative shall mail a copy or summary of the plan of merger to each member of the parent cooperative who has the right to vote on the plan and all parties to the merger. Notice and meeting requirements as provided for in this article shall apply.

(4) If the members of the parent cooperative have the right to vote on the plan of merger, unless the articles, bylaws, or the board requires a greater or lesser vote, the plan of merger, consolidation, or share or equity capital exchange shall be approved by a majority of the members of the parent cooperative present and voting on the plan in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1). Upon approval of a plan of merger pursuant to this section, a statement of merger shall be delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title, and a copy of the statement of merger, certified by the secretary of state, shall be filed for record in each of the counties, if any, in which such filing is required by section 7-56-602 (3).

(5) (Deleted by amendment, L. 98, p. 612, § 6, effective July 1, 1998.)

**Source:** L. 96: Entire article R&RE, p. 514, § 1, effective July 1. L. 98: IP(2), (3), (4), and (5) amended, p. 612, § 6, effective July 1. L. 2002: (4) amended, p. 1818, § 26, effective July 1; (4) amended, p. 1682, § 24, effective October 1. L. 2003: IP(2) and (2)(a) amended, p. 2230, § 96, effective July 1, 2004. L. 2004: (2)(a) amended, p. 1415, § 54, effective July 1. L. 2006: (4) amended, p. 849, § 3, effective July 1.

**Editor's note:** This section is similar to former §§ 7-55-112, 7-56-108, 7-56-121, and 7-56-126 as they existed prior to 1996.

**7-56-604.5. Statement of merger or conversion.** (1) After a plan of merger is approved, the surviving entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of merger pursuant to section 7-90-203.7. If the plan of merger provides for amendments to the articles of incorporation of the surviving entity, the surviving entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment effecting the amendments.

(2) After a plan of conversion is approved, the converting entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of conversion pursuant to section 7-90-201.7.

**Source:** L. 2004: Entire section added, p. 1415, § 55, effective July 1. L. 2007: Entire section amended, p. 220, § 5, effective May 29.

**7-56-605. Statement of consolidation or share or equity capital exchange.**

(1) (Deleted by amendment, L. 2004, p. 1415, § 56, effective July 1, 2004.)

(2) After a plan of consolidation or share or equity capital exchange is approved by all necessary action of all parties, the acquiring entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of consolidation or a statement of share exchange stating:

(a) The entity name of each entity that is a party to the consolidation or the shares of which will be acquired and the principal office address of its principal office;

(b) The entity name of the consolidated or acquiring entity and the principal office address of its principal office; and

(c) The effective date of the consolidation or share or equity capital exchange.

(c.5) and (d) (Deleted by amendment, L. 2004, p. 1415, § 56, effective July 1, 2004.)

(3) The consolidation or share or equity capital exchange shall be effective as provided in section 7-90-304.

**Source:** L. 96: Entire article R&RE, p. 515, § 1, effective July 1. L. 2002: (1), IP(2), and (3) amended, p. 1818, § 27, effective July 1; (1), IP(2), and (3) amended, p. 1683, § 25,



effective October 1. **L. 2003:** IP(2), (2)(c), and (2)(d) amended and (2)(c.5) added, p. 2230, § 97, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1415, § 56, effective July 1.

**Editor's note:** This section is similar to former §§ 7-55-112, 7-56-108, 7-56-121, and 7-56-126 as they existed prior to 1996.

**7-56-606. Effect of merger, conversion, consolidation, or share or equity capital exchange.** (1) The effect of a merger is determined by section 7-90-204.

(2) The effect of a conversion is determined by section 7-90-202.

(3) When a consolidation takes effect:

(a) Each nonsurviving party to the consolidation consolidates into the surviving party, and the separate existence of every party to the consolidation except the surviving party ceases;

(b) The title to all real estate and other property owned by each nonsurviving party is transferred to and vested in the surviving party without reversion or impairment. Such transfer to and vesting in the surviving party shall be deemed to occur by operation of law, and no consent or approval of any other person shall be required in connection with any such transfer or vesting unless such consent or approval is specifically required in the event of consolidation by law or by express provision in any contract, agreement, decree, order, or other instrument to which any of the parties so consolidated is a party or by which it is bound.

(c) The surviving party has all liabilities of each party to the consolidation;

(d) A proceeding pending against any party to the consolidation may be continued as if the consolidation did not occur or the surviving party may be substituted in the proceeding for the party whose existence ceased;

(e) The articles of the surviving party are amended to the extent provided in the plan of consolidation; and

(f) The shares of each such party to the consolidation that are to be converted into shares, obligations, or other securities of the surviving or any other party or into money or other property are converted, and the former holders of the shares or equity capital are entitled only to the rights provided in the statement of consolidation.

(4) When a share or equity capital exchange takes effect, the shares or equity capital of each acquired party are exchanged as provided in the plan, and the former holders of the shares or equity capital are entitled only to the exchange rights provided in the articles of share or equity capital exchange.

**Source:** **L. 96:** Entire article R&RE, p. 515, § 1, effective July 1. **L. 2004:** (1) amended, p. 1416, § 57, effective July 1. **L. 2007:** Entire section amended, p. 220, § 6, effective May 29.

**Editor's note:** This section is similar to former §§ 7-55-112, 7-56-108, 7-56-121, and 7-56-126 as they existed prior to 1996.

**7-56-606.5. Merger with foreign entity.** (1) One or more domestic cooperatives may merge with one or more foreign entities if:

(a) The merger is permitted by section 7-90-203 (2);

(b) The foreign entity complies with section 7-90-203.7 if it is the surviving entity of the merger; and

(c) Each domestic cooperative complies with the applicable provisions of sections 7-56-602 and 7-56-603 and, if it is the surviving cooperative of the merger, with section 7-56-604.5.

(2) Upon the merger taking effect, the surviving foreign entity of a merger shall comply with section 7-90-204.5.

**Source:** **L. 2007:** Entire section added, p. 222, § 7, effective May 29.

**7-56-607. Consolidation or share or equity capital exchange with foreign business.**

(1) One or more domestic cooperatives may consolidate or enter into a share or equity capital exchange with one or more foreign entities if:

(a) In a consolidation, the consolidation is permitted by the law of the jurisdiction under which each foreign entity is formed and each foreign entity complies with that law in effecting the consolidation;

(b) In a share or equity capital exchange, the cooperative whose shares or equity will be acquired is a domestic or foreign cooperative, and if a share or equity capital exchange is permitted by the law of the jurisdiction under the law of which the acquiring entity is formed;

(c) The foreign entity complies with the provisions of section 7-56-605 if it is the surviving or new entity in a consolidation or acquiring entity in a share or equity capital exchange; and

(d) The foreign entity is the surviving entity in the consolidation or the acquiring entity of the share or equity capital exchange and it complies with section 7-56-605.

(1.5) (Deleted by amendment, L. 2007, p. 222, § 8, effective May 29, 2007.)

(2) Upon the consolidation or share or equity capital exchange taking effect, the surviving foreign entity of a consolidation and the acquiring foreign entity of a share or equity capital exchange:

(a) Shall either:

(I) Appoint a registered agent if the foreign entity has no registered agent and maintain a registered agent pursuant to part 7 of article 90 of this title, whether or not the foreign entity is otherwise subject to that part, to accept service in any proceeding based on a cause of action arising with respect to any domestic entity that is merged into the foreign entity or the ownership interests of which are acquired in a share or equity capital exchange; or

(II) Be deemed to have authorized service of process on it in connection with any such proceeding by mailing in accordance with section 7-90-704 (2); and

(b) Shall comply with part 8 of article 90 of this title if it is to transact business or conduct activities in this state.

(3) (Deleted by amendment, L. 2004, p. 1417, § 58, effective July 1, 2004.)

(4) Subsection (2) of this section does not prescribe the only means, or necessarily the required means, of serving a surviving foreign entity in a consolidation or an acquiring foreign entity in a share or equity capital exchange.

(5) This section does not limit the power of a foreign entity to acquire all or part of the shares of one or more classes or series of a domestic cooperative through a voluntary exchange of shares or otherwise.

**Source:** L. 96: Entire article R&RE, p. 516, § 1, effective July 1. L. 2002: (2)(a)(II) amended, p. 1819, § 28, effective July 1; (2)(a)(II) amended, p. 1683, sect. 26, effective October 1. L. 2003: (1)(a), (1)(b), and (2) amended, p. 2231, § 98, effective July 1, 2004. L. 2004: (1)(c), (1)(d), IP(2), (2)(a)(II), (3), and (4) amended and (1.5) added, p. 1417, § 58, effective July 1. L. 2006: (1)(d) amended, p. 1488, § 4, effective June 1. L. 2007: (1), (1.5), and (2)(a)(I) amended, p. 222, § 8, effective May 29.

**Editor's note:** This section is similar to former §§ 7-55-112, 7-56-108, 7-56-121, and 7-56-126 as they existed prior to 1996.

**7-56-608. Dissenters' rights - definitions.** (1) As used in this section:

(a) "Dissenter" means a member eligible to vote who exercises the right to dissent provided in this section at the time and in the manner required by this section.

(b) "Interest" means interest required to be paid pursuant to this section at the average rate currently paid by the cooperative subject to this section on its principal bank loans or, if none, at the legal rate specified in section 5-12-101, C.R.S.

(c) "Stated value" means the original cost paid by a person for capital stock or membership fees, as recorded in the records of the cooperative, in order to qualify for membership and the right to vote in the cooperative, and for other equity capital the amount



stated in the records of the cooperative that is required to make a payment under this section.

(2) If the board of a cooperative subject to this article submits to the members of the cooperative for approval a plan of merger, conversion, consolidation, or share or equity capital exchange and if following the merger, conversion, consolidation, or share or equity capital exchange there will be members of any cooperative involved in the proposed transaction who would no longer be eligible for membership or other voting interest in the surviving or resulting entity, the ineligible members shall be entitled to repayment of their equity interests in the cooperative in accordance with this section.

(3) If the board of a cooperative subject to this article submits to the members of the cooperative for approval a plan to sell all or substantially all of the cooperative's assets and not dissolve following the sale, the members of the cooperative shall be entitled to repayment of their equity interests in the cooperative in accordance with this section.

(4) A cooperative that proposes to be a party to a merger, conversion, consolidation, share or equity capital exchange, or a sale of assets, as described in subsection (2) or (3) of this section, shall include in the notice of the membership meeting at which the vote of the members is taken thereon an explanation of the right to dissent and the requirement to give written notice of intent to demand payment by a member having the right to do so under this section.

(5) A member who may be entitled to repayment of the member's equity interests in the cooperative in accordance with this section shall give written notice of the member's intention to demand payment before the vote is taken at the membership meeting at which a vote on the proposed merger, conversion, consolidation, share or equity capital exchange, or sale of assets is to be taken. Upon giving notice, the member shall no longer be entitled to vote on the proposed transaction. The written notice shall include the name of the member in which the stock or membership is held on the records of the cooperative and the member's address and social security or federal tax identification number. Failure to give written notice of intention to demand payment in the prescribed manner disqualifies the member from demanding payment under this section.

(6) If the merger, conversion, consolidation, share or equity capital exchange, or sale of assets described in subsection (2) or (3) of this section is approved by the members of the cooperative in the manner applicable to any other entity that is a party to the transaction, the surviving, resulting, or new entity, including a cooperative that is to sell all or substantially all of its assets, shall be required to make the payments provided in this section. The surviving, resulting, or new entity shall give written notice to all dissenters who have given notice to dissent pursuant to this section. The notice shall include the address at which the surviving, resulting, or new entity will receive payment demands, the requirement to submit stock or membership certificates or certification of the loss or destruction thereof, the period in which demands will be received which shall be not less than thirty days from the date of the notice, and where applicable, a statement of qualifications for membership or other voting interest in the surviving or new entity.

(7) Within the period stated in the notice described in subsection (6) of this section, a dissenter may deliver a written demand for payment to the surviving, resulting, or new entity, or in the case of a sale of assets subject to this section, to the cooperative selling its assets, stating the address to which payment is to be made and, where applicable, a statement as to the reasons why the dissenter no longer qualifies for membership or a voting interest in the surviving, resulting, or new entity.

(8) Within thirty days after receipt of a demand for payment, the surviving, resulting, or new entity or, in the case of a sale of assets subject to this section, the cooperative selling its assets shall pay to the dissenter:

(a) The stated value of the initial investment of the dissenter in stock or membership fees in the cooperative as recorded in the records of the cooperative made to qualify the dissenter to be a member of the cooperative; and

(b) The stated value of all other equity capital of the dissenter in the cooperative as recorded in the records of the surviving, resulting, or new entity, or in the case of a sale of assets subject to this section, of the cooperative selling its assets; except that, in the case of any merger, conversion, consolidation, or share or equity capital exchange, if the surviving,

resulting, or new entity has, by written agreement or operation of law other than this section, become liable to repay the other equity capital of the dissenter, the repayment of other equity capital shall be made by the surviving, resulting, or new entity under the same conditions and time frame, but not more than fifteen years, that would have applied if the member or equity holder had withdrawn or been terminated from the cooperative that is not the surviving, resulting, or new entity immediately prior to the effective date of the merger, conversion, consolidation, or share or equity capital exchange. If payment is not made on the date required by this subsection (8), the recipient shall be entitled to interest from the date the payment should have been made until the date payment is actually made.

(9) Notwithstanding any provisions of law to the contrary, holders of equity capital who are not members of the cooperative shall under no circumstances be entitled to dissenter's rights.

(10) Section 7-90-206 (2) applies to a conversion in which the cooperative is the converting entity.

**Source:** L. 96: Entire article R&RE, p. 517, § 1, effective July 1. L. 2003: (7) amended, p. 2232, § 99, effective July 1, 2004. L. 2006: (10) added, p. 849, § 4, effective July 1. L. 2007: (2), (4), (5), (6), (7), IP(8), and (8)(b) amended, p. 223, § 9, effective May 29.

**Editor's note:** This section is similar to former §§ 7-55-112, 7-56-108, 7-56-121, and 7-56-126 as they existed prior to 1996.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

**7-56-609. Sale or other disposition of property without member approval.** (1) A cooperative may, on the terms and conditions and for the consideration determined by the board:

(a) Sell, lease, exchange, or otherwise dispose of any of its property in the usual and regular course of business; except that a sale, lease, exchange, or other disposition of all, or substantially all, of its property shall never be considered to be in the usual and regular course of business;

(b) Transfer to itself any or all of the property of a domestic or foreign entity when all the voting rights of the transferor are owned, directly or indirectly, by the transferee cooperative.

(2) Unless otherwise provided in the articles or bylaws, approval by the members of a transaction described in subsection (1) of this section is not required.

**Source:** L. 96: Entire article R&RE, p. 520, § 1, effective July 1.

**7-56-610. Sale or other disposition of property requiring member approval.** (1) A cooperative may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, with or without its good will, only on the terms and conditions and for the consideration determined by the board and if the board proposes or submits and the members approve the transaction. A sale, lease, exchange, or other disposition of all, or substantially all, of the property of a cooperative, with or without its good will, in connection with its dissolution, other than pursuant to a court order, shall be subject to the requirements of this section; but a sale, lease, exchange, or other disposition of all, or substantially all, of the property of a cooperative, with or without its good will, pursuant to a court order shall not be subject to the requirements of this section. If a resolution to dissolve the cooperative that is adopted by the members of a cooperative pursuant to section 7-56-702 contemplates the sale of all or substantially all of the cooperative's property in connection with the dissolution, the adoption of that resolution by the members shall also be an authorization to sell all or substantially all of the cooperative's property pursuant to this section.

(2) If a cooperative is entitled to vote or otherwise consent, other than in the usual and regular course of its business, with respect to the sale, lease, exchange, or other disposition



of all, or substantially all, of its property with or without the good will of another entity that it controls, and if the shares or other interests held by the cooperative in such other entity constitute all, or substantially all, of the property of the cooperative, then the cooperative shall consent to such transaction only if its board proposes and its members approve the giving of consent.

(3) For a transaction described in subsection (1) of this section or a consent described in subsection (2) of this section to be approved by the members:

(a) The board, by a two-thirds majority vote of all its members, shall recommend the transaction or the consent to the members unless the board determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the members with the submission of the transaction or the consent; and

(b) The members entitled to vote on the transaction or the consent shall approve the transaction or the consent as provided in subsection (6) of this section.

(4) The board may condition the effectiveness of the transaction or the consent on any basis.

(5) The cooperative shall give proper notice to each member entitled to vote on the transaction described in subsection (1) of this section or the consent described in subsection (2) of this section of the members' meeting at which the transaction or the consent will be voted upon. The notice shall:

(a) State that the purpose, or one of the purposes, of the meeting is to consider:

(I) In the case of action pursuant to subsection (1) of this section, the sale, lease, exchange, or other disposition of all, or substantially all, of the property of the cooperative; or

(II) In the case of action pursuant to subsection (2) of this section, the cooperative's consent to the sale, lease, exchange, or other disposition of all, or substantially all, of the property of another entity, which entity shall be identified in the notice, shares or other interests of which are held by the cooperative and constitute all, or substantially all, of the property of the cooperative; and

(b) Contain or be accompanied by a description of the transaction, in the case of action pursuant to subsection (1) of this section, or by a description of the transaction underlying the consent, in the case of action pursuant to subsection (2) of this section.

(6) Member approval of a transaction or consent described in subsections (1) and (2) of this section shall require an affirmative vote of two-thirds majority of the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1); but the two-thirds voting requirement may be reduced to not less than a majority of the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1), or may be increased to up to two-thirds of all members entitled to vote, by a provision contained in the articles or bylaws of the cooperative. The cooperative may also provide in its articles or bylaws for different voting requirements with respect to a transaction between one or more cooperatives subject to this article or similar law of other states and between the cooperative and one or more entities formed under or subject to different law of this or other states. A cooperative may not permit proportional voting to apply to a vote of members with respect to the sale of all or substantially all of the property of the cooperative pursuant to this section.

(7) After a transaction described in subsection (1) of this section or a consent described in subsection (2) of this section is authorized, the transaction may be abandoned or the consent withheld or revoked, subject to any contractual rights or other limitations on such abandonment, withholding, or revocation, by a unanimous vote of the board or the vote of two-thirds of all the members.

(8) If the members do not approve of a transaction or consent as described in subsections (1) and (2) of this section, the board may prohibit the consideration and submittal of a similar proposal to the members for a period of two years following the members' vote.

**Source:** L. 96: Entire article R&RE, p. 520, § 1, effective July 1. L. 2003: (6) amended, p. 2232, § 100, effective July 1, 2004.

## PART 7

## DISSOLUTION

## SUBPART 1

## VOLUNTARY DISSOLUTION

**7-56-701. Authorization of dissolution before issuance of memberships.** If a cooperative has not yet issued memberships, a majority of its directors or, if the initial directors designated in the articles have not met or if not designated in the articles have not been elected, a majority of its incorporators, may authorize the dissolution of the cooperative.

**Source: L. 96:** Entire article R&RE, p. 522, § 1, effective July 1.

**Editor's note:** This section is similar to former § 7-55-114 as it existed prior to 1996.

**7-56-702. Authorization of dissolution after issuance of memberships.** (1) After memberships have been issued, dissolution of a cooperative may be authorized in the following manner:

(a) The board, by a two-thirds majority vote of all its members, shall first adopt a resolution recommending dissolution that conforms to the requirements of paragraph (c) of this subsection (1);

(b) The board shall submit the resolution adopted pursuant to paragraph (a) of this subsection (1) to the members;

(c) The resolution adopted pursuant to paragraph (a) of this subsection (1) shall state the reasons why the termination of the affairs of the cooperative is deemed advisable, the time by which it should be accomplished, whether or not the board may revoke dissolution, and the names of three persons and two alternates to act as trustees in liquidation who shall have all the powers of the board to do all things they deem necessary for the efficient distribution of claims to creditors, in liquidation and termination of the affairs of the cooperative, including the sale of all or substantially all of the cooperative's property as they deem necessary if the resolution also provides for a sale of the property. Such trustees and alternates need not be members of the cooperative. Any vacancies in the trusteeship shall be first filled by the designated alternates and then may be filled by such persons as may be designated by the remaining trustees.

(2) The board may condition the effectiveness of the dissolution on any basis.

(3) The cooperative shall give notice to each member of the regular or special meeting at which the resolution to dissolve will be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposal to dissolve the cooperative. The notice shall contain or be accompanied by a copy of the proposal or a summary thereof, including a description of the proposed distribution of the cooperative's assets and, if voting by mail is permitted, with a mail ballot attached to it.

(4) The proposal to dissolve shall be approved by a two-thirds majority vote of the members present and voting in person or in any other manner authorized by the cooperative pursuant to section 7-56-305 (1) at a regular or special meeting called for such purpose. A cooperative shall not permit proportional voting to apply to a vote of members on a resolution to dissolve pursuant to this section.

**Source: L. 96:** Entire article R&RE, p. 522, § 1, effective July 1. **L. 98:** (1)(a) amended, p. 613, § 7, effective July 1. **L. 2007:** (3) amended, p. 224, § 10, effective May 29.

**Editor's note:** This section is similar to former § 7-55-114 as it existed prior to 1996.

**7-56-703. Articles of dissolution.** (1) At any time after dissolution is authorized, the cooperative may dissolve by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of dissolution stating:



- (a) The domestic entity name of the cooperative;
- (b) The principal office address of the cooperative's principal office; and
- (c) That the cooperative is dissolved.
- (d) to (f) (Deleted by amendment, L. 2004, p. 1418, § 59, effective July 1, 2004.)
- (2) A cooperative is dissolved upon the effective date of its filed articles of dissolution.
- (3) (Deleted by amendment, L. 2003, p. 2232, § 101, effective July 1, 2004.)

**Source:** L. 96: Entire article R&RE, p. 523, § 1, effective July 1. L. 2002: IP(1) amended, p. 1819, § 29, effective July 1; IP(1) amended, p. 1683, § 27, effective October 1. L. 2003: IP(1), (1)(a), (1)(b), and (3) amended, p. 2232, § 101, effective July 1, 2004. L. 2004: (1) amended, p. 1418, § 59, effective July 1.

**Editor's note:** This section is similar to former § 7-55-114 as it existed prior to 1996.

#### **7-56-704. Revocation of dissolution. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 524, § 1, effective July 1. L. 2002: IP(3) and (4) amended, p. 1819, § 30, effective July 1; IP(3) and (4) amended, p. 1684, § 28, effective October 1. L. 2003: IP(3), (3)(a), and (4) amended and (5) added, p. 2232, § 102, effective July 1, 2004. L. 2004: Entire section repealed, p. 1418, § 60, effective July 1.

**Editor's note:** This section was similar to former § 7-55-114 as it existed prior to 1996.

**7-56-705. Effect of dissolution.** (1) A dissolved cooperative continues its existence but may not carry on any business except as is appropriate to wind up and liquidate its business and affairs, including:

- (a) Collecting its assets;
  - (b) Disposing of its assets that will not be distributed in kind to its members or equity holders;
  - (c) Discharging or making provision for discharging its liabilities;
  - (d) Distributing its remaining assets among its members or equity holders according to their interests; and
  - (e) Doing every other act necessary to wind up and liquidate its business and affairs.
- (2) Unless otherwise stated in the articles or bylaws, the assets shall be used to pay, in the following order:

- (a) Liquidation expenses, including reasonable payment and reimbursement for the time and expenses of the trustees in liquidation and their consultants;
- (b) All debts and liabilities according to their respective priorities;
- (c) Amounts invested in the cooperative that have a specific preference in liquidation over other amounts invested in the cooperative;
- (d) Without priority and on a pro rata basis, amounts invested in the cooperative, whether as membership fees, common stock, or otherwise, which are required by the cooperative to be invested in order for a person to be a member or to be subject to per unit retains or be entitled to participate in the allocation of net margins on terms and conditions established in the cooperative's bylaws or by the cooperative's board;
- (e) Without priority and on a pro rata basis, retained patronage, per unit retains, other amounts withheld from or allocated to a patron of the cooperative, or any direct contributions to the capital of the cooperative not described in paragraph (d) of this subsection (2), all as shown on the books and records of the cooperative;
- (f) Any remaining assets, including reserves, if any, shall be distributed among such members of the cooperative, as shown in the records of the cooperative, without priority and on a pro rata basis, as shall be practicable as determined by the trustees in liquidation. In making their determination, the trustees in liquidation may limit those persons entitled to share in the distribution to persons entitled to share in the allocation of the cooperative's net margins during a limited specified period of time.

(g) With respect to paragraphs (e) and (f), the amounts to be distributed shall be paid to the persons entitled to them as promptly as reasonably possible after the filing of the articles of dissolution by the secretary of state, but in no event shall the distributions be made later than seven years following the filing of the articles of dissolution by the secretary of state unless distribution is prevented by circumstances beyond the control of the trustees in liquidation.

(3) Dissolution of a cooperative does not:

(a) Transfer title to the cooperative's property;

(b) Prevent transfer of its memberships or securities, although the authorization to dissolve may provide for closing the cooperative's membership, stock, or other equity transfer records;

(c) Subject its directors or officers to standards of conduct different from those otherwise applicable to them prior to dissolution;

(d) Change quorum or voting requirements for its board or members; change provisions for selection, resignation, or removal of its directors or officers, or both; or change provisions for amending its bylaws or its articles;

(e) Prevent commencement of a proceeding by or against the cooperative in its cooperative name; or

(f) Abate or suspend a proceeding pending by or against the cooperative on the effective date of dissolution.

(4) A dissolved cooperative may dispose of claims against it pursuant to sections 7-90-911 and 7-90-912.

**Source:** L. 96: Entire article R&RE, p. 525, § 1, effective July 1. L. 2006: (4) added, p. 849, § 5, effective July 1.

**Editor's note:** This section is similar to former § 7-55-114 as it existed prior to 1996.

#### **7-56-706. Disposition of known claims by notification. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 526, § 1, effective July 1. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**Editor's note:** This section was similar to former § 7-55-114 as it existed prior to 1996.

#### **7-56-707. Disposition of claims by publication. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 527, § 1, effective July 1. L. 2003: (2)(a) amended, p. 2233, § 103, effective July 1, 2004. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**Editor's note:** This section was similar to former § 7-55-114 as it existed prior to 1996.

#### **7-56-708. Enforcement of claims against dissolved cooperative. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 528, § 1, effective July 1. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**Editor's note:** This section was similar to former § 7-55-114 as it existed prior to 1996.

#### **7-56-709. Service on dissolved cooperative - repeal. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 528, § 1, effective July 1. L. 2003: (4) added by revision, pp. 2356, 2357, §§ 347, 348.



**Editor's note:** (1) This section was similar to former § 7-55-114 as it existed prior to 1996.  
(2) Subsection (4) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

## SUBPART 2

### ADMINISTRATIVE DISSOLUTION

#### **7-56-710. Grounds for administrative dissolution. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 529, § 1, effective July 1. L. 2000: (1)(b) amended, p. 951, § 13, effective July 1. L. 2003: (1)(b), (1)(c), and (1)(d) amended, p. 2233, § 104, effective July 1, 2004. L. 2004: (1)(b) amended, p. 1419, § 61, effective July 1. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

#### **7-56-711. Procedure for and effect of administrative dissolution. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 529, § 1, effective July 1. L. 2003: (2) to (5) amended, p. 2233, § 105, effective July 1, 2004. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

#### **7-56-712. Reinstatement following administrative dissolution. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 530, § 1, effective July 1. L. 2000: (1)(c) amended, p. 951, § 14, effective July 1. L. 2002: IP(1), (2), and (3) amended, p. 1819, § 31, effective July 1; IP(1), (2), and (3) amended, p. 1684, § 29, effective October 1. L. 2004: Entire section repealed, p. 1419, § 62, effective July 1.

#### **7-56-713. Appeal from denial of reinstatement. (Repealed)**

**Source:** L. 96: Entire article R&RE, p. 531, § 1, effective July 1. L. 2004: Entire section repealed, p. 1420, § 63, effective July 1.

## SUBPART 3

### JUDICIAL DISSOLUTION

**7-56-714. Grounds for judicial dissolution.** (1) A cooperative may be dissolved in a proceeding brought in court by the attorney general if it is established that:

- (a) The cooperative obtained its organization through fraud; or
  - (b) The cooperative has exceeded or abused the authority conferred upon it by law.
- (2) A cooperative may be dissolved in a proceeding brought in court by not less than ten percent of the total number of members if it is established that:
- (a) The directors are deadlocked in the management of the cooperative's affairs, the members are unable to break the deadlock, and irreparable injury to the cooperative is threatened or suffered, or the business and affairs of the cooperative can no longer be conducted to the advantage of the members generally;
  - (b) The directors or those in control of the cooperative have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent; or
  - (c) The members are deadlocked in voting power and have failed for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors.
- (3) A cooperative may be dissolved in a proceeding brought in court by a creditor if it is established that:
- (a) A creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied, and the cooperative is insolvent; or

(b) The cooperative is insolvent and the cooperative has admitted in writing that a creditor's claim is due and owing.

(4) (a) If a cooperative has been dissolved by voluntary action taken under sections 7-56-701 to 7-56-705:

(I) The cooperative may bring a proceeding in court to wind up and liquidate its business and affairs under judicial supervision in accordance with section 7-56-716; or

(II) The attorney general, a member, or a creditor, as the case may be, may bring a proceeding in court to wind up and liquidate the business and affairs of the cooperative under judicial supervision in accordance with section 7-56-716, upon establishing the grounds set forth for such person, respectively, in subsections (1) to (3) of this section.

(b) As used in sections 7-56-715 to 7-56-717, a "proceeding to dissolve the cooperative" includes a proceeding brought under this subsection (4), and a "decree of dissolution" includes an order of court entered in a proceeding under this subsection (4) that directs that the business and affairs of a cooperative be wound up and liquidated under judicial supervision.

**Source:** **L. 96:** Entire article R&RE, p. 531, § 1, effective July 1. **L. 2003:** IP(4)(a) amended, p. 2234, § 106, effective July 1, 2004. **L. 2004:** (4)(b) amended, p. 1420, § 64, effective July 1. **L. 2005:** IP(4)(a) amended, p. 1218, § 27, effective October 1. **L. 2006:** IP(4)(a) amended, p. 849, § 6, effective July 1.

**7-56-715. Procedure for judicial dissolution.** (1) A proceeding to dissolve a cooperative brought by the attorney general shall be brought in the district court for the county in this state in which the street address of the cooperative's principal office is located or, if the cooperative has no principal office in this state, in the district court for the county in which the street address of its registered agent is located or, if the cooperative has no registered agent, in the district court for the city and county of Denver. A proceeding brought by any other party named in section 7-56-714 shall be brought in the district court for the county in this state in which the street address of the cooperative's principal office is located or, if the cooperative has no principal office in this state, in the district court for the county in which the street address of its registered agent is located or, if the cooperative has no registered agent, in the district court for the city and county of Denver.

(2) A court in a proceeding brought to dissolve a cooperative may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the cooperative's assets, wherever located, and carry on the business of the cooperative until a full hearing can be held.

**Source:** **L. 96:** Entire article R&RE, p. 532, § 1, effective July 1. **L. 2003:** (1) amended, p. 2234, § 107, effective July 1, 2004. **L. 2004:** (1) amended, p. 1421, § 65, effective July 1.

**7-56-716. Receivership or custodianship.** (1) A court in a proceeding to dissolve a cooperative may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage the business and affairs, of the cooperative. The court shall hold a hearing, after giving notice to all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian pursuant to this section. The court appointing a receiver or custodian has exclusive jurisdiction over the cooperative and all of its property, wherever located.

(2) The court may appoint an individual, a domestic entity, or a foreign entity or other entity authorized to transact business or conduct activities in this state as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(a) The receiver may:



(I) Dispose of all or any part of the property of the cooperative, wherever located, at a public or private sale, if authorized by the court; and

(II) Sue and defend in the receiver's own name as receiver of the cooperative in all courts; or

(b) The custodian may exercise all of the powers of the cooperative, through or in place of its board or officers, to the extent necessary to manage the affairs of the cooperative in the best interests of its members and creditors.

(4) The court, during a receivership, may redesignate the receiver as custodian, and during a custodianship may redesignate the custodian as receiver if doing so is in the best interests of the cooperative and its members and creditors.

(5) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and such person's counsel from the assets of the cooperative or proceeds from the sale of the assets.

**Source:** L. 96: Entire article R&RE, p. 533, § 1, effective July 1. L. 2003: (1) and (2) amended, p. 2235, § 108, effective July 1, 2004. L. 2004: (1) amended, p. 1421, § 66, effective July 1.

**7-56-717. Decree of dissolution.** (1) If after a hearing the court determines that one or more grounds for judicial dissolution described in section 7-56-714 exist, it may enter a decree dissolving the cooperative and stating the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the secretary of state, who shall file it pursuant to part 3 of article 90 of this title.

(2) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the cooperative's business and activities in accordance with section 7-56-705 or 7-56-716 and the giving of notice to the cooperative's registered agent, or to the secretary of state if it has no registered agent, and to claimants in accordance with sections 7-90-911 and 7-90-912.

(3) The assets of the dissolved cooperative, after payment of administrative expenses, shall be distributed in accordance with the provisions of section 7-56-705.

(4) The court's order or decision may be appealed as in other civil proceedings.

**Source:** L. 96: Entire article R&RE, p. 533, § 1, effective July 1. L. 2002: (1) amended, p. 1820, § 32, effective July 1; (1) amended, p. 1684, § 30, effective October 1. L. 2003: (1) and (2) amended, p. 2235, § 109, effective July 1, 2004. L. 2006: (2) amended, p. 849, § 7, effective July 1.

## SUBPART 4

### MISCELLANEOUS

**7-56-718. Certain assignments of assets in dissolution.** In the winding up of the affairs of a cooperative when certain assets are not liquid and secured creditors having claim on these assets have been satisfied, the trustees in liquidation or other persons charged with winding up the cooperative's affairs are authorized to make assignment of such assets to the unsecured creditors in settlement of their claims. If assignment is refused in writing, and in the judgment of the trustees there is no liquidity or market value and the costs involved in delaying the winding up of the affairs of the cooperative exceed the potential benefits, the trustees are authorized to assign the assets or future proceeds to any local or statewide nonprofit organization that has as one of its principal purposes education or community service. The trustees shall under no circumstances be liable to any member or equity holder in the cooperative for any claim on any assets assigned by the trustees pursuant to the authority of this section.

**Source:** L. 96: Entire article R&RE, p. 534, § 1, effective July 1.

## PART 8

## FOREIGN COOPERATIVES

**Editor's note:** This article was repealed and reenacted in 1996, and this part 8 was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 8 prior to 2004, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume and the editor's note following the article heading.

**7-56-801. Authority to transact business or conduct activities required.** Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign cooperatives.

**Source: L. 2003:** Entire part R&RE, p. 2235, § 110, effective July 1, 2004.

**7-56-802. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, applies to foreign cooperatives.

**Source: L. 2003:** Entire part R&RE, p. 2236, § 110, effective July 1, 2004.

## PART 9

## TRANSITION PROVISIONS

**7-56-901. Application to existing cooperatives.** (1) A domestic corporation, association, or cooperative formed under this article before July 1, 1996, shall be governed by the provisions of this article.

(2) A cooperative formed under article 57 of this title before July 1, 1996, until it elects to be governed by the provisions of this article pursuant to section 7-56-205, shall be deemed to have been formed under, and shall be governed by, the provisions of article 55 of this title as in effect immediately prior to July 1, 1996.

**Source: L. 96:** Entire article R&RE, p. 542, § 1, effective July 1. **L. 2003:** (2) amended, p. 2236, § 111, effective July 1, 2004.

## ARTICLE 57

## Agricultural and Livestock Associations

**7-57-101 to 7-57-106. (Repealed)**

**Source: L. 96:** Entire article repealed, p. 543, § 2, effective July 1.

**Editor's note:** (1) This article was numbered as article 4 of chapter 30, C.R.S. 1963. For amendments to this article prior to its repeal in 1996, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 7-56-901 (2) of the "Colorado Cooperative Act" provides that cooperatives organized under this article prior to its repeal on July 1, 1996, shall be deemed to be organized under article 55 of this title until the cooperative elects to be governed by the "Colorado Cooperative Act".



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PART 1

GENERAL PROVISIONS

**7-58-101. Short title.** This article shall be known and may be cited as the “Colorado Uniform Limited Cooperative Association Act”.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 761, § 1, effective April 2, 2012.

**7-58-102. Definitions.** As used in this article, unless this article states a different definition:

- (1) The terms defined in article 90 of this title have the meanings stated in that article unless this article states a different definition.
- (2) “Articles of organization” or “articles” means the articles of organization of a limited cooperative association required by section 7-58-302 containing provisions required or permitted by sections 7-58-303 and 7-58-306. The term includes the articles of organization as amended or restated.
- (3) “Board of directors” means the board of directors of a limited cooperative association.
- (4) “Bylaws” means the bylaws of a limited cooperative association required by section 7-58-304 containing provisions required or permitted by sections 7-58-305 and 7-58-306. The term includes the bylaws as amended or restated.
- (5) “Contribution”, except as used in section 7-58-1008 (3), means a benefit that a person provides to a limited cooperative association to become or remain a member or in the person’s capacity as a member.
- (6) “Cooperative” means a limited cooperative association or an entity organized under any cooperative law of any jurisdiction.
- (7) “Director” means a director of a limited cooperative association.
- (8) “Distribution”, except as used in section 7-58-1007 (5), means a transfer of money or other property from a limited cooperative association to a member because of the member’s financial rights or to a transferee of a member’s financial rights.
- (9) “Financial rights” means the right to participate in allocations and distributions as provided in parts 10 and 12 of this article but does not include rights or obligations under a marketing contract governed by part 7 of this article.
- (10) “Governance rights” means the right to participate in governance of a limited cooperative association.

(11) "Investor member" means a member that has made a contribution to a limited cooperative association and that:

(a) Is not required by the articles or bylaws to conduct patronage with the association in the member's capacity as an investor member in order to receive or retain the member's interest; or

(b) Is not permitted by the articles or bylaws to conduct patronage with the association in the member's capacity as an investor member in order to receive or retain the member's interest.

(12) "Limited cooperative association" or "association" means an association organized under this article.

(13) "Member" means a person that is admitted as a patron member or investor member, or both, in a limited cooperative association. The term does not include a person that has dissociated as a member.

(14) "Member's interest" means the interest of a patron member or investor member with the attributes stated in section 7-58-601.

(15) "Members meeting" means an annual members meeting or special meeting of members.

(16) "Organizer" means a person who is named in the articles as an organizer.

(17) "Patronage" means business transactions between a limited cooperative association and a person that entitle the person to receive financial rights based on the value or quantity of business done between the association and the person.

(18) "Patron member" means a member that has made a contribution to a limited cooperative association and that:

(a) Is required by the articles or bylaws to conduct patronage with the association in the member's capacity as a patron member in order to receive or retain the member's interest; or

(b) Is permitted by the articles or bylaws to conduct patronage with the association in the member's capacity as a patron member in order to receive or retain the member's interest.

(19) "Proper court" means the district court for the county in this state in which the street address of the limited cooperative association's principal office is located or, if the association has no principal office in this state, the district court for the county in which the street address of its registered agent is located, or, if the association has no registered agent, the district court for the city and county of Denver.

(20) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(21) "Required information" means the information a limited cooperative association is required to maintain under section 7-58-112.

(22) "Sign" means, with present intent, to authenticate or adopt a record by:

(a) Executing or adopting a tangible symbol; or

(b) Attaching to or logically associating with the record an electronic symbol, sound, or process.

(23) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law.

(24) "Voting group" means any combination of one or more voting members in one or more districts or classes that, under this article or the articles or bylaws, are entitled to vote and can be counted together collectively on a matter at a members meeting.

(25) "Voting member" means a member that, under this article or the articles or bylaws, has a right to vote on matters subject to vote by members under this article or the articles or bylaws.

(26) "Voting power" means the total current power of members to vote on a particular matter for which a vote may or is to be taken.



**7-58-103. Reservation of power to amend or repeal.** The general assembly has the power to amend or repeal all or part of this article at any time, and all domestic and foreign limited cooperative associations subject to this article shall be governed by the amendment or repeal.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 764, § 1, effective April 2, 2012.

**7-58-104. Nature of limited cooperative association.** (1) A limited cooperative association organized under this article is an autonomous, unincorporated association of persons united to meet their mutual interests through a jointly owned enterprise primarily controlled by those persons, the patronage of which is carried on for the mutual benefit of the patron members and that permits combining:

(a) Ownership, financing, and receipt of benefits by the patron members for whose patronage the association is formed; and

(b) Separate investments in the association by investor members who invest in the limited cooperative association and may receive returns on their investments and a share of control.

(2) The fact that a limited cooperative association does not have more than one of the characteristics described in paragraph (a) of subsection (1) of this section or any of the characteristics described in paragraph (b) of subsection (1) of this section does not alone prevent the association from being formed under and governed by this article, nor does it alone provide a basis for an action against the association or a member.

(3) The relations between a limited cooperative association and its members are consensual and contractual. Unless required, limited, or prohibited by this article or other applicable law, the articles and bylaws of an association may provide for any matter concerning the relations among the members of the association and between the members and the association, the activities of the association, and the conduct of its activities.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 764, § 1, effective April 2, 2012.

**7-58-105. Purpose of limited cooperative association.** (1) A limited cooperative association is an entity distinct from its members.

(2) A limited cooperative association may be organized for any lawful purpose, whether or not for profit.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 764, § 1, effective April 2, 2012.

**7-58-106. Powers.** (1) Unless otherwise provided in the articles, every limited cooperative association has perpetual duration and succession in its domestic entity name and has the powers to do all things necessary or convenient to carry out its business and affairs, including without limitation:

(a) To sue and be sued, complain, and defend in its entity name, and to maintain an action against a member for harm caused to the association by the member's violation of a duty to the association or of this article or the articles or bylaws;

(b) To have a seal, which may be altered at will, and to use the seal, or a facsimile thereof, including a rubber stamp, by impressing or affixing it or by reproducing it in any other manner;

(c) To amend its articles and make and amend bylaws;

(d) To purchase, receive, lease, and otherwise acquire, and to own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located;

(e) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(f) To purchase, receive, subscribe for, and otherwise acquire shares and other interests in, and obligations of, any other entity; and to own, hold, vote, use, sell, mortgage, lend, pledge, and otherwise dispose of, and deal in and with, the same;

(g) To make contracts and guarantees; incur liabilities; borrow money; issue notes, bonds, and other obligations, which may be convertible into or include the option to purchase other interests or securities of the association; and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(h) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(i) To be an agent, an associate, a fiduciary, a manager, a member, a partner, an equity owner, a promoter, or a trustee of, or to hold any similar position with, any entity;

(j) To conduct its business and activities, locate offices, and exercise the powers granted by this article within or without this state;

(k) To elect and appoint directors, officers, employees, and agents of the association, define their duties, fix their compensation, and lend them money and credit;

(l) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, share bonus plans, share options and rights plans, and benefit or incentive plans for any of its current or former directors, officers, employees, and agents;

(m) To make donations for the public welfare or for charitable, scientific, or educational purposes;

(n) To make payments or donations and to do any other act, not inconsistent with law, that furthers the business and affairs of the association;

(o) To establish conditions for admission of members, admit members, and issue or transfer memberships;

(p) To impose dues, assessments, and admission and transfer fees upon its members;

(q) To impose restrictions on the transfer of its membership interests or other interests in the association;

(r) To carry on its business and affairs;

(s) To indemnify current or former directors, officers, employees, fiduciaries, or agents as provided in part 9 of this article;

(t) To limit the liability of its directors as provided in section 7-58-818; and

(u) To cease its activities and dissolve.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 764, § 1, effective April 2, 2012.

**7-58-107. Governing law.** (1) The law of this state governs:

(a) The internal affairs of a limited cooperative association; and

(b) The liability of a member as member and a director as director for the debts, obligations, or other liabilities of a limited cooperative association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 766, § 1, effective April 2, 2012.

**7-58-108. Supplemental principles of law.** Unless displaced by particular provisions of this article, the principles of law and equity supplement this article.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 766, § 1, effective April 2, 2012.

**7-58-109. Requirements of other laws.** (1) This article does not alter or amend any law that governs the licensing and regulation of an individual or entity in carrying on a specific business or profession even if that law permits the business or profession to be conducted by a limited cooperative association, a foreign cooperative, or its members.



(2) A limited cooperative association shall not conduct an activity that, under the law of this state other than this article, may be conducted only by an entity that meets specific requirements for the internal affairs of that entity unless the articles or bylaws of the association conform to those requirements.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 766, § 1, effective April 2, 2012.

**7-58-110. Relation to restraint of trade and antitrust law.** No limited cooperative association formed under or subject to this article shall, solely by its organization and existence, be deemed to be a conspiracy or a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or to fix prices arbitrarily, nor shall the marketing or purchasing contracts and agreements authorized in this article be considered illegal as such, in unlawful restraint of trade, or as part of a conspiracy or combination to accomplish an improper or illegal purpose.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 766, § 1, effective April 2, 2012.

**7-58-111. Name.** (1) Use of the term “cooperative” or its abbreviation under this article or section 7-90-601 is not a violation of the provisions restricting the use of the term under section 7-90-601 (7) (a).

(2) A limited cooperative association or a member may enforce the restrictions on the use of the term “cooperative” under section 7-90-601 (7).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 767, § 1, effective April 2, 2012.

**7-58-112. Required information.** (1) Subject to subsection (2) of this section, a limited cooperative association shall maintain in a record available at its principal office:

(a) A list containing the name, last-known street address and, if different, mailing address, and term of office of each director and officer;

(b) The initial articles and all amendments to and restatements of the articles;

(c) The initial bylaws and all amendments to and restatements of the bylaws;

(d) All filed statements of merger and statements of conversion;

(e) All annual financial statements of the association for the three most recent fiscal years;

(f) The minutes of members meetings and records of all action taken by members without a meeting for the three most recent years;

(g) A list containing:

(I) The name, in alphabetical order, and last-known street address and, if different, mailing address of each patron member and each investor member; and

(II) If the association has districts or classes of members, information from which each member in a district or class may be identified;

(h) The federal income tax returns and any state and local income tax returns of the association for the three most recent years;

(i) Accounting records maintained by the association in the ordinary course of its operations for the three most recent years;

(j) The minutes of all directors meetings and records of all action taken by directors without a meeting for the three most recent years;

(k) The amount of money contributed and agreed to be contributed by each member;

(l) A description and statement of the agreed value of contributions other than money made and agreed to be made by each member;

(m) The times at which, or events on the happening of which, any additional contribution is to be made by each member;

(n) For each member, a description and statement of the member's interest or information from which the description and statement can be derived; and

(o) All communications concerning the association made in a record to all members, or to all members in a district or class, for the three most recent years.

(2) If a limited cooperative association has existed for less than the period for which records must be maintained under subsection (1) of this section, the period for which records must be kept is the period of the association's existence.

(3) The articles or bylaws may require that more information be maintained.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 767, § 1, effective April 2, 2012.

**7-58-113. Business transactions of member with limited cooperative association.** Subject to sections 7-58-818 and 7-58-819 and except as otherwise provided in the articles or bylaws or a specific contract relating to a transaction, a member may lend money to and transact other business with a limited cooperative association in the same manner as a person that is not a member.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 768, § 1, effective April 2, 2012.

**7-58-114. Dual capacity.** A person may have a patron member's interest and an investor member's interest. When such person acts as a patron member, the person is subject to this article and the articles and bylaws governing patron members. When such person acts as an investor member, the person is subject to this article and the articles and bylaws governing investor members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 768, § 1, effective April 2, 2012.

## PART 2

### REGISTERED AGENTS, FILING, ANNUAL REPORTS, AND STATEMENT OF FOREIGN ENTITY AUTHORITY

**7-58-201. Limited cooperative associations - registered agents - service of process - annual reports.** (1) Part 7 of article 90 of this title, providing for registered agents and service of process, applies to limited cooperative associations formed under this article.

(2) Part 5 of article 90 of this title, providing for periodic reports, applies to limited cooperative associations formed under this article.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 768, § 1, effective April 2, 2012.

**7-58-202. Foreign entity authority.** Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign limited cooperative associations formed under substantially similar laws of another jurisdiction.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 769, § 1, effective April 2, 2012.

## PART 3

### FORMATION AND INITIAL ARTICLES OF LIMITED COOPERATIVE ASSOCIATION - BYLAWS

**7-58-301. Organizers.** A limited cooperative association must be organized by one or more organizers.



**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 769, § 1, effective April 2, 2012.

**7-58-302. Formation of limited cooperative association.** (1) To form a limited cooperative association, one or more organizers of the association shall deliver or cause to be delivered articles to the secretary of state for filing.

(2) A limited cooperative association is formed after articles that substantially comply with section 7-58-303 (1) become effective under section 7-90-304.

(3) If articles filed by the secretary of state state a delayed effective date, a limited cooperative association is not formed if, before the articles take effect, a statement of correction is filed pursuant to section 7-90-304 (3) that revokes the articles.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 769, § 1, effective April 2, 2012.

**7-58-303. Articles.** (1) The articles shall state:

- (a) The domestic entity name of the limited cooperative association;
  - (b) The purposes for which the limited cooperative association is formed, which may be for any lawful purpose;
  - (c) The registered agent name and registered agent address of the association's initial registered agent;
  - (d) The street address and, if different, mailing address of the association's initial principal office; and
  - (e) The true name and street address and, if different, mailing address of each organizer.
- (2) The articles may contain any other provisions in addition to those required by subsection (1) of this section, including any matters referred to in subsection (3) of this section, section 7-58-305 (1), or section 7-58-305 (3).
- (3) The matters referred to in this subsection (3) may be varied only in the articles. The articles may:
- (a) State a term of duration, less than perpetual, of the limited cooperative association under section 7-58-106 (1);
  - (b) Limit or eliminate the acceptance of new or additional members by the initial board of directors under section 7-58-304 (2);
  - (c) Vary the percentage of votes required for members to approve an amendment to the articles under section 7-58-405;
  - (d) Vary the limitations on the obligations and liability of members for association obligations under section 7-58-504;
  - (e) Require a notice of an annual members meeting to state a purpose of the meeting under section 7-58-508 (2);
  - (f) Provide for less than unanimous consent to action by members without a members meeting under section 7-58-516 (1) (a);
  - (g) Vary the matters the board of directors may consider in making a decision under section 7-58-820;
  - (h) Specify causes of dissolution under section 7-58-1202 (1);
  - (i) Delegate amendment of the bylaws to the board of directors pursuant to section 7-58-405 (6);
  - (j) Provide for member approval of asset dispositions under section 7-58-1501;
  - (k) Subject to section 7-58-820, provide for the elimination or limitation of liability of a director to the association or its members for money damages pursuant to section 7-58-818; and
  - (l) Provide for permitting or requiring indemnification under section 7-58-901 (1).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 769, § 1, effective April 2, 2012.

**7-58-304. Organization of limited cooperative association.** (1) After a limited cooperative association is formed:

(a) If initial directors are named in the articles, the initial directors shall hold an organizational meeting to adopt initial bylaws and carry on any other business necessary or proper to complete the organization of the association; or

(b) If initial directors are not named in the articles, the organizers shall designate the initial directors and call a meeting of the initial directors to adopt initial bylaws and carry on any other business necessary or proper to complete the organization of the association.

(2) Unless the articles otherwise provide, the initial directors may cause the limited cooperative association to accept members, including those necessary for the association to begin business.

(3) Initial directors need not be members.

(4) An initial director serves until a successor is elected and qualified at a members meeting or the director is removed, resigns, is adjudged incompetent, or dies.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 770, § 1, effective April 2, 2012.

**7-58-305. Bylaws.** (1) Bylaws shall be in a record and, if not stated in the articles, shall include:

(a) A statement of the capital structure of the limited cooperative association, including:

(I) The classes or other types of members' interests and relative rights, preferences, and restrictions granted to or imposed upon each class or other type of member's interest; and

(II) The rights to share in profits or distributions of the association;

(b) A statement of the method for admission of members;

(c) A statement designating voting and other governance rights, including which members have voting power and any restriction on voting power;

(d) A statement that a member's interest is transferable, if it is to be transferable, and a statement of the conditions upon which it may be transferred;

(e) A statement concerning the manner in which profits and losses are allocated and distributions are made among patron members and, if investor members are authorized, the manner in which profits and losses are allocated and how distributions are made among investor members and between patron members and investor members;

(f) A statement concerning:

(I) Whether persons that are not members but conduct business with the association may be permitted to share in allocations of profits and losses and receive distributions; and

(II) The manner in which profits and losses are allocated and distributions are made with respect to those persons; and

(g) A statement of the number and terms of directors or the method by which the number and terms are determined.

(2) Subject to subsection (3) of this section and the articles, bylaws may contain any other provision for managing and regulating the affairs of the association.

(3) The matters referred to in this subsection (3) may be varied only in the bylaws, in the articles, or in the bylaws and the articles. The bylaws may:

(a) Require more information to be maintained under section 7-58-112 or provided to members under section 7-58-505 (11);

(b) Provide restrictions on transactions between a member and an association under section 7-58-113;

(c) Provide for the percentage and manner of voting on amendments to the articles and bylaws by district, class, or voting group under section 7-58-404 (1);

(d) Provide for the percentage vote required to amend the bylaws concerning the admission of new members under section 7-58-405 (5) (e);

(e) Provide for terms and conditions to become a member under section 7-58-502;

(f) Restrict the manner of conducting members meetings under sections 7-58-506 (3) and 7-58-507 (5);

(g) Designate the presiding officer of members meetings under sections 7-58-506 (5) and 7-58-507 (7);



- (h) Require a statement of purposes in the annual meeting notice under section 7-58-508 (2);
- (i) Increase quorum requirements for members meetings under section 7-58-510 and board of directors meetings under section 7-58-815;
- (j) Allocate voting power among members, including patron members and investor members, and provide for the manner of member voting and action as permitted by sections 7-58-511 to 7-58-517;
- (k) Authorize investor members and expand or restrict the transferability of members' interests to the extent provided in sections 7-58-602 to 7-58-604;
- (l) Provide for enforcement of a marketing contract under section 7-58-704 (1);
- (m) Provide for qualification, election, terms, removal, filling vacancies, and member approval for compensation of directors in accordance with sections 7-58-803 to 7-58-805, 7-58-807, 7-58-809, and 7-58-810;
- (n) Restrict the manner of conducting board meetings and taking action without a meeting under sections 7-58-811 and 7-58-812;
- (o) Provide for frequency, location, notice, and waivers of notice for board meetings under sections 7-58-813 and 7-58-814;
- (p) Increase the percentage of votes necessary for board action under section 7-58-816 (2);
- (q) Provide for the creation of committees of the board of directors and matters related to the committees in accordance with section 7-58-817;
- (r) Provide for officers and their appointment, designation, and authority under section 7-58-822;
- (s) Provide for forms and values of contributions under section 7-58-1002;
- (t) Provide for remedies for failure to make a contribution under section 7-58-1003;
- (u) Provide for the allocation of profits and losses of the association, distributions, and the redemption or repurchase of distributed property other than money in accordance with sections 7-58-1004 to 7-58-1007;
- (v) Specify when a member's dissociation is wrongful and the liability incurred by the dissociating member for damage to the association under section 7-58-1101 (2) and (3);
- (w) Provide the personal representative, or other legal representative of, a deceased member or a member adjudged incompetent with additional rights under section 7-58-1103;
- (x) Increase the percentage of votes required for board of director approval of:
  - (I) A resolution to dissolve under section 7-58-1205;
  - (II) A proposed amendment to the articles or bylaws under section 7-58-402 (1) (a);
  - (III) A plan of conversion under section 7-58-1603 (1);
  - (IV) A plan of merger under section 7-58-1607 (1); and
  - (V) A proposed disposition of assets under section 7-58-1503 (1); and
- (y) Vary the percentage of votes required for members' approval of:
  - (I) A resolution to dissolve under section 7-58-1205;
  - (II) An amendment to the bylaws under section 7-58-405;
  - (III) A plan of conversion under section 7-58-1603;
  - (IV) A plan of merger under section 7-58-1608; and
  - (V) A disposition of assets under section 7-58-1504.
- (4) In addition to amendments permitted under part 4 of this article, the initial board of directors may amend the bylaws by a majority vote of the directors at any time before the admission of members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 771, § 1, effective April 2, 2012.

**7-58-306. Required provision for members' contributions.** The articles or the bylaws shall address members' contributions pursuant to section 7-58-1001.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 774, § 1, effective April 2, 2012.

## PART 4

AMENDMENT OF ARTICLES AND BYLAWS OF  
LIMITED COOPERATIVE ASSOCIATIONS

**7-58-401. Authority to amend articles and bylaws.** (1) A limited cooperative association may amend its articles and bylaws under this part 4 for any lawful purpose. In addition, the initial board of directors may amend the bylaws of an association under section 7-58-304.

(2) Unless the articles or bylaws otherwise provide, a member does not have a vested property right resulting from any provision in the articles or bylaws, including a provision relating to the management, control, capital structure, distribution, entitlement, purpose, or duration of the limited cooperative association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 774, § 1, effective April 2, 2012.

**7-58-402. Notice and action on amendment of articles and bylaws.** (1) Except as provided in this subsection (1) and section 7-58-405 (6), the articles and bylaws of a limited cooperative association may be amended only at a members meeting. An amendment requiring membership approval may be proposed by either:

(a) A majority of the board of directors, or a greater percentage if required by the articles or bylaws; or

(b) One or more petitions signed by at least ten percent of the patron members or at least ten percent of the investor members.

(2) The board of directors shall call a members meeting to consider an amendment proposed pursuant to subsection (1) of this section. The meeting shall be held not later than ninety days following the proposal of the amendment by the board or receipt of a petition or petitions satisfying the requirements of this section. The board shall mail or otherwise transmit or deliver in a record to each member:

(a) The proposed amendment, or a summary of the proposed amendment and a statement of the manner in which a copy of the amendment in a record may be reasonably obtained by a member;

(b) A recommendation that the members approve the amendment, or, if the board determines that because of conflict of interest or any other reason it should not make a favorable recommendation, the basis for that determination;

(c) A statement of any condition of the board's submission of the amendment to the members; and

(d) Notice of the meeting at which the proposed amendment will be considered, which shall be given in the same manner as notice for a special meeting of members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 774, § 1, effective April 2, 2012.

**7-58-403. Method of voting on amendment of articles and bylaws.** (1) A substantive change to a proposed amendment of the articles or bylaws may not be made at the members meeting at which a vote on the amendment occurs.

(2) A nonsubstantive change to a proposed amendment of the articles or bylaws may be made at the members meeting at which the vote on the amendment occurs and need not be separately voted upon by the board of directors.

(3) A vote to adopt a nonsubstantive change to a proposed amendment to the articles or bylaws shall be by the same percentage of votes required to pass a proposed amendment.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 775, § 1, effective April 2, 2012.



**7-58-404. Voting by district, class, or voting group.** (1) This section applies if the articles or bylaws provide for voting by district or class, or if there is one or more identifiable voting groups that a proposed amendment to the articles or bylaws would affect differently from other members with respect to matters identified in section 7-58-405 (1). Approval of the amendment requires the same percentage of votes of the members of that district, class, or voting group required in sections 7-58-405 and 7-58-514.

(2) If a proposed amendment to the articles or bylaws would affect members in two or more districts or classes entitled to vote separately under subsection (1) of this section in the same or a substantially similar way, the districts or classes affected shall vote as a single voting group unless the articles or bylaws otherwise provide for separate voting.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 775, § 1, effective April 2, 2012.

**7-58-405. Approval of amendment.** (1) Subject to section 7-58-404 and subsections (3) and (4) of this section, an amendment to the articles must be approved by:

(a) At least a majority vote of the voting power of all members present at a members meeting called under section 7-58-402, unless the articles require a greater percentage; and

(b) If the limited cooperative association has investor members, at least a majority of the votes cast by patron members, unless the articles require a greater percentage vote by patron members.

(2) Subject to section 7-58-404 and subsections (3), (4), (5), and (6) of this section, an amendment to the bylaws must be approved by:

(a) At least a majority vote of the voting power of all members present at a members meeting called under section 7-58-402, unless the articles or bylaws require a greater percentage; and

(b) If a limited cooperative association has investor members, a majority of the votes cast by patron members, unless the articles or bylaws require a larger affirmative vote by patron members.

(3) The articles may require that the percentage of votes required under paragraph (a) of subsection (1) of this section, or the articles or bylaws may require that the percentage of votes required under paragraph (a) of subsection (2) of this section, be:

(a) A different percentage that is not less than a majority of members voting at the meeting;

(b) Measured against the voting power of all members; or

(c) A combination of paragraphs (a) and (b) of this subsection (3).

(4) Consent in a record by a member shall be delivered to a limited cooperative association before delivery of an amendment to the articles or restated articles for filing pursuant to section 7-58-407, or before or at the same time as a members vote is taken on an amendment to the bylaws or adoption of restated bylaws submitted to members for a vote, if, as a result of the amendment or restatement:

(a) The member will have:

(I) Personal liability for an obligation of the association; or

(II) An obligation or liability for an additional contribution; or

(b) The relative rights of the member in the association will be adversely affected or diminished by the amendment.

(5) The vote required to amend bylaws must satisfy the requirements of subsection (1) of this section if the proposed amendment modifies:

(a) The equity capital structure of the limited cooperative association, including the rights of the association's members to share in profits or distributions, or the relative rights, preferences, and restrictions granted to or imposed upon one or more districts, classes, or voting groups of similarly situated members;

(b) The transferability of a member's interest;

(c) The manner or method of allocation of profits or losses among members;

(d) The quorum for a meeting and the rights of voting and governance; or

(e) Unless otherwise provided in the articles or bylaws, the terms for admission of new members.

(6) Except for the matters described in subsection (5) of this section, the articles may delegate amendment of all or a part of the bylaws to the board of directors without requiring member approval.

(7) If the articles delegate amendment of bylaws to the board of directors, the board shall provide a description of any amendment of the bylaws made by the board to the members in a record not later than thirty days after the amendment, but the description may be provided at the next annual members meeting if the meeting is held within the thirty-day period.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 775, § 1, effective April 2, 2012.

**7-58-406. Restated articles.** (1) The board of directors may restate the articles at any time with or without action by the members. If the limited cooperative association does not have both members and directors, its organizers may restate the articles at any time.

(2) The restatement may include one or more amendments to the articles. If the restatement includes an amendment requiring approval of the members, it must be approved in the same manner as an amendment to the articles under section 7-58-405 (1).

(3) If the board of directors submits a restatement for action by the members, the board shall call a meeting of members and mail or otherwise transmit or deliver in a record the information and give notice of the meeting in accordance with section 7-58-402 (2) to each member entitled to vote on the restatement. The copy of the restatement provided to members must identify any amendment or other change the restatement would make in the articles.

(4) A limited cooperative association restating its articles shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of restatement stating:

(a) The domestic entity name of the association;

(b) The text of the restated articles; and

(c) If the restatement was adopted by the board of directors or organizers without member action, a statement to that effect and that member action was not required.

(5) Upon filing by the secretary of state or at any later effective date determined pursuant to section 7-90-304, restated articles supersede the original articles and all prior amendments to them.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 777, § 1, effective April 2, 2012.

**7-58-407. Amendment of articles - filing.** (1) A limited cooperative association amending its articles shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment stating:

(a) The domestic name of the association; and

(b) The text of each amendment adopted.

(2) Before the beginning of the initial meeting of the board of directors, an organizer who knows that information in the filed articles was inaccurate when the articles were filed or has become inaccurate due to changed circumstances shall promptly:

(a) Cause the articles to be amended; and

(b) If appropriate, deliver a statement of:

(I) Change to the secretary of state for filing pursuant to section 7-90-305.5; or

(II) Correction to the secretary of state for filing pursuant to section 7-90-305.

(3) Upon filing, an amendment of the articles that has been properly adopted by the members is effective as provided in section 7-90-304.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 778, § 1, effective April 2, 2012.



## PART 5

## MEMBERS

**7-58-501. Members.** To begin business, a limited cooperative association must have at least two patron members unless the sole member is a cooperative.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 778, § 1, effective April 2, 2012.

**7-58-502. Becoming a member.** (1) A person becomes a member:

- (a) As provided in the articles or bylaws;
- (b) As the result of a merger or conversion under part 16 of this article; or
- (c) With the consent of all the members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 778, § 1, effective April 2, 2012.

**7-58-503. No power as member to bind association.** A member, solely by reason of being a member, may not act for or bind the limited cooperative association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 779, § 1, effective April 2, 2012.

**7-58-504. No liability as member for association's obligations.** Unless the articles otherwise provide, a debt, obligation, or other liability of a limited cooperative association is solely that of the association and is not the debt, obligation, or liability of a member solely by reason of being a member.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 779, § 1, effective April 2, 2012.

**7-58-505. Right of member and former member to information.** (1) Not later than ten business days after receipt of a demand made in a record, a limited cooperative association shall permit a member to obtain, inspect, and copy in the association's principal office required information listed in section 7-58-112 (1) (a) to (1) (f) during regular business hours. A member need not have any particular purpose for seeking the information. The association is not required to provide the information listed in section 7-58-112 (1) (b) to (1) (f) to the same member more than once during a six-month period.

(2) On demand made in a record received by the limited cooperative association, a member may obtain, inspect, and copy in the association's principal office required information listed in section 7-58-112 (1) (g), (1) (h), (1) (j), and (1) (o) during regular business hours, if:

(a) The member seeks the information in good faith and for a proper purpose reasonably related to the member's interest;

(b) The demand includes a description, with reasonable particularity, of the information sought and the purpose for seeking the information;

(c) The information sought is directly connected to the member's purpose; and

(d) The demand is otherwise reasonable.

(3) Not later than ten business days after receipt of a demand pursuant to subsection (2) of this section, a limited cooperative association shall provide, in a record, the following information to the member that made the demand:

(a) If the association agrees to provide the demanded information:

(I) What information the association will provide in response to the demand; and

(II) A reasonable time and reasonable place at which the association will provide the information; or

(b) If the association declines to provide some or all of the demanded information, the association's reasons for declining.

(4) A person dissociated as a member may obtain, inspect, and copy information available to a member under subsection (1) or (2) of this section by delivering a demand in a record to the limited cooperative association, in the same manner and subject to the same conditions applicable to a member under subsection (2) of this section, if:

(a) The information pertains to the period during which the person was a member in the association; and

(b) The person seeks the information in good faith.

(5) A limited cooperative association shall respond to a demand made pursuant to subsection (4) of this section in the manner provided in subsection (3) of this section.

(6) Not later than ten business days after receipt by a limited cooperative association of a demand made by a member in a record, but not more often than once in a six-month period, the association shall deliver to the member a record stating the information with respect to the member required by section 7-58-112 (1) (n).

(7) A limited cooperative association may impose reasonable restrictions, including nondisclosure restrictions, on the use of information obtained under this section. In a dispute concerning the reasonableness of a restriction under this subsection (7), the association has the burden of proving reasonableness.

(8) A limited cooperative association may charge a person that makes a demand under this section reasonable costs of copying, limited to the costs of equipment, labor, and material.

(9) A person that may obtain information under this section may obtain the information through an attorney or other agent. A restriction imposed on the person under subsection (7) of this section or by the articles or bylaws applies to the attorney or other agent.

(10) The rights stated in this section do not extend to a person as transferee.

(11) The articles or bylaws may require a limited cooperative association to provide more information than required by this section and may establish conditions and procedures for providing the information.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 779, § 1, effective April 2, 2012.

**7-58-506. Annual meeting of members.** (1) Members shall meet annually at a time provided in the articles or bylaws or set by the board of directors not inconsistent with the articles and bylaws.

(2) An annual members meeting may be held inside or outside this state at the place stated in the articles or bylaws or selected by the board of directors not inconsistent with the articles and bylaws.

(3) Unless the articles or bylaws otherwise provide, members may attend or conduct an annual members meeting through any means of communication if all members attending the meeting can communicate with each other during the meeting.

(4) The board of directors shall report, or cause to be reported, at the association's annual members meeting the association's business and financial condition as of the close of the most recent fiscal year.

(5) Unless the articles or bylaws otherwise provide, the board of directors shall designate the presiding officer of the association's annual members meeting.

(6) Failure to hold an annual members meeting does not affect the validity of any action by the limited cooperative association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 780, § 1, effective April 2, 2012.

**7-58-507. Special meeting of members.** (1) A special meeting of members may be called only:

(a) As provided in the articles or bylaws;



(b) By a majority vote of the board of directors on a proposal stating the purpose of the meeting;

(c) By demand in a record signed by members holding at least twenty percent of the voting power of the persons in any district or class entitled to vote on the matter that is the purpose of the meeting stated in the demand; or

(d) By demand in a record signed by members holding at least ten percent of the total voting power of all the persons entitled to vote on the matter that is the purpose of the meeting stated in the demand.

(2) A demand under paragraph (c) or (d) of subsection (1) of this section must be submitted to the officer of the limited cooperative association charged with keeping its records.

(3) Any voting member may withdraw its demand under paragraph (c) or (d) of subsection (1) of this section before receipt by the limited cooperative association of demands sufficient to require a special meeting of members.

(4) A special meeting of members may be held inside or outside this state at the place stated in the articles or bylaws or selected by the board of directors not inconsistent with the articles and bylaws.

(5) Unless the articles or bylaws otherwise provide, members may attend or conduct a special meeting of members through the use of any means of communication if all members attending the meeting can communicate with each other during the meeting.

(6) Only business within the purpose or purposes stated in the notice of a special meeting of members may be conducted at the meeting.

(7) Unless the articles or bylaws otherwise provide, the presiding officer of a special meeting of members shall be designated by the board of directors.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 781, § 1, effective April 2, 2012.

**7-58-508. Notice of members meeting.** (1) A limited cooperative association shall notify each member of the time, date, and place of a members meeting at least ten and not more than sixty days before the meeting; except that, if the notice is of a meeting of the members in one or more districts or classes of members, the notice shall be given only to members in those districts or classes.

(2) Unless this article or the articles otherwise provide, notice of an annual members meeting need not include any purpose of the meeting.

(3) Notice of a special meeting of members shall include each purpose of the meeting as contained in the demand under section 7-58-507 (1) (c) or (1) (d) or as voted upon by the board of directors under section 7-58-507 (1) (b).

(4) Notice of a members meeting shall be given in a record unless oral notice is reasonable under the circumstances.

(5) (a) Notwithstanding any other provision of this section, whenever notice is required to be given under this section or under any other provision of this article to any member, such notice shall not be required to be given to a member if:

(I) Notice of two consecutive annual meetings, and all notices of meetings during the period between the two consecutive annual meetings, have been sent to the member at the member's address as shown on the records of the limited cooperative association and have been returned undeliverable; or

(II) All, but not less than two, payments of distributions during a twelve-month period, or two consecutive payments of distributions during a period of more than twelve months, have been sent to the member at the member's address as shown on the records of the association and have been returned undeliverable.

(b) If any such member delivers to the association a notice in a record setting forth the member's then-current address, the requirement that notice be given to the member shall be reinstated.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 782, § 1, effective April 2, 2012.

**7-58-509. Waiver of members meeting notice.** (1) A member may waive notice of a members meeting before, during, or after the meeting.

(2) A member's participation in a members meeting is a waiver of notice of that meeting unless the member objects to the meeting at the beginning of the meeting or promptly upon the member's arrival at the meeting and does not thereafter vote for or assent to action taken at the meeting.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 782, § 1, effective April 2, 2012.

**7-58-510. Quorum of members.** Unless the articles or bylaws otherwise require a different number of members or percentage of the voting power, a quorum for conducting business at all meetings of the members consists of five percent of the total number of members or thirty members present at the meeting, whichever is less. Nothing prevents the articles or bylaws from requiring a greater or lesser number or percentage of members, or members of classes, districts, or voting groups as a quorum.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 783, § 1, effective April 2, 2012.

**7-58-511. Voting by patron members.** Except as provided by section 7-58-512 (1), each patron member has one vote. The articles or bylaws may allocate voting power among patron members as provided in section 7-58-512 (1).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 783, § 1, effective April 2, 2012.

**7-58-512. Determination of voting power of patron member.** (1) The articles or bylaws may allocate voting power among patron members on the basis of one or a combination of the following:

- (a) One member, one vote;
- (b) Use or patronage;
- (c) Equity; or
- (d) If a patron member is a cooperative, the number of its patron members.

(2) If the articles or bylaws allocate voting power on the basis of use or patronage and a member would be denied a vote because the member did not use the limited cooperative association or conduct patronage with it during the period on which the allocation of voting power is determined, the articles or bylaws must provide that the member shall nevertheless be allocated a vote equal to at least the minimum voting power allocated to members who used the association or conducted patronage with it during the period.

(3) The articles or bylaws may provide for the allocation of patron member voting power by districts or class or any combination thereof.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 783, § 1, effective April 2, 2012.

**7-58-513. Voting by investor members.** If the articles or bylaws provide for investor members, each investor member has one vote unless the articles or bylaws otherwise provide. The articles or bylaws may provide for the allocation of investor member voting power by class, classes, or any combination of classes.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 783, § 1, effective April 2, 2012.

**7-58-514. Voting requirements for members.** (1) If a limited cooperative association has both patron and investor members, the following rules apply:



(a) The total voting power of all patron members must not be less than a majority of the entire voting power entitled to vote.

(b) Action on any matter is approved only upon the affirmative vote of at least a majority of:

(I) All members voting at the meeting unless more than a majority is required or permitted by parts 4, 12, 15, and 16 of this article or the articles or bylaws; and

(II) Votes cast by patron members unless the articles or bylaws require a larger affirmative vote by patron members.

(c) The articles or bylaws may provide for the percentage of the affirmative votes that must be cast by investor members to approve the matter.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 784, § 1, effective April 2, 2012.

**7-58-515. Manner of voting.** (1) Unless the articles or bylaws otherwise provide, voting by a proxy at a members meeting is prohibited. This subsection (1) does not prohibit delegate voting based on district or class.

(2) If voting by a proxy is permitted, a patron member may appoint only another patron member as a proxy and, if investor members are permitted, an investor member may appoint only another investor member as a proxy.

(3) The articles or bylaws may provide for the manner of and provisions governing the appointment of a proxy.

(4) The articles or bylaws may provide for voting on any question by ballot delivered by mail or voting by other means on questions that are subject to vote by members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 784, § 1, effective April 2, 2012.

**7-58-516. Action without a meeting.** (1) Unless the articles or bylaws require that action be taken at a members meeting, any action required or permitted by this article to be taken at a members meeting may be taken without a meeting if notice of the proposed action is given as provided in subsection (6) of this section, and:

(a) All of the members entitled to vote thereon consent to the action in a record; or

(b) If expressly provided for in the articles, the members holding membership interests having not less than the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all of the membership interests entitled to vote thereon were present and voted consent to the action in a record.

(2) (a) No action taken pursuant to this section is effective unless, within sixty days after the date the limited cooperative association first receives a record describing and consenting to the action and signed by a member, the association has received records that describe and consent to the action, signed by members holding at least the number of votes entitled to be voted on the action as required by subsection (1) of this section, disregarding any record that has been revoked pursuant to subsection (3) of this section. The articles or bylaws may provide for the receipt of any record by the association by electronically transmitted facsimile or other form of wire or wireless communication providing the association with a complete copy thereof, including a copy of the signature thereon.

(b) Action taken pursuant to this section is effective as of the date the limited cooperative association receives the last record necessary to effect the action unless all of the records necessary to effect the action state another date as the effective date of the action, in which case the stated date is the effective date of the action.

(3) Any member who has signed a record describing and consenting to action taken pursuant to this section may revoke the consent by a record signed and dated by the member describing the action and stating that the member's prior consent thereto is revoked, if the record is received by the limited cooperative association prior to the effectiveness of the action.

(4) If not otherwise fixed under subsection (7) of this section, the record date for determining members entitled to take action pursuant to this section or entitled to be given notice under subsection (6) of this section of action taken pursuant to this section is the date the limited cooperative association first receives a writing upon which the action is taken pursuant to this section.

(5) Action taken under this section has the same effect as action taken at a members meeting and may be described as such.

(6) (a) If action is to be taken under subsection (1) of this section, the limited cooperative association shall give notice of the proposed action to the members entitled to vote thereon. The notice must:

(I) Be given in a record;

(II) Describe the proposed action; and

(III) Specify the date on or before which consents to be given pursuant to subsection (1) of this section must be received by the association.

(b) (I) Notwithstanding paragraph (a) of this subsection (6), whenever notice is required to be given under this subsection (6) to any member, the notice is not required to be given to a member if:

(A) Notice of two consecutive annual meetings, and all notices of meetings during the period between the two consecutive annual meetings, have been sent to the member at the member's address as shown on the records of the limited cooperative association and have been returned undeliverable; or

(B) All, but not less than two, payments of distributions during a twelve-month period, or two consecutive payments of distributions during a period of more than twelve months, have been sent to the member at the member's address as shown on the records of the association and have been returned undeliverable.

(II) If any such member delivers to the association a notice in a record setting forth the member's then-current address, the requirement that notice be given to the member is reinstated.

(7) The proper court may, upon application of the association or any member who would be entitled to vote on the action at a members meeting, summarily state a record date for determining members entitled to sign records consenting to an action under this section and may enter other orders necessary or appropriate to effect the purposes of this section.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 784, § 1, effective April 2, 2012.

**7-58-517. Districts and delegates - classes of members.** (1) The articles or bylaws may provide for the formation of geographic districts of patron members, the conduct of patron member meetings by districts, the election of directors at the meetings, the election of district delegates to represent and vote for the district at members meetings, or any combination thereof.

(2) A delegate elected under subsection (1) of this section has one vote unless voting power is otherwise allocated by the articles or bylaws.

(3) The articles or bylaws may provide for the establishment of classes of members; the preferences, rights, and limitations of the classes; the conduct of members meetings by classes and the election of directors at the meetings; the election of class delegates to represent and vote for the district at members meetings; or any combination thereof.

(4) A delegate elected under subsection (3) of this section has one vote unless voting power is otherwise allocated by the articles or bylaws.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 786, § 1, effective April 2, 2012.



## PART 6

MEMBER'S INTEREST IN LIMITED  
COOPERATIVE ASSOCIATION**7-58-601. Member's interest.** (1) A member's interest:

- (a) Is personal property;
- (b) Consists of:
  - (I) Governance rights;
  - (II) Financial rights; and
  - (III) The right or obligation, if any, to do business with the limited cooperative association; and
- (c) May be in certificated or uncertificated form.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 786, § 1, effective April 2, 2012.

**7-58-602. Patron and investor members' interests.** (1) Unless the articles or by-laws establish investor members' interests, a member's interest is a patron member's interest.

(2) Unless the articles or bylaws otherwise provide, if a limited cooperative association has investor members, while a person is a member of the association, the person:

- (a) If admitted as a patron member, remains a patron member;
- (b) If admitted as an investor member, remains an investor member; and
- (c) If admitted as a patron member and investor member, remains a patron and investor member if not dissociated in one of the capacities.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 787, § 1, effective April 2, 2012.

**7-58-603. Transferability of member's interest.** (1) Section 7-90-104 applies to this article.

(2) Unless the articles or bylaws otherwise provide, a member's interest other than financial rights is not transferable.

(3) Unless a transfer is restricted or prohibited by the articles or bylaws, a member may transfer its financial rights in the limited cooperative association.

(4) The terms of any restriction on transferability of financial rights must be:

- (a) Set forth in the articles or bylaws and the member records of the association; and
- (b) Conspicuously noted on any certificates evidencing a member's interest.

(5) A transferee of a member's financial rights, to the extent the rights are transferred, has the right to share in the allocation of profits or losses and to receive the distributions to the member transferring the interest to the same extent as the transferring member.

(6) A transferee of a member's financial rights does not become a member upon transfer of the rights unless the transferee is admitted as a member by the limited cooperative association.

(7) A limited cooperative association need not give effect to a transfer under this section until the association has notice of the transfer.

(8) A transfer of a member's financial rights in violation of a restriction on transfer contained in the articles or bylaws is ineffective as to a person having notice of the restriction at the time of transfer.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 787, § 1, effective April 2, 2012.

**7-58-604. Security interest and set-off.** (1) A member or transferee may create an enforceable security interest in its financial rights in a limited cooperative association.

(2) Unless the articles or bylaws otherwise provide, a member may not create an enforceable security interest in the member's governance rights in, or in the right or obligation, if any, to do business with, a limited cooperative association.

(3) The articles or bylaws may provide that a limited cooperative association has a security interest in the financial rights of a member to secure payment of any indebtedness or other obligation of the member to the association. A security interest provided for in the articles or bylaws is enforceable under, and governed by, article 9 of title 4, C.R.S.

(4) Unless the articles or bylaws otherwise provide, a member may not compel the limited cooperative association to offset financial rights against any indebtedness or obligation owed to the association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 788, § 1, effective April 2, 2012.

#### **7-58-605. Charging orders for judgment creditor of member or transferee.**

(1) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the financial rights of the judgment debtor for the unsatisfied amount of the judgment. A charging order issued under this subsection (1) constitutes a lien on the judgment debtor's financial rights and requires the limited cooperative association to pay over to the creditor or receiver, to the extent necessary to satisfy the judgment, any distribution that would otherwise be paid to the judgment debtor.

(2) To the extent necessary to effectuate the collection of distributions pursuant to a charging order under subsection (1) of this section, the court may:

(a) Appoint a receiver of the share of the distributions due or to become due to the judgment debtor under the judgment debtor's financial rights, with the power to make all inquiries the judgment debtor might have made; and

(b) Make all other orders that the circumstances of the case may require to give effect to the charging order.

(3) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the financial rights. The purchaser at the foreclosure sale obtains only the financial rights that are subject to the charging order, does not thereby become a member, and is subject to section 7-58-603.

(4) At any time before a sale pursuant to a foreclosure, a member or transferee whose financial rights are subject to a charging order under subsection (1) of this section may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(5) At any time before sale pursuant to a foreclosure, the limited cooperative association or one or more members whose financial rights are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and succeed to the rights of the judgment creditor, including the charging order. Unless the articles or bylaws otherwise provide, the association may act under this subsection (5) only with the consent of all members whose financial rights are not subject to the charging order.

(6) This article does not deprive any member or transferee of the benefit of any exemption laws applicable to the member's or transferee's financial rights.

(7) This section provides the exclusive remedy by which a judgment creditor of a member or transferee may satisfy the judgment from the member's or transferee's financial rights.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 788, § 1, effective April 2, 2012.

### **PART 7**

#### **MARKETING CONTRACTS**

**7-58-701. Authority.** (1) In this part 7, "marketing contract" means a contract between a limited cooperative association and another person, which person need not be a



patron member:

(a) Requiring the other person to sell, or deliver for sale or marketing on the person's behalf, a specified part of the person's products, commodities, or goods exclusively to or through the association or any facilities furnished by the association; or

(b) Authorizing the association to act for the person in any manner with respect to the products, commodities, or goods.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 789, § 1, effective April 2, 2012.

**7-58-702. Marketing contracts.** (1) If a marketing contract provides for the sale of products, commodities, or goods to a limited cooperative association, the sale transfers title to the association upon delivery or at any other specific time expressly provided by the contract.

(2) A marketing contract may:

(a) Authorize a limited cooperative association to create an enforceable security interest in the products, commodities, or goods delivered; and

(b) Allow the association to sell the products, commodities, or goods delivered and pay the sales price on a pooled or other basis after deducting selling costs, processing costs, overhead, expenses, and other charges.

(3) Some or all of the provisions of a marketing contract between a patron member and a limited cooperative association may be contained in the articles or bylaws.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 789, § 1, effective April 2, 2012.

**7-58-703. Duration of marketing contract.** The initial duration of a marketing contract may not exceed ten years, but the contract may be self-renewing for additional periods not exceeding five years each. Unless the contract provides for another manner or time for termination, either party may terminate the contract by giving notice in a record at least ninety days before the end of the current term.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 790, § 1, effective April 2, 2012.

**7-58-704. Remedies for breach of contract.** (1) Damages to be paid to a limited cooperative association for breach or anticipatory repudiation of a marketing contract may be liquidated, but only at an amount or under a formula that is reasonable in light of the actual or anticipated harm caused by the breach or repudiation. A provision that so provides is not a penalty.

(2) Upon a breach of a marketing contract, whether by anticipatory repudiation or otherwise, a limited cooperative association may seek:

(a) An injunction to prevent further breach; and

(b) Specific performance.

(3) The remedies in this section are in addition to any other remedies available to an association under law other than this part 7.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 790, § 1, effective April 2, 2012.

## PART 8

### DIRECTORS AND OFFICERS

**7-58-801. Board of directors.** (1) A limited cooperative association must have a board of directors of at least three individuals unless the association has fewer than three

members. If the association has fewer than three members, the number of directors may not be fewer than the number of members.

(2) The affairs of a limited cooperative association must be managed by, or under the direction of, the board of directors. The board may adopt policies and procedures that do not conflict with the articles, bylaws, or this article.

(3) An individual is not an agent for a limited cooperative association solely by being a director.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 790, § 1, effective April 2, 2012.

**7-58-802. No liability as director for limited cooperative association's obligations.** A debt, obligation, or other liability of a limited cooperative association is solely that of the association and is not a debt, obligation, or liability of a director solely by reason of being a director. An individual is not personally liable, directly or indirectly, for an obligation of an association solely by reason of being a director.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 791, § 1, effective April 2, 2012.

**7-58-803. Qualifications of directors.** (1) Unless the articles or bylaws otherwise provide, and subject to subsection (3) of this section, each director of a limited cooperative association must be an individual who is a member of the association or an individual who is designated by a member that is not an individual for purposes of qualifying and serving as a director; except that initial directors need not be members or designees of a member. A director must be at least eighteen years of age.

(2) Unless the articles or bylaws otherwise provide, a director may be an officer or employee of the limited cooperative association.

(3) If the articles or bylaws provide for nonmember directors, the number of nonmember directors may not exceed:

- (a) One, if there are two to four directors;
- (b) Two, if there are five to eight directors; or
- (c) One-third of the total number of directors if there are at least nine directors.

(4) The articles or bylaws may provide qualifications for directors in addition to those in this section.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 791, § 1, effective April 2, 2012.

**7-58-804. Election of directors and composition of board.** (1) Unless the articles or bylaws require a greater number:

- (a) The number of directors that must be patron members may not be fewer than:

- (I) One, if there are two or three directors;
- (II) Two, if there are four or five directors;
- (III) Three, if there are six to eight directors; or
- (IV) One-third of the directors if there are at least nine directors; and

- (b) A majority of the board of directors must be elected exclusively by patron members.

(2) Unless the articles or bylaws otherwise provide, if a limited cooperative association has investor members, directors who are investor members and who are not elected exclusively by patron members must be elected by the investor members.

(3) Unless the articles or bylaws otherwise provide, all nonmember directors, if any, must be elected by the patron members and the investor members.

(4) Subject to subsection (1) of this section, the articles or bylaws may provide for the election of all or a specified number of directors by one or more districts or classes of members.



(5) Subject to subsection (1) of this section, the articles or bylaws may provide for the nomination or election of directors by districts or classes, directly or by district delegates.

(6) If a class of members consists of a single member, the articles or bylaws may provide for the member to appoint a director or directors.

(7) Unless the articles or bylaws otherwise provide, cumulative voting for directors is prohibited.

(8) Except as otherwise provided by the articles, bylaws, subsection (6) of this section, or section 7-58-303, 7-58-516, 7-58-517, or 7-58-809, member directors must be elected at an annual members meeting.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 791, § 1, effective April 2, 2012.

**7-58-805. Term of director.** (1) Unless the articles or bylaws otherwise provide, and subject to subsections (3) and (4) of this section and section 7-58-304 (4), the term of a director expires at the annual members meeting following the director's election or appointment.

(2) Unless the articles or bylaws otherwise provide, a director may be reelected.

(3) Except as otherwise provided in subsection (4) of this section, a director continues to serve until a successor director is elected or appointed and qualifies or the director is removed, resigns, is adjudged incompetent, or dies.

(4) Unless the articles or bylaws otherwise provide, a director shall not serve the remainder of the director's term if the director ceases to qualify to be a director.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 792, § 1, effective April 2, 2012.

**7-58-806. Resignation of director.** A director may resign at any time by giving notice in a record to the limited cooperative association. Unless the notice states a later effective date, a resignation is effective when the notice is received by the association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 792, § 1, effective April 2, 2012.

**7-58-807. Removal of director.** (1) Unless the articles or bylaws otherwise provide:

(a) Members may remove a director with or without cause.

(b) A member or members holding at least ten percent of the total voting power entitled to be voted in the election of a director may demand removal of the director by one or more signed petitions submitted to the officer of the limited cooperative association charged with keeping its records.

(c) Upon receipt of a petition for removal of a director, an officer of the association or the board of directors shall:

(I) Call a special meeting of members to be held not later than ninety days after receipt of the petition by the association; and

(II) Mail or otherwise transmit or deliver in a record to the members entitled to vote on the removal, and to the director to be removed, notice of the meeting that complies with section 7-58-508.

(d) A director is removed if the votes in favor of removal are equal to or greater than the votes required to elect the director.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 792, § 1, effective April 2, 2012.

**7-58-808. Suspension of director by board.** (1) A board of directors may suspend a director if, considering the director's course of conduct and the inadequacy of other

available remedies, immediate suspension is necessary for the best interests of the association and the director is engaging, or has engaged, in:

- (a) Fraudulent conduct with respect to the association or its members;
  - (b) Gross abuse of the position of director;
  - (c) Intentional or reckless infliction of harm on the association; or
  - (d) Any other behavior, act, or omission as provided by the articles or bylaws.
- (2) A suspension under subsection (1) of this section is effective for a period determined by the board of directors, not to exceed sixty days, unless, before the end of the suspension period, the board calls and gives notice of a special meeting of members for removal of the director, in which case the suspension is effective until the earlier of adjournment of the members meeting or removal of the director.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 793, § 1, effective April 2, 2012.

**7-58-809. Vacancy on board.** (1) Unless the articles or bylaws otherwise provide, a vacancy on the board of directors must be filled:

- (a) Within a reasonable time by majority vote of the remaining directors, until the next annual members meeting or a special meeting of members is called to fill the vacancy; and
  - (b) For the balance of the unexpired term by members at the next annual members meeting or a special meeting of members called to fill the vacancy.
- (2) Unless the articles or bylaws otherwise provide, if a vacating director was elected or appointed by a class of members or a district:
- (a) The new director must be of that class or district; and
  - (b) The selection of the director for the unexpired term must be conducted in the same manner as would the selection for that position without a vacancy.
- (3) If a member appointed a vacating director, the articles or bylaws may provide for that member to appoint a director to fill the vacancy.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 793, § 1, effective April 2, 2012.

**7-58-810. Remuneration of directors.** Unless the articles or bylaws otherwise provide, the board of directors may set the remuneration of directors and of nondirector committee members appointed under section 7-58-817 (1).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 794, § 1, effective April 2, 2012.

**7-58-811. Meetings.** (1) A board of directors shall meet at least annually and may hold meetings inside or outside this state.

- (2) Unless the articles or bylaws otherwise provide, a board of directors may permit directors to attend or conduct board meetings through the use of any means of communication if all directors attending the meeting can communicate with each other during the meeting.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 794, § 1, effective April 2, 2012.

**7-58-812. Action without meeting.** (1) Unless prohibited by the articles or bylaws, any action that may be taken by a board of directors may be taken without a meeting if each director consents in a record to the action.

- (2) Consent under subsection (1) of this section may be withdrawn by a director in a record at any time before the limited cooperative association receives consent from all directors.



(3) A record of consent for any action under subsection (1) of this section may specify the effective date or time of the action.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 794, § 1, effective April 2, 2012.

**7-58-813. Meetings - notice.** (1) Unless the articles or bylaws otherwise provide, a board of directors may establish a time, date, and place for regular board meetings, and notice of the time, date, place, or purpose of those meetings is not required.

(2) Unless the articles or bylaws otherwise provide, notice of the time, date, and place of a special meeting of a board of directors must be given to all directors at least three days before the meeting, the notice must contain a statement of the purpose of the meeting, and the meeting is limited to the matters contained in the statement.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 794, § 1, effective April 2, 2012.

**7-58-814. Waiver of notice of meeting.** (1) Unless the articles or bylaws otherwise provide, a director may waive any required notice of a meeting of the board of directors in a record before, during, or after the meeting.

(2) Unless the articles or bylaws otherwise provide, a director's participation in a meeting is a waiver of notice of that meeting unless:

(a) The director objects to the meeting at the beginning of the meeting or promptly upon the director's arrival at the meeting and does not thereafter vote in favor of or otherwise assent to the action taken at the meeting; or

(b) The director promptly objects upon the introduction of any matter for which notice under section 7-58-813 is required and has not been given and does not thereafter vote in favor of or otherwise assent to the action taken on the matter.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 795, § 1, effective April 2, 2012.

**7-58-815. Quorum.** (1) Unless the articles or bylaws provide for a greater number, a majority of the total number of directors specified by the articles or bylaws constitutes a quorum for a meeting of the directors.

(2) If a quorum of the board of directors is present at the beginning of a meeting, any action taken by the directors present is valid even if withdrawal of directors originally present results in the number of directors being fewer than the number required for a quorum.

(3) A director present at a meeting but objecting to notice under section 7-58-814 (2) does not count toward a quorum.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 795, § 1, effective April 2, 2012.

**7-58-816. Voting.** (1) Each director has one vote for purposes of decisions made by the board of directors.

(2) Unless the articles or bylaws otherwise provide, the affirmative vote of a majority of directors present at a meeting is required for action by the board of directors.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 795, § 1, effective April 2, 2012.

**7-58-817. Committees.** (1) Unless the articles or bylaws otherwise provide, a board of directors may create one or more committees and appoint one or more individuals to serve on a committee.

(2) Unless the articles or bylaws otherwise provide, an individual appointed to serve on a committee of a limited cooperative association need not be a director or member.

(3) An individual who is not a director and is serving on a committee has, with respect to the subject matter of the committee, the same rights, duties, and obligations as a director serving on the committee.

(4) Unless the articles or bylaws otherwise provide, and subject to the oversight responsibility of the board of directors, each committee of a limited cooperative association may exercise the powers delegated to it by the board of directors, but a committee may not:

(a) Approve allocations or distributions except according to a formula or method prescribed by the board of directors;

(b) Approve or propose to members action requiring approval of members; or

(c) Fill vacancies on the board of directors or any of its committees.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 795, § 1, effective April 2, 2012.

**7-58-818. Standards of conduct and liability.** (1) Except as otherwise provided in section 7-58-820:

(a) The discharge of the duties of a director or member of a committee of the board of directors is governed by the law applicable to directors of entities organized under the “Colorado Business Corporation Act”, articles 101 to 117 of this title; and

(b) The liability of a director or member of a committee of the board of directors is governed by the law applicable to directors of entities organized under the “Colorado Business Corporation Act”, articles 101 to 117 of this title.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 796, § 1, effective April 2, 2012.

**7-58-819. Conflict of interest.** (1) The law applicable to conflicts of interest relating to a director of an entity organized under the “Colorado Business Corporation Act”, articles 101 to 117 of this title, governs conflicts of interest relating to a limited cooperative association and a director.

(2) A director does not have a conflict of interest under this article or the articles and bylaws solely because the director’s conduct relating to the duties of the director may further the director’s own interest.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 796, § 1, effective April 2, 2012.

**7-58-820. Other considerations of directors.** (1) Unless the articles otherwise provide, in considering the best interests of a limited cooperative association, a director of the association in discharging the duties of director, in conjunction with considering the long- and short-term interest of the association and its members, may consider:

(a) The interest of employees, customers, and suppliers of the association;

(b) The interest of the community in which the association operates; and

(c) Other cooperative principles and values that may be applied in the context of the decision.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 796, § 1, effective April 2, 2012.

**7-58-821. Right of director or committee member to information.** A director or a member of a committee appointed under section 7-58-817 may obtain, inspect, and copy all



information regarding the state of activities and financial condition of the limited cooperative association and other information regarding the activities of the association if the information is reasonably related to the performance of the director's duties as director or the committee member's duties as a member of the committee. Information obtained in accordance with this section may not be used by a director or a committee member in any manner that would violate any duty of or to the association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 796, § 1, effective April 2, 2012.

**7-58-822. Appointment and authority of officers.** (1) A limited cooperative association has the officers:

(a) Provided in the articles or bylaws; or  
(b) Established by the board of directors in a manner not inconsistent with the articles and bylaws.

(2) The articles or bylaws may designate or, if the articles or bylaws do not designate, the board of directors shall designate, one of the association's officers for preparing all records required by section 7-58-112 and for the authentication of records.

(3) Unless the articles or bylaws otherwise provide, the board of directors shall appoint the officers of the limited cooperative association.

(4) Officers of a limited cooperative association shall perform the duties the articles and bylaws prescribe or as authorized by the board of directors in a manner not inconsistent with the articles and bylaws.

(5) The election or appointment of an officer of a limited cooperative association does not of itself create a contract between the association and the officer.

(6) Unless the articles or bylaws otherwise provide, an individual may simultaneously hold more than one office in a limited cooperative association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 797, § 1, effective April 2, 2012.

**7-58-823. Resignation and removal of officers.** (1) The board of directors may remove an officer at any time with or without cause.

(2) An officer of a limited cooperative association may resign at any time by giving notice in a record to the association. Unless the notice specifies a later time, the resignation is effective when the notice is received by the association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 797, § 1, effective April 2, 2012.

## PART 9

### INDEMNIFICATION

**7-58-901. Indemnification.** (1) Indemnification of an individual who has incurred liability or is a party, or is threatened to be made a party, to litigation because of the performance of a duty to, or activity on behalf of, a limited cooperative association is governed by the "Colorado Business Corporation Act", articles 101 to 117 of this title.

(2) A limited cooperative association may purchase and maintain insurance on behalf of any individual against liability asserted against or incurred by the individual to the same extent and subject to the same conditions as provided by the "Colorado Business Corporation Act", articles 101 to 117 of this title.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 797, § 1, effective April 2, 2012.

## PART 10

## CONTRIBUTIONS, ALLOCATIONS, AND DISTRIBUTIONS

**7-58-1001. Members' contributions.** The articles or bylaws must establish the amount, manner, or method of determining any contribution requirements for members or must authorize the board of directors to establish the amount, manner, or other method of determining any contribution requirements for members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 798, § 1, effective April 2, 2012.

**7-58-1002. Contribution and valuation.** (1) Unless the articles or bylaws otherwise provide, the contributions of a member to a limited cooperative association may consist of tangible or intangible property or other benefit to the association, including money, labor or other services performed or to be performed, promissory notes, other agreements to contribute money or property, and contracts to be performed.

(2) The receipt and acceptance of contributions and the valuation of contributions must be reflected in a limited cooperative association's records.

(3) Unless the articles or bylaws otherwise provide, the board of directors shall determine the value of a member's contributions received or to be received, and the determination by the board of directors of valuation is conclusive for purposes of determining whether the member's contribution obligation has been met.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 798, § 1, effective April 2, 2012.

**7-58-1003. Contribution agreements.** Persons may enter into agreements to make contributions to a limited cooperative association before or after it is formed. Those agreements are enforceable by the association in accordance with their terms.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 798, § 1, effective April 2, 2012.

**7-58-1004. Allocations of profits and losses.** (1) Unless the articles or bylaws otherwise provide, all profits and losses of a limited cooperative association must be allocated to patron members. Unless the articles or bylaws otherwise provide, losses of the association must be allocated in the same proportion as profits.

(2) The articles or bylaws may provide for allocating profits of a limited cooperative association among members, among persons that are not members but conduct business with the association, to an unallocated account, or to any combination thereof.

(3) If a limited cooperative association has investor members, the articles or bylaws may not reduce the allocation to patron members to less than fifty percent of profits. For purposes of this subsection (3), the following rules apply:

(a) Amounts paid or due on contracts for the delivery to the association by patron members of products, goods, or services are not considered amounts allocated to patron members.

(b) Amounts paid, due, or allocated to investor members as a stated fixed or variable rate of return on investment are not considered amounts allocated to investor members if the determination of the return is not related to or based on profits.

(4) Unless prohibited by the articles or bylaws, in determining the profits for allocation under subsections (1), (2), and (3) of this section, the board of directors may first deduct and set aside a part of the profits to create or accumulate:

(a) Unallocated capital; and

(b) Reasonable unallocated reserves for specific purposes, including expansion and replacement of capital assets; education, training, and cooperative development; creation



and distribution of information concerning principles of cooperation; and community responsibility.

(5) Subject to subsections (1) and (6) of this section and the articles and bylaws, the board of directors shall allocate the amount remaining after any deduction or setting aside of amounts under subsection (4) of this section:

(a) To patron members in the ratio of each member's patronage to the total patronage of all patron members during the period for which allocations are to be made; and

(b) To investor members, if any, in the ratio of each investor member's contributions to the total contributions of all investor members.

(6) For purposes of allocation of profits and losses or specific items of profits or losses of a limited cooperative association to members, the articles or bylaws may establish allocation units or methods based on separate classes of members or, for patron members, on class, function, division, district, department, allocation units, pooling arrangements, members' contributions, or other equitable methods.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 798, § 1, effective April 2, 2012.

**7-58-1005. Distributions.** (1) Unless the articles or bylaws otherwise provide and subject to section 7-58-1007, the board of directors may authorize, and the limited cooperative association may make, distributions to members.

(2) Unless the articles or bylaws otherwise provide, distributions to members may be made in any form, including money, capital credits, allocated patronage equities, revolving fund certificates, and the limited cooperative association's own or other securities.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 799, § 1, effective April 2, 2012.

**7-58-1006. Redemption or repurchase.** Property distributed to a member by a limited cooperative association, other than money, may be redeemed or repurchased as provided in the articles or bylaws, but a redemption or repurchase may not be made without authorization by the board of directors. The board may withhold authorization for any reason in its sole discretion. A redemption or repurchase is treated as a distribution for purposes of section 7-58-1007.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 800, § 1, effective April 2, 2012.

**7-58-1007. Limitation on distributions.** (1) A limited cooperative association may not make a distribution if, after the distribution:

(a) The association would not be able to pay its debts as they become due in the ordinary course of the association's activities; or

(b) The association's assets would be less than the sum of its total liabilities.

(2) A limited cooperative association may base a determination that a distribution is not prohibited under subsection (1) of this section on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(3) Except as otherwise provided in subsection (4) of this section, the effect of a distribution allowed under subsection (2) of this section is measured:

(a) In the case of distribution by purchase, redemption, or other acquisition of financial rights in the limited cooperative association, as of the date money or other property is transferred or debt is incurred by the association; and

(b) In all other cases, as of the date:

(1) The distribution is authorized, if the payment occurs not later than one hundred twenty days after that date; or

(II) The payment is made, if payment occurs more than one hundred twenty days after the distribution is authorized.

(4) If indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

(5) For purposes of this section, “distribution” does not include reasonable amounts paid to a member in the ordinary course of business as payment or compensation for commodities, goods, past or present services, or reasonable payments made in the ordinary course of business under a bona fide employee retirement or other benefits program.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 800, § 1, effective April 2, 2012.

**7-58-1008. Liability for improper distributions - limitation of action.** (1) A director who consents to a distribution that violates section 7-58-1007 is personally liable to the limited cooperative association for the amount of the distribution that exceeds the amount that could have been distributed without the violation if it is established that, in consenting to the distribution, the director failed to comply with section 7-58-818 or 7-58-819.

(2) A member or transferee of financial rights that received a distribution knowing that the distribution was made in violation of section 7-58-1007 is personally liable to the limited cooperative association to the extent that the distribution exceeded the amount that could have been properly paid.

(3) A director against whom an action is commenced under subsection (1) of this section may:

(a) Implead in the action any other director who is liable under subsection (1) of this section and compel contribution from the director; and

(b) Implead in the action any person that is liable under subsection (2) of this section and compel contribution from the person in the amount the person received as described in subsection (2) of this section.

(4) An action under this section is barred if it is commenced later than three years after the distribution.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 801, § 1, effective April 2, 2012.

**7-58-1009. Relation to state securities law.** Any security, patronage refund, per unit retain certificate, capital credit, evidence of membership, preferred equity certificate, or other equity instrument issued, sold, or reported by a limited cooperative association as an investment in its stock or capital to the patron members of the association or by an entity subject to this article or a similar law of any other jurisdiction and authorized to transact business or conduct activities in this state is exempt from the securities laws contained in the “Colorado Securities Act”, article 51 of title 11, C.R.S. Such securities, patronage refunds, per unit retain certificates, capital credits, or evidences of membership, preferred equity certificates, or other equity instruments may be issued, sold, or reported to patron members of the association or entity lawfully by the issuer or its directors, officers, members, or salaried employees without the necessity of the issue or its directors, officers, members, or employees being registered as brokers or dealers under the “Colorado Securities Act”, article 51 of title 11, C.R.S.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 801, § 1, effective April 2, 2012.

**7-58-1010. Alternative distribution of unclaimed property, distributions, redemptions, or payments.** A limited cooperative association may provide in its articles or bylaws for the disposition of funds when declared payable by the association and remaining unclaimed by the holder for three years after notification has been mailed to the holder’s



last-known address of record on the books of the association, which disposition may consist of transferring the funds to the general operating account of the association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 801, § 1, effective April 2, 2012.

## PART 11

### DISSOCIATION

**7-58-1101. Member's dissociation.** (1) A member has the power to dissociate at any time, rightfully or wrongfully, by notice in a record.

(2) Unless the articles or bylaws otherwise provide, a member's dissociation from a limited cooperative association is wrongful only if the dissociation:

- (a) Breaches an express provision of the articles or bylaws; or
- (b) Occurs before the termination of the limited cooperative association and:

(I) The person is expelled as a member under paragraph (c) or (d) of subsection (4) of this section; or

(II) In the case of a person that is not an individual, trust other than a business trust, or estate, the person is expelled or otherwise dissociated as a member because it dissolved or terminated in bad faith.

(3) Unless the articles or bylaws otherwise provide, a person that wrongfully dissociates as a member is liable to the limited cooperative association for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or liability of the person to the association.

(4) A member is dissociated from the limited cooperative association as a member when:

(a) The association receives notice from the member in a record of dissociation as a member or, if the member specifies in the notice an effective date later than the date the association received notice, on that later date;

(b) An event stated in the articles or bylaws as causing the member's dissociation as a member occurs;

(c) The member is expelled as a member under the articles or bylaws;

(d) The member is expelled as a member by the board of directors because:

(I) It is unlawful to carry on the association's activities with the member as a member;

(II) There has been a transfer of all the member's financial rights in the association, other than:

(A) A creation or perfection of a security interest; or

(B) A charging order in effect under section 7-58-605 that has not been foreclosed;

(III) The member is a limited liability company or partnership that has been dissolved and its business is being wound up;

(IV) The member is a corporation or cooperative and:

(A) The member filed a statement of dissolution or the equivalent, or the jurisdiction of formation revoked the member's charter or right to conduct business;

(B) The association sends a notice to the member that it will be expelled as a member for a reason described in sub-subparagraph (A) of this subparagraph (IV); and

(C) Not later than ninety days after the notice was sent under sub-subparagraph (B) of this subparagraph (IV), the member did not reinstate or the jurisdiction of formation did not reinstate the member's charter or right to conduct business; or

(V) The member is an individual and is adjudged incompetent;

(e) In the case of a member who is an individual, the individual dies;

(f) In the case of a member that is a trust or is acting as a member by virtue of being a trustee of a trust, all the trust's financial rights in the association are distributed;

(g) In the case of a member that is an estate, the estate's entire financial interest in the association is distributed;

(h) In the case of a member that is not an individual, partnership, limited liability company, cooperative, corporation, trust, or estate, the member is terminated; or

(i) The association's participation in a merger if, under the plan of merger as approved under part 16 of this article, the member ceases to be a member.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 802, § 1, effective April 2, 2012.

**7-58-1102. Effect of dissociation as member.** (1) Upon a member's dissociation, subject to section 7-58-1103:

(a) The dissociated member has no further rights as a member; and

(b) Any financial rights owned by the dissociated member in the dissociated member's capacity as a member immediately before dissociation are owned by the dissociated member as a transferee.

(2) A dissociated member's dissociation as a member does not of itself discharge the dissociated member from any debt, obligation, or liability to the limited cooperative association that the dissociated member incurred under the articles or bylaws, by contract, or by other means while a member.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 803, § 1, effective April 2, 2012.

**7-58-1103. Power of estate of member.** Unless the articles or bylaws provide for greater rights, if a member is dissociated in accordance with section 7-58-1101 (4) (d) (V) or (4) (e), the member's personal representative or other legal representative may exercise the rights of a transferee of the member's financial rights and, for purposes of settling the estate of a deceased member, may exercise the informational rights of a current member to obtain information under section 7-58-505 (1).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 804, § 1, effective April 2, 2012.

## PART 12

### DISSOLUTION

**7-58-1201. Dissolution - winding up.** A limited cooperative association may be dissolved only as provided in this part 12 and in part 9 of article 90 of this title, and upon dissolution its business and activities must be wound up as provided in this part 12 and part 9 of article 90 of this title.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 804, § 1, effective April 2, 2012.

**7-58-1202. Voluntary dissolution.** (1). Except as otherwise provided in sections 7-58-1203 and 7-90-908, a limited cooperative association is dissolved and its activities must be wound up:

(a) Upon the occurrence of an event or at a time specified in the articles;

(b) Upon the action of the association's organizers, board of directors, or members under section 7-58-1205 or 7-58-1206; or

(c) Ninety days after the dissociation of a member that results in the association having one patron member and no other members, unless the association:

(I) Has a sole member that is a cooperative; or

(II) Not later than the end of the ninety-day period, admits at least one member in accordance with the articles or bylaws and has at least two members, at least one of which is a patron member.



**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 804, § 1, effective April 2, 2012.

**7-58-1203. Judicial dissolution - grounds.** (1) A limited cooperative association may be dissolved in a proceeding brought in court by the attorney general if it is established that:

- (a) The association obtained its articles of organization through fraud; or
- (b) The association has continued to exceed or abuse the authority conferred upon it by law.
- (2) A limited cooperative association may be dissolved in a proceeding brought in court by a member if it is established that:
  - (a) The directors are deadlocked in the management of the association's affairs, the members are unable to break the deadlock, and irreparable injury to the association is occurring or is threatened because of the deadlock;
  - (b) The directors or those in control of the association have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;
  - (c) The members are deadlocked in voting power and have failed to elect successors to directors whose terms have expired for two consecutive periods during which annual members meetings were held or were to be held; or
  - (d) The assets of the association are being misapplied or wasted.
- (3) A limited cooperative association may be dissolved in a proceeding brought in court by a creditor if it is established that:
  - (a) A creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied, and the association is insolvent; or
  - (b) The association is insolvent and the association has admitted in writing that a creditor's claim is due and owing.
- (4) In lieu of dissolution in a proceeding described in subsection (1), (2), or (3) of this section, the court may order any other relief that is appropriate and equitable.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 804, § 1, effective April 2, 2012.

**7-58-1204. Judicial dissolution - procedure.** (1) A judicial proceeding to dissolve a limited cooperative association must be brought in the proper court.

(2) It is not necessary to make members parties to a judicial proceeding to dissolve a limited cooperative association unless relief is sought against them individually.

(3) A court in a judicial proceeding brought to dissolve a limited cooperative association may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the limited liability company's assets wherever located, and carry on the business of the association until a full hearing can be held.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 805, § 1, effective April 2, 2012.

**7-58-1205. Voluntary dissolution before commencement of activity.** A majority of the organizers or initial directors of a limited cooperative association that has not yet begun business activity or the conduct of its affairs may dissolve the association.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 806, § 1, effective April 2, 2012.

**7-58-1206. Voluntary dissolution by the board and members.** (1) Except as otherwise provided in section 7-58-1205, for a limited cooperative association to voluntarily dissolve:

(a) A resolution to dissolve must be approved by a majority vote of the board of directors unless a greater percentage is required by the articles or bylaws;

(b) The board of directors must call a members meeting to consider the resolution, to be held not later than ninety days after adoption of the resolution; and

(c) The board of directors must mail or otherwise transmit or deliver to each member in a record that complies with section 7-58-508:

(I) The resolution required by paragraph (a) of this subsection (1);

(II) A recommendation that the members vote in favor of the resolution or, if the board determines that because of conflict of interest or any other reason it should not make a favorable recommendation, the basis of that determination; and

(III) Notice of the members meeting, which must be given in the same manner as notice of a special meeting of members.

(2) Subject to subsection (3) of this section, a resolution to dissolve must be approved by:

(a) At least two-thirds of the voting power of members present at a members meeting called under paragraph (b) of subsection (1) of this section; and

(b) If the limited cooperative association has investor members, at least a majority of the votes cast by patron members, unless the articles or bylaws require a greater percentage.

(3) The articles or bylaws may require that the percentage of votes required under paragraph (a) of subsection (2) of this section is:

(a) A different percentage that is not less than a majority of members voting at the meeting;

(b) Measured against the voting power of all members; or

(c) A combination of paragraphs (a) and (b) of this subsection (3).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 806, § 1, effective April 2, 2012.

**7-58-1207. Winding up.** (1) A limited cooperative association continues its existence after dissolution only for purposes of winding up its activities.

(2) In winding up a limited cooperative association's activities, the board of directors shall cause the association to:

(a) Collect its assets;

(b) Preserve the association or its property as a going concern for no more than a reasonable time;

(c) Prosecute and defend actions and proceedings;

(d) Dispose of its properties that will not be distributed in kind to its members;

(e) Discharge or make provision for discharging its liabilities;

(f) Distribute its remaining property among its members; and

(g) Do every other act necessary to wind up and liquidate its business and affairs.

(3) After dissolution and upon application of a limited cooperative association, a member, or a holder of financial rights, the proper court may order judicial supervision of the winding up of the association, including the appointment of a person to wind up the association's activities, if:

(a) After a reasonable time, the association has not wound up its activities; or

(b) The applicant establishes other good cause.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 807, § 1, effective April 2, 2012.

**7-58-1208. Distribution of assets in winding up.** (1) In winding up a limited cooperative association's business, the association shall apply its assets to discharge its obligations to creditors, including members that are creditors. The association shall apply any remaining assets to pay in money the net amount distributable to members in accordance with their right to distributions under subsection (2) of this section.



(2) Unless the articles or bylaws otherwise provide, in this subsection (2), “financial interests” means the amounts recorded in the names of members in the records of a limited cooperative association at the time a distribution is made, including amounts paid to become a member, amounts allocated but not distributed to members, and amounts of distributions authorized but not yet paid to members. Unless the articles or bylaws otherwise provide, each member is entitled to a distribution from the association of any remaining assets in the proportion of the member’s financial interests to the total financial interests of the members after all other obligations are satisfied.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 807, § 1, effective April 2, 2012.

**7-58-1209. Court proceeding.** (1) Upon application by a dissolved limited cooperative association that has published a notice under section 7-90-912, the proper court may determine the amount and form of security to be provided for payment of claims against the association that are contingent, have not been made known to the association, or are based on an event occurring after the effective date of dissolution but that, based on the facts known to the association, are reasonably anticipated to arise after the effective date of dissolution.

(2) Not later than ten days after filing an application under subsection (1) of this section, a dissolved limited cooperative association shall give notice of the proceeding to each known claimant holding a contingent claim.

(3) The court may appoint a representative in a proceeding brought under this section to represent all claimants whose identities are unknown. The dissolved limited cooperative association shall pay reasonable fees and expenses of the representative, including all reasonable attorney fees and expert witness fees.

(4) Provision by the dissolved limited cooperative association for security in the amount and the form ordered by the court satisfies the association’s obligations with respect to claims that are contingent, have not been made known to the association, or are based on an event occurring after the effective date of dissolution, and the claims shall not be enforced against a member that received a distribution.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 808, § 1, effective April 2, 2012.

**7-58-1210. Statement of dissolution.** (1) Upon dissolution, the limited cooperative association shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of dissolution stating:

(a) The domestic entity name of the limited cooperative association; and

(b) The principal office address of the limited cooperative association’s principal office.

(2) A limited cooperative association is dissolved as provided in section 7-58-1202, 7-58-1203, or 7-90-908.

(3) A person who is not a director or member has notice of the dissolution of a limited cooperative association on the earlier of:

(a) The ninetieth day after the limited cooperative association’s statement of dissolution is on file with the secretary of state; or

(b) The date on which the person first has actual knowledge of the dissolution.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 808, § 1, effective April 2, 2012.

## PART 13

### ACTION BY MEMBER

**7-58-1301. Derivative action.** (1) A member may maintain a derivative action to enforce a right of a limited cooperative association if:

- (a) The member demands in a record that the association bring an action to enforce the right; and
- (b) Any of the following occur:
  - (I) The association does not, within ninety days after the association receives the demand, agree to bring the action;
  - (II) The association notifies the member in a record that it has rejected the demand;
  - (III) Irreparable harm to the association would result by waiting ninety days after the association receives the demand; or
  - (IV) The association agrees to bring an action demanded and fails to bring the action within a reasonable time.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 809, § 1, effective April 2, 2012.

**7-58-1302. Proper plaintiff.** (1) A derivative action to enforce a right of a limited cooperative association may be maintained only by a person that:

- (a) Is a member or a dissociated member at the time the action is commenced and:
  - (I) Was a member when the conduct giving rise to the action occurred; or
  - (II) Whose status as a member devolved upon the person by operation of law or the articles or bylaws from a person that was a member at the time of the conduct; and
- (b) Adequately represents the interests of the association.
- (2) If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member who meets the requirements of subsection (1) of this section to be substituted as plaintiff.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 809, § 1, effective April 2, 2012.

**7-58-1303. Pleading.** (1) In a derivative action to enforce a right of a limited cooperative association, the complaint must state:

- (a) The date and content of the plaintiff's demand under section 7-58-1301 (1) (a) and the association's response;
- (b) If ninety days have not expired since the demand was received by the association, how irreparable harm to the association would result by waiting for the expiration of ninety days; and
- (c) If the association agreed to bring an action demanded, that the action has not been brought within a reasonable time.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 809, § 1, effective April 2, 2012.

**7-58-1304. Approval for discontinuance or settlement.** A derivative action to enforce a right of a limited cooperative association may not be discontinued or settled without notice to the association and the court's approval.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 810, § 1, effective April 2, 2012.

**7-58-1305. Proceeds and expenses.** (1) Except as otherwise provided in subsection (2) of this section:

- (a) Any proceeds or other benefits of a derivative action to enforce a right of a limited cooperative association, whether by judgment, compromise, or settlement, belong to the association and not to the plaintiff; and
- (b) If the plaintiff in the derivative action receives any proceeds, the plaintiff shall immediately remit them to the association.



(2) If a derivative action to enforce a right of a limited cooperative association is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney fees and costs, from the recovery of the association if not otherwise awarded against the defendant.

(3) On the termination of a derivative proceeding commenced pursuant to this part 13, where the court finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose, the court may order the plaintiff to pay any of the defendant's reasonable expenses, including attorney fees, incurred by the defendant in connection with the defense of the proceeding.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 810, § 1, effective April 2, 2012.

**7-58-1306. Applicability of derivative proceeding to foreign limited cooperative associations.** In any derivative proceeding in the right of a foreign limited cooperative association, the right of a person to commence or maintain a derivative proceeding in the right of a foreign limited cooperative association and any matters raised in the proceeding covered by sections 7-58-1301 to 7-58-1305 are governed by the law of the jurisdiction under which the foreign limited cooperative association was formed; except that any matters raised in the proceeding covered by section 7-58-1304 are governed by the law of this state.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 810, § 1, effective April 2, 2012.

## PART 14

### FOREIGN COOPERATIVES

**7-58-1401. Authority to transact business or conduct activities required.** Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign limited cooperative associations.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 811, § 1, effective April 2, 2012.

**7-58-1402. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, applies to foreign limited cooperative associations.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 811, § 1, effective April 2, 2012.

## PART 15

### DISPOSITION OF ASSETS

**7-58-1501. Disposition of assets not requiring member approval.** (1) Unless the articles of organization otherwise provide, member approval under section 7-58-1502 is not required for a limited cooperative association to:

(a) Sell, lease, exchange, license, or otherwise dispose of all or any part of the assets of the association in the usual and regular course of business; or

(b) Mortgage, pledge, dedicate to the repayment of indebtedness, or otherwise encumber in any way all or any part of the assets of the association, whether or not in the usual and regular course of business.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 811, § 1, effective April 2, 2012.

**7-58-1502. Member approval of other disposition or encumbrance of assets.** A sale, lease, exchange, license, or other disposition of assets or an encumbrance of assets of a limited cooperative association, other than a disposition or encumbrance described in section 7-58-1501, requires approval of the association's members under sections 7-58-1503 and 7-58-1504.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 811, § 1, effective April 2, 2012.

**7-58-1503. Notice and action on disposition or encumbrance of assets.** (1) For a limited cooperative association to dispose of or encumber assets under section 7-58-1502:

(a) A majority of the board of directors, or a greater percentage if required by the articles or bylaws, must approve the proposed disposition or encumbrance; and

(b) The board of directors must call a members meeting to consider the proposed disposition or encumbrance, hold the meeting not later than ninety days after approval of the proposed disposition or encumbrance by the board, and mail or otherwise transmit or deliver in a record to each member:

(I) The terms of the proposed disposition or encumbrance;

(II) A recommendation that the members approve the disposition or encumbrance or, if the board determines that because of conflict of interest or any other reason it should not make a favorable recommendation, the basis for that determination;

(III) A statement of any condition of the board's submission of the proposed disposition or encumbrance to the members; and

(IV) Notice of the meeting at which the proposed disposition or encumbrance will be considered, which notice must be given in the same manner as notice of a special meeting of members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 811, § 1, effective April 2, 2012.

**7-58-1504. Disposition or encumbrance of assets.** (1) Subject to subsection (2) of this section, a disposition or encumbrance of assets under section 7-58-1502 must be approved by:

(a) At least a majority of the voting power of members present at a members meeting called under section 7-58-1503 (1) (b); and

(b) If the limited cooperative association has investor members, at least a majority of the votes cast by patron members, unless the articles or bylaws require a greater percentage vote by patron members.

(2) The articles or bylaws may require that the percentage of votes required under paragraph (a) of subsection (1) of this section is:

(a) A different percentage that is not less than a majority of members voting at the meeting;

(b) Measured against the voting power of all members; or

(c) A combination of paragraphs (a) and (b) of this subsection (2).

(3) Subject to any contractual obligations, after a disposition or encumbrance of assets is approved and at any time before the consummation of the disposition or encumbrance, a limited cooperative association may approve an amendment to the contract for the disposition or encumbrance or the resolution authorizing the disposition or encumbrance or approve abandonment of the disposition or encumbrance:

(a) As provided in the contract or the resolution; and

(b) Except as limited or prohibited by the resolution, with the same affirmative vote of the board of directors and of the members as was required to approve the disposition or encumbrance.



(4) The voting requirements for districts, classes, or voting groups under section 7-58-404 apply to approval of a disposition of assets under this part 15.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 812, § 1, effective April 2, 2012.

## PART 16

### CONVERSION AND MERGER

**7-58-1601. Definitions.** In this part 16, unless the context otherwise requires:

- (1) “Constituent entity” means an entity that is a party to a merger.
- (2) “Constituent limited cooperative association” means a limited cooperative association that is a party to a merger.
- (3) “Converting limited cooperative association” means a converting entity that is a limited cooperative association.
- (4) “Organizational documents” means articles of incorporation, bylaws, articles of organization, operating agreements, partnership agreements, and any other documents serving a similar function in the creation and governance of an entity.
- (5) “Personal liability” means personal liability for a debt, liability, or other obligation of an entity imposed, by operation of law or otherwise, on a person that co-owns or has an interest in the entity:
  - (a) By the entity’s organic statute solely because of the person co-owning or having an interest in the entity; or
  - (b) By the entity’s organizational documents under a provision of the entity’s organic statute authorizing those documents to make one or more specified persons liable for all or specified parts of the entity’s debts, liabilities, and other obligations solely because the person co-owns or has an interest in the entity.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 812, § 1, effective April 2, 2012.

**7-58-1602. Conversion.** A limited cooperative association may convert into any form of entity permitted by section 7-90-201 if the board of directors of the limited cooperative association adopts a plan of conversion that complies with section 7-90-201.3 and the members entitled to vote thereon, if any, if required by section 7-58-1603, approve the plan of conversion.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 813, § 1, effective April 2, 2012.

**7-58-1603. Action on plan of conversion by converting limited cooperative association.** (1) For a limited cooperative association to convert into another form of entity, a plan of conversion must be approved by a majority of the board of directors, or a greater percentage if required by the articles or bylaws, and the board of directors must call a members meeting to consider the plan of conversion, hold the meeting not later than ninety days after approval of the plan by the board, and mail or otherwise transmit or deliver in a record to each member:

- (a) The plan, or a summary of the plan and a statement of the manner in which a copy of the plan in a record may be reasonably obtained by a member;
- (b) A recommendation that the members approve the plan of conversion or, if the board determines that because of a conflict of interest or any other reason it should not make a favorable recommendation, the basis for that determination;
- (c) A statement of any condition of the board’s submission of the plan of conversion to the members; and

(d) Notice of the meeting at which the plan of conversion will be considered, which notice must be given in the same manner as notice of a special meeting of members.

(2) Subject to subsections (3) and (4) of this section, a plan of conversion must be approved by:

(a) At least a majority of the voting power of members present at a members meeting called under subsection (1) of this section; and

(b) If the limited cooperative association has investor members, at least a majority of the votes cast by patron members, unless the articles or bylaws require a greater percentage vote by patron members.

(3) The articles or bylaws may require that the percentage of votes required under paragraph (a) of subsection (2) of this section is:

(a) A different percentage that is not less than a majority of members voting at the meeting;

(b) Measured against the voting power of all members; or

(c) A combination of paragraphs (a) and (b) of this subsection (3).

(4) The vote required to approve a plan of conversion must not be less than the vote required for the members of the limited cooperative association to amend the articles of organization.

(5) Consent in a record to a plan of conversion by a member must be delivered to the limited cooperative association before delivery of a statement of conversion for filing pursuant to section 7-58-1608 (1) if, as a result of the conversion, the member will have:

(a) Personal liability for an obligation of the association; or

(b) An obligation or liability for an additional contribution.

(6) Subject to subsection (5) of this section and any contractual rights, after a conversion is approved and at any time before the effective date of the conversion, a converting limited cooperative association may amend a plan of conversion or abandon the planned conversion:

(a) As provided in the plan; and

(b) Except as prohibited by the plan, by the same affirmative vote of the board of directors and of the members as was required to approve the plan.

(7) The voting requirements for districts, classes, or voting groups under section 7-58-404 apply to approval of a conversion under this part 16.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 813, § 1, effective April 2, 2012.

**7-58-1604. Merger.** (1) One or more domestic limited cooperative associations may merge into another domestic entity if the board of directors of each association that is a party to the merger and each other entity that is a party to the merger adopts a plan of merger complying with section 7-90-203.3 and the members entitled to vote thereon, if any, of each such association, if required by sections 7-58-1605 and 7-58-1606, approve the plan of merger.

(2) One or more domestic limited cooperative associations may merge with one or more foreign entities if:

(a) The merger is permitted by section 7-90-203 (2);

(b) The foreign entity complies with section 7-90-203.7 if it is the surviving entity of the merger; and

(c) Each domestic limited cooperative association complies with the applicable provisions of sections 7-58-1605 and 7-58-1606 and, if it is the surviving association of the merger, with section 7-58-1608 (2).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 815, § 1, effective April 2, 2012.

**7-58-1605. Notice and action on plan of merger by constituent limited cooperative association.** (1) For a limited cooperative association to merge with another entity, a plan



of merger must be approved by a majority vote of the board of directors or a greater percentage if required by the association's articles or bylaws.

(2) The board of directors shall call a members meeting to consider a plan of merger approved by the board, hold the meeting not later than ninety days after approval of the plan by the board, and mail or otherwise transmit or deliver in a record to each member:

(a) The plan of merger, or a summary of the plan and a statement of the manner in which a copy of the plan in a record may be reasonably obtained by a member;

(b) A recommendation that the members approve the plan of merger or, if the board determines that because of conflict of interest or any other reason it should not make a favorable recommendation, the basis for that determination;

(c) A statement of any condition of the board's submission of the plan of merger to the members; and

(d) Notice of the meeting at which the plan of merger will be considered, which notice must be given in the same manner as notice of a special meeting of members.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 815, § 1, effective April 2, 2012.

**7-58-1606. Approval or abandonment of merger by members.** (1) Subject to subsections (2) and (3) of this section, a plan of merger must be approved by:

(a) At least a majority of the voting power of members present at a members meeting called under section 7-58-1605 (2); and

(b) If the limited cooperative association has investor members, at least a majority of the votes cast by patron members, unless the articles or bylaws require a greater percentage vote by patron members.

(2) The articles or bylaws may provide that the percentage of votes required under paragraph (a) of subsection (1) of this section is:

(a) A different percentage that is not less than a majority of members voting at the meeting;

(b) Measured against the voting power of all members; or

(c) A combination of paragraphs (a) and (b) of this subsection (2).

(3) The vote required to approve a plan of merger must not be less than the vote required for the members of the limited cooperative association to amend the articles of organization.

(4) Consent in a record to a plan of merger by a member must be delivered to the limited cooperative association before delivery of a statement of merger for filing pursuant to section 7-58-1608 (2) if, as a result of the merger, the member will have:

(a) Personal liability for an obligation of the association; or

(b) An obligation or liability for an additional contribution.

(5) Subject to subsection (4) of this section and any contractual rights, after a merger is approved, and at any time before the effective date of the merger, a limited cooperative association that is a party to the merger may approve an amendment to the plan of merger or approve abandonment of the planned merger:

(a) As provided in the plan; and

(b) Except as limited by the plan, with the same affirmative vote of the board of directors and of the members as was required to approve the plan.

(6) The voting requirements for districts, classes, or voting groups under section 7-58-404 apply to approval of a merger under this part 16.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 816, § 1, effective April 2, 2012.

**7-58-1607. Merger of parent and subsidiary.** (1) Notwithstanding sections 7-58-1605 and 7-58-1606, by complying with this section, any parent limited cooperative association owning one hundred percent of the voting power, memberships, or interests of a subsidiary may either merge the subsidiary into itself or merge itself into the subsidiary.

(2) Subject to subsection (3) of this section, the boards of directors of the parent association and of the subsidiary shall adopt by resolution a plan of merger that states the following:

(a) The entity names of the parent association and subsidiary and the entity name of the surviving entity;

(b) The terms and conditions of the proposed merger;

(c) The manner and basis of converting the shares of the parent association and subsidiary into shares, obligations, or other securities of the surviving entity or any other limited cooperative association into money or other property in whole or part;

(d) Any amendments to the organizational documents of the surviving party to be effected by the merger; and

(e) Any other provisions relating to the merger as are deemed necessary or desirable.

(3) The members of the parent association are not required to vote on the merger unless the articles, bylaws, or the board require otherwise; except that if, as a result of the merger, the voting shares, memberships, or other interests of members of the parent association would be materially altered, then the members of the parent association have the right to vote on the plan of merger. If the members of the parent association have the right to vote on the plan of merger, the parent association shall mail a copy or summary of the plan of merger to each member of the parent association who has the right to vote on the plan. Notice and meeting requirements as provided for in this article shall apply.

(4) If the members of the parent limited cooperative association have the right to vote on the plan of merger, unless the articles, bylaws, or the board requires a greater vote, the plan of merger must be approved by a majority of the members of the parent association present and voting on the plan in person or in any other manner authorized by the association pursuant to section 7-58-515.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 816, § 1, effective April 2, 2012.

**7-58-1608. Filings required for conversion or merger.** (1) After a plan of conversion is approved, the converting entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of conversion pursuant to section 7-90-201.7.

(2) After a plan of merger is approved, the surviving entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of merger pursuant to section 7-90-203.7.

(3) If the plan of conversion or merger provides for amendments to the organizational documents of the converting or surviving entity, the converting or surviving entity shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment effecting the amendments.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 817, § 1, effective April 2, 2012.

**7-58-1609. Effect of conversion or merger.** (1) The effect of a conversion is determined by section 7-90-202.

(2) The effect of a merger is determined by section 7-90-204.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 818, § 1, effective April 2, 2012.

**7-58-1610. Consolidation.** (1) Constituent entities that are limited cooperative associations or foreign cooperatives may agree to call a merger a consolidation under this part 16.



(2) All provisions governing mergers or using the term merger in this part 16 apply equally to mergers that the constituent entities choose to call consolidations under subsection (1) of this section.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 818, § 1, effective April 2, 2012.

**7-58-1611. Part not exclusive.** This part 16 does not prohibit a limited cooperative association from being converted or merged under law other than this part 16.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 818, § 1, effective April 2, 2012.

## PART 17

### MISCELLANEOUS PROVISIONS

**7-58-1701. Uniformity of application and construction.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it or similar statutes.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 818, § 1, effective April 2, 2012.

**7-58-1702. Relation to electronic signatures in global and national commerce act.** This article modifies, limits, or supersedes the federal “Electronic Signatures in Global and National Commerce Act”, 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 818, § 1, effective April 2, 2012.

**7-58-1703. Savings clause.** This article does not affect an action or proceeding commenced, or right accrued, before April 2, 2012.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 818, § 1, effective April 2, 2012.

**7-58-1704. Effective date.** This article takes effect April 2, 2012.

**Source: L. 2011:** Entire article added, (SB 11-191), ch. 197, p. 818, § 1, effective April 2, 2012.

## PARTNERSHIPS

### ARTICLE 60

#### Uniform Partnership Law

**Cross references:** For the “Colorado Uniform Partnership Act (1997)”, see article 64 of this title; for recovery of personal judgments limited to parties served, see § 13-50-105 and rule 54(e), C.R.C.P.; for joint rights and obligations, see article 50 of title 13 and § 38-11-101; for pleading proper parties, see § 13-25-117; for mining partnerships, see article 44 of title 34; for filing affidavits

of firm names, see §§ 7-71-101, 7-71-103, 7-71-104, 7-71-106, and 7-71-108; for the “Uniform Records Retention Act”, see article 17 of title 6.

**Law reviews:** For article, “Choice of Entities in Colorado”, see 23 Colo. Law. 293 (1993); for article, “Choice of Entity in Colorado: An Update”, see 25 Colo. Law. 3 (October 1996); for article, “Colorado Choice of Entity 1998”, see 27 Colo. Law. 5 (June 1998); for article, “Contractually Binding Colorado Entities”, see 28 Colo. Law. 33 (December 1999); for article, “Colorado Choice of Form of Organization and Structure 2001”, see 30 Colo. Law. 11 (October 2001); for article “Entity and Trade Name Registration: 2001 Update”, see 30 Colo. Law. 81 (October 2001); for article “No Paper Required: Business Entity Legislation Makes Life Easier for Business Lawyers”, see 33 Colo. Law. 6 (June 2004); for article “Entity and Trade Name Registration: 2004 Update”, see 34 Colo. Law. 11 (January 2005).

7-60-101.	Short title.	7-60-136.	Effect of dissolution on existing liability.
7-60-102.	Definitions.	7-60-137.	Right to wind up.
7-60-103.	Knowledge and notice.	7-60-138.	Application of partnership property.
7-60-104.	Rules of construction.	7-60-139.	Rights dissolved for fraud.
7-60-105.	Rules for cases not covered.	7-60-140.	Rules for distribution.
7-60-106.	Partnership defined.	7-60-141.	Liability of persons continuing business.
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7-60-110.	Conveyance of real property.	7-60-144.5.	Statement of partnership authority or statement of denial.
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7-60-114.	Partner's breach of trust - liability.	7-60-148.	Law governing foreign limited liability partnerships - repeal. (Repealed)
7-60-115.	Nature of partner's liability.	7-60-149.	Limited liability partnership periodic reports.
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7-60-117.	Liability of incoming partner.	7-60-151.	Filing, service, and copying fees. (Repealed)
7-60-118.	Rights and duties of partners.	7-60-152.	Failure of limited liability partnerships to comply with part 5 of article 90 of this title. (Repealed)
7-60-119.	Partnership books.	7-60-152.5.	Registered agent - service of process.
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**7-60-101. Short title.** This article shall be known and may be cited as the “Uniform Partnership Law”.

**Source:** L. 31: p. 645, § 1. CSA: C. 123, § 1. CRS 53: § 104-1-1. C.R.S. 1963: § 104-1-1.



## ANNOTATION

**Law reviews.** For article, "One Year Review of Corporations, Partnership, and Agency", see 37 Dicta 11 (1960). For article, "Research and Development Tax Shelter Partnerships", see 11 Colo. Law. 1851 (1982).

**The uniform act governs** the formation, operation, and dissolution of partnerships and the rights and duties of partners, one to another and to third persons. Mann v. Friden, 132 Colo. 273, 287 P.2d 961 (1955).

This article governs in a dispute involving a partnership formed before 1998. Adams v. Land Servs., Inc., 194 P.3d 429 (Colo. App. 2008).

**Derivative actions not authorized.** This act contains no provision analogous to C.R.C.P. 23.1 or § 7-62-1001 that would give a general partner the right to bring a derivative action, absent exceptional circumstances. Adams v. Land Servs., Inc., 194 P.3d 429 (Colo. App. 2008).

**7-60-102. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Bankrupt" includes bankrupt or debtor under the federal bankruptcy code of 1978, title 11 of the United States Code, or insolvent under any state insolvency act.
- (2) "Business" includes every trade, occupation, or profession.
- (3) "Conveyance" includes every assignment, lease, mortgage, or encumbrance.
- (4) "Court" includes every court and judge having jurisdiction in the case.
- (4.5) Repealed.
- (4.7) "Limited liability partnership" means a partnership that has registered under section 7-60-144.
- (5) Repealed.
- (6) "Real property" includes land and any interest or estate in land.
- (7) (Deleted by amendment, L. 2004, p. 1421, § 67, effective July 1, 2004.)

**Source:** L. 31: p. 645, § 2. CSA: C. 123, § 2. CRS 53: § 104-1-2. C.R.S. 1963: § 104-1-2. L. 80: (1) amended, p. 782, § 1, June 5. L. 95: (4.5) and (7) added, p. 778, § 1, effective May 24. L. 2003: (4.5)(b) and (5)(b) added by revision, pp. 2356, 2357, §§ 347, 348. L. 2004: (4.7) added and (7) amended, p. 1421, § 67, effective July 1.

**Editor's note:** Subsections (4.5)(b) and (5)(b) provided for the repeal of subsections (4.5) and (5) respectively, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

## ANNOTATION

**Law reviews.** For note, "Corporations — Investment Clubs", see 31 Rocky Mt. L. Rev. 358 (1959).

**Applied** in Frazier v. Carlin, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**7-60-103. Knowledge and notice.** (1) A person has "knowledge" of a fact within the meaning of this article not only when the person has actual knowledge thereof but also when the person has knowledge of such other facts as in the circumstances show bad faith.

(2) A person has "notice" of a fact within the meaning of this article when the person who claims the benefit of the notice:

- (a) States the fact to such person; or
- (b) Delivers through the mail or by other means of communication a written statement of the facts to such person or to a proper person at such person or recipient's place of business or residence.

**Source:** L. 31: p. 646, § 3. CSA: C. 123, § 3. CRS 53: § 104-1-3. C.R.S. 1963: § 104-1-3. L. 2004: (1) and (2)(b) amended, p. 1421, § 68, effective July 1.

### ANNOTATION

**Law reviews.** For note, "Corporations — Investment Clubs", see 31 Rocky Mt. L. Rev. 358 (1959).

**7-60-104. Rules of construction.** (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(2) The law of estoppel shall apply under this article.

(3) The law of agency shall apply under this article.

(4) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This article shall not be construed so as to impair the obligations of any contract existing prior to April 17, 1931, nor to affect any action or proceedings begun or right accrued before said date.

**Source:** L. 31: p. 646, § 4. CSA: C. 123, § 4. CRS 53: § 104-1-4. C.R.S. 1963: § 104-1-4.

**7-60-105. Rules for cases not covered.** In any case not provided for in this article, the rules of law and equity, including the law merchant, shall govern.

**Source:** L. 31: p. 647, § 5. CSA: C. 123, § 5. CRS 53: § 104-1-5. C.R.S. 1963: § 104-1-5.

**7-60-106. Partnership defined.** (1) A partnership is an association of two or more persons to carry on, as co-owners, a business for profit and includes, without limitation, a limited liability partnership.

(2) But any association formed under any other statute of this state or any statute adopted by an authority other than the authority of this state is not a partnership under this article unless such association has been a partnership in this state prior to April 17, 1931. This article shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith.

**Source:** L. 31: p. 647, § 6. CSA: C. 123, § 6. CRS 53: § 104-1-6. C.R.S. 1963: § 104-1-6. L. 95: (1) amended, p. 778, § 2, effective May 24. L. 2004: (1) amended, p. 1422, § 69, effective July 1.

**Cross references:** For provisions on limited partnerships, see articles 61 and 62 of this title.

### ANNOTATION

**Law reviews.** For article, "Partnership or LLC: Alternative to an Irrevocable Life Insurance Trust?", see 25 Colo. Law. 43 (January 1996).

**A partnership is formed when** an agreement is entered into which clearly embodies every element necessary for the formation and creation of a partnership and when it is executed by the parties nothing further remains to be done to legally bring about a partnership relation. Roberts v. Roberts, 113 Colo. 128, 155 P.2d 155 (1945); Thompson v. McCormick, 149 Colo. 465, 370 P.2d 442 (1962).

An express agreement is not required to create a partnership; a partnership may be formed by the conduct of the parties. Stratman v.

Dietrich, 765 P.2d 603 (Colo. App. 1988); In re Winden, 120 Bankr. 570 (Bankr. D. Colo. 1990).

**And the partnership relation continues until it is dissolved** either by mutual agreement or by action of the parties or decree of court. Thompson v. McCormick, 149 Colo. 465, 370 P.2d 442 (1962).

**Failure by a partner to contribute his share of capital** does not necessarily negative existence of a partnership, as such failure may be waived by the other partner where, following execution of the agreement, the other partner authorizes and makes payments of profits to the noncontributing partner. Thompson v. McCormick, 149 Colo. 465, 370 P.2d 442 (1962).



An agreement providing "all profits and losses in this venture are to be borne equally by the parties", expresses a consideration in the form of mutual promises and is sufficient to bring about a partnership. *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962).

**And partner's liability for losses indicates right to profit.** If a partnership incurs losses and there is no question but that a partner would be

liable for his share of the losses under the terms of the partnership agreement, this clearly indicates that the parties intended that partner to have an equal share of the profits. *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962).

**Applied** in *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979); *Damrell v. Creagar*, 42 Colo. App. 281, 599 P.2d 262 (1979).

**7-60-107. Partnership determined - how.** (1) In determining whether a partnership exists these rules shall apply:

(a) Except as provided by section 7-60-116, persons who are not partners as to each other are not partners as to third persons;

(b) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property;

(c) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;

(d) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(I) As a debt by installments or otherwise;

(II) As wages of an employee or rent to a landlord;

(III) As an annuity to a surviving spouse or representative of a deceased partner;

(IV) As interest on a loan, though the amount of payment varies with the profits of the business;

(V) As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.

**Source:** L. 31: p. 647, § 7. **CSA:** C. 123, § 7. **CRS 53:** § 104-1-7. **C.R.S. 1963:** § 104-1-7. **L. 77:** (1)(d)(III) amended, p. 294, § 1, effective July 1. **L. 2004:** IP(1)(d) amended, p. 1422, § 70, effective July 1.

## ANNOTATION

**A partnership can only be created by a contract of the parties** whereby they agree to place their money, effects, labor, and skill in a lawful business and to divide the profits and bear the loss in certain proportions. *Mann v. Friden*, 132 Colo. 273, 287 P.2d 961 (1955).

**Mere joint ownership of land does not establish a partnership** even though profits are shared. *Brown v. Miller*, 111 Colo. 327, 141 P.2d 682 (1943).

**Subsection (1)(d) makes receipt of a share of the profits of a business prima facie evidence** that the person receiving it is a partner. *Quier v. Rickly*, 166 Colo. 5, 177 P.2d 549 (1947); *Montgomery v. Tufford*, 165 Colo. 18, 437 P.2d 36 (1968).

**And where there is no evidence indicating that the landlord-tenant relationship exists** between individuals, the mere fact that profits come from rental property does not bring them within the exception of subsection (1)(d)(II) as

"rent to a landlord". *Montgomery v. Tufford*, 165 Colo. 18, 437 P.2d 36 (1968).

**Assignment of right to profits.** Where a partner assigns his rights to profits, but the remaining partners have not agreed to admit the assignee as a partner, § 7-60-127 assures that the assignee does not become a partner without the consent of the remaining partners in contravention of § 7-60-118 (1)(g). Hence, the provision that the partnership is not dissolved merely protects the original parties from an unwanted partner or from a finding of partnership from the fact of the assignee's receipt of a share of the profits. *Wester & Co. v. Nestle*, 669 P.2d 1046 (Colo. App. 1983).

**No evidence of joint venture.** Where each party was to be separately and solely responsible for the expenses involved in the development of certain land into residential building sites, one party could have enjoyed an individual profit while the other might have sustained an individ-

ual loss. For such reason, the parties cannot be said to be actual joint venturers even though the agreement between the parties provided that the "gross sales price" was to be divided equally between them. *Colo. Performance v. Mariposa Assoc.*, 754 P.2d 401 (Colo. App. 1987).

**Trial court properly found that plaintiff and defendant had not formed a partnership.** There was no agreement between plaintiff and defendant to share profits and losses in the house venture, and execution of a quitclaim deed and promissory note by plaintiff indicated that defendant's contribution was a loan secured by the house as collateral. *Reid v. Pyle*, 51 P.3d 1064 (Colo. App. 2002).

**For the relevant cases decided prior to enactment of the uniform partnership law in**

**7-60-108. Partnership property.** (1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

**Source: L. 31: p. 648, § 8. CSA: C. 123, § 8. CRS 53: § 104-1-8. C.R.S. 1963: § 104-1-8.**

## ANNOTATION

**Law reviews.** For article, "One Year Review of Agency, Partnerships, and Corporations", see 39 *Dicta* 61 (1962).

**The intent of the parties with respect to the issue of contribution** of individually held property to the partnership is a question of fact and several factors reflecting the parties' intent shall be weighed by the fact finder. *Strandring v. Strandring*, 794 P.2d 1089 (Colo. App. 1990).

**Property acquired with partnership funds is presumed to belong to the partnership unless** it is shown that all the partners had a contrary intention. This presumption is not negated by property so acquired being placed in the name of one of the individual members. *Oswald v. Dawn*, 143 Colo. 487, 354 P.2d 505 (1960); *Wise v. Nu-Tone Prods. Co.*, 148 Colo. 574, 367 P.2d 346 (1961).

**Mutual abandonment of proposed partnership entails return to status quo as to real property.** Where real estate is purchased by one partner to be used by a proposed partnership and the suggested partnership is mutually rescinded and abandoned, it is for both parties to return to status quo. *Acker v. Johns*, 121 Colo. 336, 216 P.2d 426 (1950).

**Where an insurance policy is issued** on the life of one member of a partnership with the

1931, see *Leavitt v. Windsor Land & Inv. Co.*, 54 F. 439 (8th Cir. 1893); *Omaha & Grant Smelting & Ref. Co. v. Rucker*, 6 Colo. App. 334, 40 P. 853 (1895); *Mason v. Sieglitz*, 22 Colo. 320, 44 P. 588 (1896); *Robinson v. Compher*, 13 Colo. App. 343, 57 P. 754 (1899); *L. Baldwin & Co. v. Patrick*, 39 Colo. 347, 91 P. 828 (1907); *Kent v. Cobb*, 24 Colo. App. 264, 133 P. 424 (1913); *Bond-Connell Sheep & Wool Co. v. Snyder*, 68 Colo. 238, 188 P. 740 (1920).

**Applied in** *Golden v. Sanderson*, 103 Colo. 359, 86 P.2d 252 (1938); *Damrell v. Creagar*, 42 Colo. App. 281, 599 P.2d 262 (1979); *Yoder v. Hooper*, 695 P.2d 1182 (Colo. App. 1984), *aff'd*, 737 P.2d 852 (Colo. 1987).

other partner being the beneficiary, the partnership as contingent beneficiary, and the premiums paid from partnership funds, such policy constitutes a partnership asset in the absence of evidence to indicate a contrary intention on the part of the partners. *Wise v. Nu-Tone Prods. Co.*, 148 Colo. 574, 367 P.2d 346 (1961).

**And the cash value of such a policy during the lifetime of the insured is a partnership asset** where all premiums are paid with partnership funds. *Wise v. Nu-Tone Prods. Co.*, 148 Colo. 574, 367 P.2d 346 (1961).

**Moreover, the fact that an accountant does not include the cash value of an insurance policy as an asset of the partnership** is not always significant in determining whether it is a partnership asset. *Wise v. Nu-Tone Prods. Co.*, 148 Colo. 574, 367 P.2d 346 (1961).

**Where deeds of trust to property owned by the partnership are signed only by the partners in their individual capacity and are recorded under the partners' names**, there was no indication in the record of a conveyance by the partnership and the bankruptcy trustee was not charged with constructive knowledge of the deeds of trust signed by the individual partners. *Nile Valley Fed. Sav. & Loan Ass'n v. Security*



Title Guarantee Corp., 813 P.2d 849 (Colo. App. 1991).

**Applied** in *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**7-60-109. Partner agent of partnership.** (1) Subject to the effect of a statement of partnership authority under section 7-64-303, every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which the partner is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom the partner is dealing has knowledge of the fact that the partner has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership;

(b) Dispose of the goodwill of the business;

(c) Do any other act which would make it impossible to carry on the ordinary business of the partnership;

(d) Confess a judgment.

(e) Repealed.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

**Source:** L. 31: p. 649, § 9. CSA: C. 123, § 9. CRS 53: § 104-1-9. C.R.S. 1963: § 104-1-9. L. 75: (3)(e) repealed, p. 578, § 3, effective July 14. L. 2004: (1) amended, p. 1422, § 71, effective July 1.

## ANNOTATION

**Law reviews.** For article, "A Law Firm Pension Plan?", see 37 Dicta 351 (1960).

**Annotator's note.** Relevant cases decided prior to the earliest source of § 7-60-109 have been included with the annotations to this section.

**Effect of subsection (1)** is that the status of a partner, as both principal and agent of the partnership, serves as complete authority with respect to acts which are apparently within the usual course of the partnership's particular business, unless the other party knows that he has no such authority. This obviates the necessity of a specific written authorization from the other partners. *Ball v. Carlson*, 641 P.2d 303 (Colo. App. 1981).

**Each active partner a general agent.** When acting in furtherance of the objects and business of the firm and within the scope of its business, one partner is clothed with the full powers of all the partners and is authorized to bind the firm in all transactions, for the very nature and purposes of a partnership association necessarily constitute each active partner a general agent of the firm. *Wilcox v. Jackson*, 7 Colo. 521, 4 P. 966 (1884); *Sch. Dist. No. 3, Clear Creek County v. Central Sav. Bank & Trust Co.*, 113 Colo. 487, 159 P.2d 361 (1945).

**This agency principle is subject to the terms of the partnership agreement.** Dissenting partners, who had delegated to the managing partners the right to enter into certain transactions, could not later rely on their status as agents of the partnership to attempt to rescind those transactions. *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

**Where a promissory note was made by a partner, purportedly in a partnership capacity,** and the partnership's name appeared thereon, which inferred that the note was partnership business, these facts indicated a basis for the court's conclusion that the partner had ostensible authority to sign the note on behalf of the partnership. *Rocky Mt. Nat'l Bank v. McCaskill*, 16 Colo. 408, 26 P. 821 (1891); *Kruse v. Bank of Fountain Valley*, 28 Colo. App. 364, 473 P.2d 171 (1970).

**A confession of judgment by one partner without any authority** from the other partner is void. *Buchanan v. Scandia Plow Co.*, 6 Colo. App. 34, 39 P. 899 (1895).

**Sale of partnership realty.** The act of a partner in selling real estate, when in the apparent scope of the partnership's business, is binding upon the partnership and the other partners

without obtaining their written consent, notwithstanding the statute of frauds requirement of § 38-10-109, that the authority of an agent to sell real estate must be in writing. *Ball v. Carlson*, 641 P.2d 303 (Colo. App. 1981).

**Transfer of assets under plan authorized by partnership did not violate subsection (3)(c).** *Silverberg v. Colantuno*, 991 P.2d 280 (Colo. App. 1998).

**The acts of one joint venturer are binding upon other joint venturers** if those acts pertain

to matters within the scope of the joint venture, and the joint venturer had authority to act. *A.B. Hirschfeld Press v. Weston Group*, 824 P.2d 44 (Colo. App. 1991).

**Applied** in *Moynahan v. Prentiss*, 10 Colo. App. 295, 51 P. 94 (1897); *Singer Hous. Co. v. Seven Lakes Venture*, 466 F.Supp. 369 (D. Colo. 1979); *Erickson v. Oberlohr*, 749 P.2d 996 (Colo. App. 1987).

**7-60-110. Conveyance of real property.** (1) Subject to the effect of a statement of partnership authority under section 7-64-303, where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; except that the partnership may recover such property unless the partner's act binds the partnership under the provisions of section 7-60-109 (1) or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded the partner's authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner in the partner's own name passes the equitable interest of the partnership if the act is one within the authority of the partner under the provisions of section 7-60-109 (1).

(3) Where title to real property is in the name of one or more but not all the partners and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partner's act does not bind the partnership under the provisions of section 7-60-109 (1), unless the purchaser or the purchaser's assignee is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name or in the partner's own name passes the equitable interest of the partnership if the act is one within the authority of the partner under the provisions of section 7-60-109 (1).

(5) Where the title to real property is in the names of all the partners, a conveyance executed by all the partners passes all their rights in such property.

**Source:** L. 31: p. 650, § 10. CSA: C. 123, § 10. CRS 53: § 104-1-10. C.R.S. 1963: § 104-1-10. L. 2004: (1) to (4) amended, p. 1422, § 72, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Evidence in the Proof of Real Estate Titles", see 24 Rocky Mt. L. Rev. 424 (1952). For article, "Guess Who's Coming to Closing", see 11 Colo. Law. 689 (1982). For article, "Signatures on Documents Affecting Title to Colorado Real Property —

Part II", see 12 Colo. Law. 258 (1983). For article, "Partnership Status of Joint Ventures in Colorado: Editorial Comments on CRS § 38-30-166", see 25 Colo. Law. 61 (February 1996).

**Applied** in *Ball v. Carlson*, 641 P.2d 303 (Colo. App. 1981).

**7-60-111. Admission of partner binds partnership.** An admission or representation made by any partner concerning partnership affairs within the scope of the partner's authority as conferred by this article is evidence against the partnership.

**Source:** L. 31: p. 651, § 11. CSA: C. 123, § 11. CRS 53: § 104-1-11. C.R.S. 1963: § 104-1-11. L. 2004: Entire section amended, p. 1423, § 73, effective July 1.

**7-60-112. Notice to partner - effect.** Notice to any partner of any matter relating to partnership affairs and the knowledge of the partner acting in the particular matter acquired



while a partner or then present to the partner's mind and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

**Source:** L. 31: p. 651, § 12. CSA: C. 123, § 12. CRS 53: § 104-1-12. C.R.S. 1963: § 104-1-12. L. 2004: Entire section amended, p. 1423, § 74, effective July 1.

#### ANNOTATION

**Knowledge of one partner concerning the partnership business is knowledge possessed by all the partners.** *Lee v. Durango Music*, 144 Colo. 270, 355 P.2d 1083 (1960).

**When a general partner has knowledge and notice of a matter concerning partnership business**, received or acquired while transacting partnership business, that knowledge and

notice must generally be imputed to the limited partners. *BMS P'ship v. Winter Park Devil's Thumb Inv. Co.*, 910 P.2d 61 (Colo. App. 1995), *aff'd* on other grounds, 926 P.2d 1253 (Colo. 1996).

**Applied** in *Spiker v. Hoogetboom*, 628 P.2d 177 (Colo. App. 1981); *In re Lynch v. Three Ponds Co.*, 656 P.2d 51 (Colo. App. 1982).

**7-60-113. Partner's wrongful acts - liability.** Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of the other partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same intent as the partner so acting or omitting to act.

**Source:** L. 31: p. 652, § 13. CSA: C. 123, § 13. CRS 53: § 104-1-13. C.R.S. 1963: § 104-1-13. L. 2004: Entire section amended, p. 1423, § 75, effective July 1.

#### ANNOTATION

**Law reviews.** For note, "Liability of Joint Tortfeasors in Colorado", see 30 *Dicta* 176 (1953). For article, "One Year Review of Contracts", see 34 *Dicta* 85 (1957).

**Knowledge that note is given outside scope of partnership's business precludes recovery.** Where one purchases a note from a partner with the knowledge that it is given for a purpose

clearly outside of the scope of the partnership's business, he is not entitled to recover as against the partnership or either of the nonsigning partners. *King v. Meckleburg*, 43 Colo. 316, 95 P. 951 (1908) (decided prior to the earliest source of § 7-60-113).

**Applied** in *Williams v. Burns*, 463 F. Supp. 1278 (D. Colo. 1979).

**7-60-114. Partner's breach of trust - liability.** (1) The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of such partner's apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

**Source:** L. 31: p. 652, § 14. CSA: C. 123, § 14. CRS 53: § 104-1-14. C.R.S. 1963: § 104-1-14. L. 2004: (1)(a) amended, p. 1423, § 76, effective July 1.

#### ANNOTATION

**Law reviews.** For note, "Liability of Joint Tortfeasors in Colorado", see 30 *Dicta* 176 (1953). For article, "One Year Review of Contracts", see 34 *Dicta* 85 (1957).

**Applied** in *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**7-60-115. Nature of partner's liability.** (1) Except as otherwise provided in subsection (2) of this section, all partners are liable:

(a) Jointly and severally for everything chargeable to the partnership under sections 7-60-113 and 7-60-114;

(b) Jointly and severally for all other debts and obligations of the partnership, but any partner may enter into a separate obligation to perform a partnership contract.

(2) (a) Except as otherwise provided in the partnership agreement, partners in a limited liability partnership are not liable directly or indirectly, including by way of indemnification, contribution, or otherwise, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of or chargeable to the partnership while it is a limited liability partnership; except that this subsection (2) shall not affect the liability of a partner in a limited liability partnership for such partner's own negligence, wrongful acts, or misconduct.

(b) Partners in a limited liability partnership do not become liable, directly or indirectly, for debts, obligations, or liabilities incurred while the partnership was a limited liability partnership merely because the partnership ceases to be a limited liability partnership.

**Source:** L. 31: p. 652, § 15. CSA: C. 123, § 15. CRS 53: § 104-1-15. C.R.S. 1963: § 104-1-15. L. 73: p. 1082, § 1. L. 95: Entire section amended, p. 778, § 3, effective May 24. L. 2004: (2) amended, p. 1423, § 77, effective July 1.

**Cross references:** For service on partnerships, see rule 4(e)(4), C.R.C.P.; for judgments against partners and partnerships, see rule 54(e), C.R.C.P.; for judgments against partners not served with process, see rule 106 (a)(5), C.R.C.P.; for joint rights and obligations, see § 13-50-101.

## ANNOTATION

**Law reviews.** For article, "One Year Review of Contracts", see 34 Dicta 85 (1957). For article, "A Law Firm Pension Plan?", see 37 Dicta 351 (1960).

**Section 13-21-111.5 abolishing joint and several liability does not apply to partnerships under this section.** Bank of Denver v. Southeastern Capital Group, Inc., 763 F. Supp. 1552 (D. Colo. 1991).

**Section is not abrogated by § 13-21-111.5 which calculates liability based upon wrongdoer's percentage of fault.** Hughes v. Johnson, 764 F. Supp. 1412 (D. Colo. 1991).

**Partners and creditors may expressly agree to limit the liability of the partners and the terms of each obligation must be examined to determine the extent of each partner's liability.** Black v. First Federal Savings and Loan, 830 P.2d 1103 (Colo. App. 1992).

**The creditor's waiver of personal guarantees by the general partners did not waive the general partners' liability under this section** where the evidence showed that the creditor did not contemplate a total waiver of liability and nothing in the limited partnership agreement limited the general partners' liability. Black v. First Federal Savings and Loan, 830 P.2d 1103 (Colo. App. 1992).

**General partners are estopped to deny the validity of contracts and deeds they enter into if the limited partnership received the full benefits and use of the proceeds for the purposes intended.** Black v. First Fed. Sav. & Loan Ass'n, 830 P.2d 1103 (Colo. App. 1992).

**Although the general rule is that partners are jointly and severally liable for all debts and obligations of the partnership,** partners and creditors may expressly agree to limit the liability of partners for the debts of the partnership, and the terms of each obligation must be ascertained to determine the extent of the partners' liability. Black v. First Fed. Sav. & Loan Ass'n, 830 P.2d 1103 (Colo. App. 1992).

**Where partnership is assessed for use taxes and incurs liability owing to its failure to protest liability,** taxpayer, as general partner of a limited partnership, is jointly and severally liable therefor. AF Prop. v. Dept. of Rev., 852 P.2d 1267 (Colo. App. 1992).

**When issue of material fact existed as to whether general partnership had been assessed with a use tax, trial court erred in entering motion for summary judgment** in favor of individual partner on grounds that partner could not be held jointly and severally liable for deficiency owed by partnership. AF Prop. v. Dept. of Rev., 852 P.2d 1267 (Colo. App. 1992).

**The trial court's finding that the lender's waiver of personal guarantees did not relieve the general partners on the note** is supported by the record including testimony by an officer of the lender that he and other officers did not seek personal guarantees because they considered it redundant in view of the general partner's liability and nothing in the limited partnership agreement expressly limited the general partner's liability for the limited partnership's obli-



gations that might have given notice of such an intent to the lender. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**Applied** in *Singer Hous. Co. v. Seven Lakes Venture*, 466 F. Supp. 369 (D. Colo. 1979); *Ball*

*v. Carlson*, 641 P.2d 303 (Colo. App. 1981); *Keneco Oil & Gas v. Univ. Nat. Bank*, 732 P.2d 247 (Colo. App. 1986).

**7-60-116. Liability of purported partner.** (1) If a person, by words or conduct, purports to be a partner or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If a partnership obligation results, the purported partner is liable with respect to that obligation as if the purported partner were a partner in the partnership, and, if the partnership is a limited liability partnership, the purported partner's liability is subject to section 7-60-115 (2) as if the purported partner were a partner in the limited liability partnership. If no partnership obligation results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(2) When a partnership liability results, such person is liable as though the person were an actual member of the partnership; except that, in the case of a limited liability partnership, the person's liability is subject to section 7-60-115 (2).

(3) When no partnership liability results, such person is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(4) When a person has been thus represented to be a partner in an existing partnership or with one or more persons not actual partners, the purported partner is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though the purported partner were a partner in fact with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

**Source:** L. 31: p. 653, § 16. CSA: C. 123, § 16. CRS 53: § 104-1-16. C.R.S. 1963: § 104-1-16. L. 95: (2) amended, p. 779, § 4, effective May 24. L. 2004: (1), (2), and (4) amended, p. 1424, § 78, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "The Convertible, Participating Mortgage: Planning Opportunities

and Legal Pitfalls in Structuring the Transaction", see 54 U. Colo. L. Rev. 295 (1983).

**7-60-117. Liability of incoming partner.** A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before such admission as though the person had been a partner when such obligations were incurred; except that this liability shall be satisfied only out of partnership property.

**Source:** L. 31: p. 654, § 17. CSA: C. 123, § 17. CRS 53: § 104-1-17. C.R.S. 1963: § 104-1-17. L. 2004: Entire section amended, p. 1425, § 79, effective July 1.

#### ANNOTATION

**This section held inapplicable to an incoming partner who expressly assumed a pre-existing obligation.** Absent that express as-

sumption however, the incoming partner's personal liability under a modified note would be limited to the amount of the new obligation

created after his partnership interest began. *Resolution Trust Corp. v. Teem P'ship*, 835 F. Supp. 563 (D. Colo. 1993).

**7-60-118. Rights and duties of partners.** (1) The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid such partner's contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied and shall contribute toward the losses whether of capital or otherwise sustained by the partnership according to such partner's share in the profits; except that a partner in a limited liability partnership shall not be obligated to contribute to partnership losses in excess of the partner's interest in the partnership beyond the extent:

(I) Such obligation to contribute is set out in a writing signed by the partner; or

(II) Such loss is attributable to an obligation or liability for which the partner would have individual liability under section 7-60-115 (2).

(b) The partnership shall indemnify every partner in respect of payments made and personal liabilities reasonably incurred by the partner in the ordinary and proper conduct of its business or for the preservation of its business or property.

(c) A partner who in aid of the partnership makes any payment or advance beyond the amount of capital that the partner agreed to contribute shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by the partner only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, but a surviving partner is entitled to reasonable compensation for the partner's services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

**Source:** L. 31: p. 654, § 18. CSA: C. 123, § 18. CRS 53: § 104-1-18. C.R.S. 1963: § 104-1-18. L. 95: (1)(a) amended, p. 779, § 5, effective May 24. L. 2004: IP(1)(a), (1)(b), (1)(c), (1)(d), and (1)(f) amended, p. 1425, § 80, effective July 1.

## ANNOTATION

**Law reviews.** For article, "A Law Firm Pension Plan?", see 37 *Dicta* 351 (1960).

**Each partner is to be repaid his contribution, and the partners are to share equally in the profits and surplus after all liabilities, including those to the partners, are satisfied.** *Rossi v. Rossi*, 154 Colo. 21, 389 P.2d 191 (1963).

**And the fact that one partner has failed to make the required capital contribution is not sufficient to impose a forfeiture where the contribution can be deducted from his share of the profits.** *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962).

**A division of the profits may be enforced by a partner entitled to share in the profits.**

*Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962).

**And where one partner "grubstakes" another partner, he becomes entitled to that partner's agreed share of the profits.** *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962).

**Assignment of partner's right to profits.** Where a partner assigns his rights to profits, but the remaining partners have not agreed to admit the assignee as a partner, § 7-60-127 assures that the assignee does not become a partner without the consent of the remaining partners in contravention of subsection (1)(g). Hence, the provision that the partnership is not dissolved



merely protects the original parties from an unwanted partner or from a finding of partnership from the fact of the assignee's receipt of a share of the profits. *Wester & Co. v. Nestle*, 669 P.2d 1046 (Colo. App. 1983).

**The rights of a party to a joint venture agreement are subject to any agreements between the parties of the venture.** *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306 (Colo. App. 1998); *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

Where transactions were authorized and approved by the managing partners, after the objections of the minority partners had been considered, the minority partners were nevertheless bound by the actions of the general partners. *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

**Partner violated subsection (1)(g) by unilaterally including his children in partnership without the other partner's consent.** *Tucker v. Ellbogen*, 793 P.2d 592 (Colo. App. 1989).

**Individual members of partnership cannot maintain an action for damages against an-**

**other member unless there has been an accounting.** *Boner v. L.C. Fulenwider, Inc.*, 32 Colo. App. 440, 513 P.2d 730 (1973).

**There is no provision in this act which provides a general partner with the right to bring a derivative action.** *Kline Hotel Partners v. Aircoa Equity Interests*, 708 F. Supp. 1193 (D. Colo. 1989).

**Trial court properly determined the allocation of losses of partnership** on the basis of the partners' ambiguous agreement and testimony by the partners. The court, however, erred in determining that compensation to one partner was an advance against profits to be earned, despite the partners' testimony and the court's earlier finding that the term "draw" in the ambiguous partnership agreement meant compensation to one of the partners in exchange for greater participation in the partnership. *Tucker v. Ellbogen*, 793 P.2d 592 (Colo. App. 1989).

**Applied** in *Hooper v. Yoder*, 737 P.2d 852 (Colo. 1987).

**7-60-119. Partnership books.** The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

**Source:** L. 31: p. 655, § 19. CSA: C. 123, § 19. CRS 53: § 104-1-19. C.R.S. 1963: § 104-1-19.

#### ANNOTATION

**Applied** in *Heinold Hog Mkt., Inc. v. McCoy*, 700 F.2d 611 (10th Cir. 1983).

**7-60-120. Duty to render information.** Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner under legal disability.

**Source:** L. 31: p. 656, § 20. CSA: C. 123, § 20. CRS 53: § 104-1-20. C.R.S. 1963: § 104-1-20.

#### ANNOTATION

**Applied** in *Skeen v. Harms*, 10 Bankr. 817 (Bankr. D. Colo. 1981).

**7-60-121. Accountable as a fiduciary.** (1) Every partner shall account to the partnership for any benefit and hold as trustee for it any profits derived by such partner without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by such partner of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

**Source:** L. 31: p. 656, § 21. CSA: C. 123, § 21. CRS 53: § 104-1-21. C.R.S. 1963: § 104-1-21. L. 2004: (1) amended, p. 1425, § 81, effective July 1.

## ANNOTATION

**Law reviews.** For article, "The Fiduciary Duties of General Partners", see 17 Colo. Law. 1959 (1988).

**Where a partner exchanges property which belongs to the partnership** for real estate and he takes the deed to the real estate in his own name but refuses to transfer any part of the land to the partnership, the land belongs to the partnership and is held by the exchanging partner in trust for the use and benefit of the partnership. *Payne v. Martin*, 39 Colo. 265, 89 P. 46 (1907) (decided prior to the earliest source of § 7-60-121).

**"Benefit" and "profit" would be** the rental value of the partnership equipment wrongfully used, not the value of the property upon which it was used. *Thompson v. McCormick*, 169 Colo. 151, 454 P.2d 934 (1969).

**Partner who excluded other partner from partnership business breached fiduciary duty** to wind up partnership expeditiously by: Failing to wind up the partnership in a reasonable period of time; allowing an accumulation of \$200,000 in interest on a loan guaranteed by the partnership; allowing various oil and gas leases to expire; and unilaterally including his children in the partnership without the other partner's con-

sent. *Tucker v. Ellbogen*, 793 P.2d 592 (Colo. App. 1989).

Liabilities that accrued after reasonable time for winding up partnership are to be assessed against the partner responsible for winding up the partnership, as are liabilities affected by the partner's breach of his fiduciary duty in unilaterally bringing his children into partnership without the other partner's consent. *Tucker v. Ellbogen*, 793 P.2d 592 (Colo. App. 1989).

Partner did not breach fiduciary duty by participating in a personal capacity in the purchase and sale of a lease where the partners had previously agreed to such action by the partner. *Tucker v. Ellbogen*, 793 P.2d 592 (Colo. App. 1989).

**Section does not per se create the level of fiduciary duty required under federal bankruptcy laws for purposes of dischargeability;** however, coupled with Colorado case law, a fiduciary obligation is imposed upon partners. In re Winden, 120 Bankr. 570 (Bankr. D. Colo. 1990); In re Schwenn, 126 Bankr. 351 (Bankr. D. Colo. 1991).

**Applied** in *Yoder v. Hooper*, 695 P.2d 1182 (Colo. App. 1984), *aff'd*, 737 P.2d 852 (Colo. 1987).

**7-60-122. Right to an account.** (1) Any partner shall have the right to a formal account as to partnership affairs:

- (a) If the partner is wrongfully excluded from the partnership business or possession of its property by the other partners;
- (b) If the right exists under the terms of any agreement;
- (c) As provided by section 7-60-121;
- (d) Whenever other circumstances render it just and reasonable.

**Source:** L. 31: p. 656, § 22. CSA: C. 123, § 22. CRS 53: § 104-1-22. C.R.S. 1963: § 104-1-22. L. 2004: (1)(a) amended, p. 1425, § 82, effective July 1.

## ANNOTATION

**Having determined that a partnership exists, the right to an accounting necessarily follows.** *Roberts v. Roberts*, 113 Colo. 128, 155 P.2d 155 (1945).

**But no right to receivership.** A partner has a right to an accounting, a right to a dissolution, the right to contribution, and various rights on dissolution, but nowhere does the uniform act

provide that even a bona fide partner has a right to receivership for property that he says belongs to the firm. *Mann v. Friden*, 132 Colo. 273, 287 P.2d 961 (1955).

**No right to derivative action,** absent exceptional circumstances. *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

**7-60-123. Rights and duties beyond term.** (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, insofar as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.



**Source:** L. 31: p. 657, § 23. CSA: C. 123, § 23. CRS 53: § 104-1-23. C.R.S. 1963: § 104-1-23.

**7-60-124. Property rights of a partner.** (1) The property rights of a partner are:

- (a) Such partner's rights in specific partnership property;
- (b) Such partner's interest in the partnership; and
- (c) Such partner's right to participate in the management.

**Source:** L. 31: p. 657, § 24. CSA: C. 123, § 24. CRS 53: § 104-1-24. C.R.S. 1963: § 104-1-24. L. 2004: Entire section amended, p. 1426, § 83, effective July 1.

**7-60-125. Right in specific property.** (1) A partner is co-owner with the other partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of tenancy in partnership are such that:

(a) A partner, subject to the provisions of this article and to any agreement between the partners, has an equal right with the other partners to possess specific partnership property for partnership purposes; except that a partner has no right to possess such property for any other purpose without the consent of the other partners;

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property;

(c) A partner's right in specific partnership property is not subject to attachment or execution except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner, the deceased partner's right in specific partnership property vests in the surviving partner or partners, except where the deceased partner was the last surviving partner, when the right in such property vests in the deceased partner's legal representative. The surviving partner or partners or the legal representative of the last surviving partner has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

**Source:** L. 31: p. 657, § 25. CSA: C. 123, § 25. CRS 53: § 104-1-25. C.R.S. 1963: § 104-1-25. L. 2004: (1), (2)(a), and (2)(d) amended, p. 1426, § 84, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Non-Tax Advantages of the Revocable Trust (With Emphasis on Use as Will Substitute)", see 37 Dicta 333 (1960).

**A partner's right in specific partnership property is not assignable by an individual partner,** nor is it subject to attachment or execution except upon a claim against the partnership. Upon a partner's death, the partner's right in such property vests in the surviving partner or

partners. *Mountain States Bank v. Irvin*, 809 P.2d 1113 (Colo. App. 1991).

**This section does not confer upon partners a right to redress for individual losses** where such losses are not unique and are shared by other partners. *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

**Applied** in *Erickson v. Oberlohr*, 749 P.2d 996 (Colo. App. 1987).

**7-60-126. Nature of partner's interest.** A partner's interest in the partnership is the partner's share of the profits and surplus, and the same is personal property.

**Source:** L. 31: p. 659, § 26. CSA: C. 123, § 26. CRS 53: § 104-1-26. C.R.S. 1963: § 104-1-26. L. 2004: Entire section amended, p. 1426, § 85, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Financing Real Estate Developments", see 11 Colo. Law. 2093 (1982). For article, "Campbell: A Caveat for Service Partners", see 20 Colo. Law. 75 (1991).

**Where the partner's interest in the partnership is deemed personalty and consists of**

**a proportionate share of the partnership's profits and surplus, the court cannot order a division of specific partnership interest to a non-partner spouse if there are other partners in the venture besides the other spouse.** In re Paul, 821 P.2d 925 (Colo. App. 1991).

**7-60-127. Assignment of partner's interest.** (1) A conveyance by a partner of the partner's interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with the assignee's contract the profits to which the assigning partner would otherwise be entitled.

(2) In a dissolution of the partnership, the assignee is entitled to receive the assignor's interest and may require an account only from the date of the last account agreed to by all the partners.

**Source:** L. 31: p. 659, § 27. CSA: C. 123, § 27. CRS 53: § 104-1-27. C.R.S. 1963: § 104-1-27. L. 2004: Entire section amended, p. 1426, § 86, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Non-Tax Advantages of the Revocable Trust (With Emphasis on Use as Will Substitute)", see 37 Dicta 333 (1960).

**Purpose of section.** Where a partner assigns his rights to profits, but the remaining partners have not agreed to admit the assignee as a partner, this section assures that the assignee does not become a partner without the consent of the remaining partners in contravention of

§ 7-60-118 (1)(g). Hence, the provision that the partnership is not dissolved merely protects the original parties from an unwanted partner or from a finding of partnership from the fact of the assignee's receipt of a share of the profits. *Wester & Co. v. Nestle*, 669 P.2d 1046 (Colo. App. 1983).

**Applied in** *In re Dews*, 152 Bankr. 982 (D. Colo. 1993).

**7-60-128. Interest subject to charging order.** (1) On due application to a court of competent jurisdiction by any judgment creditor of a partner, the court that entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of the judgment with interest thereon; and may then or later appoint a receiver of the debtor partner's share of the profits and of any other money due or to fall due to the debtor partner in respect of the partnership and make all other orders, directions, accounts, and inquiries that the debtor partner might have made, or that the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure or, in case of a sale being directed by the court, may be purchased without thereby causing a dissolution:

- (a) With separate property by any one or more of the partners; or
- (b) With partnership property by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this article shall be held to deprive a partner of the partner's right, if any, under the exemption laws, as regards the partner's interest in the partnership.

**Source:** L. 31: p. 659, § 28. CSA: C. 123, § 28. CRS 53: § 104-1-28. C.R.S. 1963: § 104-1-28. L. 2004: (1) and (3) amended, p. 1427, § 87, effective July 1.



## ANNOTATION

**Law reviews.** For comment on Phillips v. Phillips (cited below), see 37 U. Colo. L. Rev. 425 (1965). For article, "Charging Partnership and LLC Interests To Satisfy Debts of Individuals", see 23 Colo. Law. 2743 (1994).

**The "due application" referred to in this section means** an application made to the court upon adequate notice to the persons whose rights might be adversely affected by the granting of the relief sought. Phillips v. Phillips, 155 Colo. 538, 400 P.2d 450 (1964); First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

**Partner has no right to receivership.** A partner has a right to an accounting, and in a proper case to a dissolution of the partnership, but no right to a receivership. Mann v. Friden, 132 Colo. 273, 287 P.2d 961 (1955).

**Rather, receivership rests in discretion of the court.** Equity will not lend its extraordinary aid of receivership for property of an alleged partnership, unless an actual partnership is shown; and then, it rests in the discretion of the court, since a receivership is an extraordinary remedy and should be exercised with the gravest of caution. Mann v. Friden, 132 Colo. 273, 287 P.2d 961 (1955).

**Moreover, a receiver for a solvent going concerning cannot be appointed** in the ab-

sence of a charge of fraud. Mann v. Friden, 132 Colo. 273, 287 P.2d 961 (1955).

**Notice requirements.** Where a sale of debtors' partnership interests would affect the partnerships themselves, as well as other partners who are not parties to this action, ordering such a sale without first providing notice and hearing to those who would be affected, is void under the notice requirements of subsection (1). First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

**Method of apportioning payment to judgment creditors who obtain charging orders directed to same partnership interest** should be parallel to the method of determining priority among judgment creditors who seek execution on other kinds of personal property. Union Colony Bank v. United Bank, 832 P.2d 1112 (Colo. App. 1992).

**Trial court erred in issuing unsecured judgment creditor's charging order nunc pro tunc** to the creditor's first writ of garnishment. Other judgment creditor which had charging order issued and served prior to time charging order was issued was entitled to full satisfaction of judgment from debtor's partnership interest. Union Colony Bank v. United Bank, 832 P. 2d 1112 (Colo. App. 1992).

**7-60-129. Dissolution defined.** The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

**Source:** L. 31: p. 660, § 29. CSA: C. 123, § 29. CRS 53: § 104-1-29. C.R.S. 1963: § 104-1-29.

## ANNOTATION

**No party is compelled to continue as a partner** when, by his express will, he chooses to withdraw. Wester & Co. v. Nestle, 669 P.2d 1046 (Colo. App. 1983).

**Remaining partners may continue as partnership.** When one partner withdraws from the business, the partnership is dissolved as to that party, although the remaining partners may elect

to continue operating as a partnership. Wester & Co. v. Nestle, 669 P.2d 1046 (Colo. App. 1983).

**In distributing marital assets, awarding the nonpartner spouse an in-kind division of the partner spouse's partnership interest** could result in dissolution of the partnership or disruption of partnership business. In re Paul, 821 P.2d 925 (Colo. App. 1991).

**7-60-130. Dissolution is not termination.** On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed.

**Source:** L. 31: p. 660, § 30. CSA: C. 123, § 30. CRS 53: § 104-1-30. C.R.S. 1963: § 104-1-30.

## ANNOTATION

**Harmless error to join dissolved partnership as defendant.** Where a trial court renders

judgment against a partnership as such when it is in fact dissolved when its assets and liabilities

were transferred to a trust, it is harmless error which does not require reversal of the judgment by having joined the partnership, since if, in fact, the partnership has no assets and is a nonentity, then the judgment against a nonentity can do no harm and since the individual partners were also named parties, then they cannot es-

cape personal liability for the partnership debts if the partnership is no longer existent as such. *Western Spring Serv. Co. v. Andrew*, 229 F.2d 413 (10th Cir. 1956).

**Applied in** *Hooper v. Yoder*, 737 P.2d 852 (Colo. 1987).

**7-60-131. Causes of dissolution.** (1) Dissolution is caused:

(a) Without violation of the agreement between the partners:

(I) By the termination of the definite term or particular undertaking stated in the agreement;

(II) By the express will of any partner when no definite term or particular undertaking is stated;

(III) By the express will of all the partners who have not assigned their interests or allowed them to be charged for their separate debts either before or after the termination of any stated term or particular undertaking;

(IV) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(b) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(c) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(d) By the death of any partner;

(e) By the bankruptcy of any partner or the partnership;

(f) By decree of court under section 7-60-132.

**Source:** L. 31: p. 660, § 31. **CSA:** C. 123, § 31. **CRS 53:** § 104-1-31. **C.R.S. 1963:** § 104-1-31. **L. 2003:** (1)(a)(I) to (1)(a)(III) amended, p. 2236, § 112, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "A Law Firm Pension Plan?", see 37 *Dicta* 351 (1960). For article, "Partnership Reorganization Under Chapter 11", see 12 *Colo. Law.* 1207 (1983).

**A partnership is not dissolved** by the failure on the part of one of its members in some respect to perform his duty or obligation to it, nor does such an individual thereby lose his right to come into a court of equity and have an accounting and settlement of the partnership affairs. *Thompson v. McCormick*, 149 *Colo.* 465, 370 P.2d 442 (1962).

**Limited partnership dissolves without general partner.** Since a limited partnership cannot exist without a general partner, a limited partnership dissolves when the limited partners are without their general partner. *Skeen v. Harms*, 10 *Bankr.* 817 (*Bankr. D. Colo.* 1981).

**During a specified term of existence or in the midst of a particular undertaking, a partnership** may only be dissolved by a mutual agreement which settles the rights and obligations of the parties inter se or by judicial decree which determines such rights and obligations. *Yoder v. Hooper*, 695 P.2d 1182 (*Colo. App.*

1984), *aff'd*, 737 P.2d 852 (*Colo.* 1987); *Tucker v. Ellbogen*, 793 P.2d 592 (*Colo. App.* 1989).

**Appointment of bankruptcy trustee dissolves partnership.** A bankruptcy trustee cannot assume the position of general partner of a limited partnership where he is not the person with whom the limited partners contracted: thus, the partnership dissolves when the trustee is appointed. *Skeen v. Harms*, 10 *Bankr.* 817 (*Bankr. D. Colo.* 1981).

**As does debtor-in-possession.** Where limited partners have not consented to the performance of a debtor-in-possession as their general partner, the limited partnership, having no general partner as of the day the debtor came into possession, ceases to exist, except for purposes of winding up. *Skeen v. Harms*, 10 *Bankr.* 817 (*Bankr. D. Colo.* 1981).

**Where partners organize a corporation to operate the business of the partnership** and where partnership assets are transferred to the corporation, the partnership is dissolved. *Hooper v. Yoder*, 737 P.2d 852 (*Colo.* 1987); *Tucker v. Ellbogen*, 793 P.2d 592 (*Colo. App.* 1989).



**Party not compelled to continue as partner.**

Under subsection (1)(a)(II), no party is compelled to continue as a partner when, by his express will, he chooses to withdraw. *Wester & Co. v. Nestle*, 669 P.2d 1046 (Colo. App. 1983).

**Disposition of goodwill interest.** On the occasion of the dissolution of a partnership, absent

a contrary agreement, there is no obligation on either partner to buy the goodwill interest of the other partner, which remains as an undistributed asset of the dissolved partnership. *Orzolek v. Forman*, 670 P.2d 443 (Colo. App. 1983).

**Applied** in *First Nat'l Bank v. District Court*, 652 P.2d 613 (Colo. 1982).

**7-60-132. Dissolution by decree of court.** (1) On application by or for a partner, the court shall decree a dissolution if:

(a) A partner has been determined by the court to be mentally incompetent to such a degree that the partner is incapable of performing the partner's part of the partnership contract or a court of competent jurisdiction has made such a finding pursuant to part 3 or part 4 of article 14 of title 15 or section 27-65-109 (4) or 27-65-127, C.R.S.;

(b) A partner becomes in any other way incapable of performing the partner's part of the partnership contract;

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of business;

(d) A partner willfully or persistently commits a breach of the partnership agreement or otherwise so acts in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with the partner;

(e) The business of the partnership can only be carried on at a loss;

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 7-60-127 and 7-60-128, the court shall decree a dissolution:

(a) After the termination of the stated term or particular undertaking;

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

**Source:** L. 31: p. 662, § 32. CSA: C. 123, § 32. CRS 53: § 104-1-32. C.R.S. 1963: § 104-1-32. L. 75: (1)(a) R&RE, p. 922, § 7, effective July 1. L. 91: (1)(a) amended, p. 1781, § 4, effective July 1. L. 2003: (2)(a) amended, p. 2236, § 113, effective July 1, 2004. L. 2004: (1)(a), (1)(b), and (1)(d) amended, p. 1427, § 88, effective July 1. L. 2010: (1)(a) amended, (SB 10-175), ch. 188, p. 777, § 4, effective April 29.

## ANNOTATION

**Law reviews.** For article, "A Law Firm Pension Plan?", see 37 *Dicta* 351 (1960).

**Section not used to defeat defendant-partner's rights.** In the absence of substantial misconduct on a defendant-partner's part, a partner-plaintiff should not be permitted to defeat the defendant-partner's rights by the simple expedient of bringing suit. *Master Garage, Inc. v. Bugdanowitz*, 690 P.2d 879 (Colo. App. 1984).

**Derivative actions not authorized.** The Uniform Partnership Law contains no provision analogous to C.R.C.P. 23.1 or § 7-62-1001 that would give a general partner the right to bring a derivative action. *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

**Date of dissolution by court decree.** Where trial court record was replete with statements by partner of unwillingness to participate in partnership, the date partner filed action under this section was properly declared the date of dissolution for purposes of valuation of partnership interests. *Master Garage, Inc. v. Bugdanowitz*, 690 P.2d 879 (Colo. App. 1984).

**Applied** in *Beals v. Tri-B Assocs.*, 644 P.2d 78 (Colo. App. 1982); *First Nat'l Bank v. District Court*, 652 P.2d 613 (Colo. 1982); *Mahon v. Harst*, 738 P.2d 1190 (Colo. App. 1987).

**7-60-133. General effect of dissolution.** (1) Except insofar as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership:

(a) With respect to the partners:

(I) When the dissolution is not by the act, bankruptcy, or death of a partner; or

(II) When the dissolution is by such act, bankruptcy, or death of a partner, in cases where section 7-60-134 so requires.

(b) With respect to persons not partners, as declared in section 7-60-135.

**Source:** L. 31: p. 663, § 33. CSA: C. 123, § 33. CRS 53: § 104-1-33. C.R.S. 1963: § 104-1-33.

**7-60-134. Right of partner to contribution.** (1) Except as otherwise provided in subsection (2) of this section, where the dissolution is caused by the act, death, or bankruptcy of a partner, each partner is liable to the other partners for such partner's share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless:

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution; or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

(2) A partner in a limited liability partnership shall not be liable to the other partners except to the extent that:

(a) The partner's liability is set out in a writing signed by the partner; or

(b) The partner's obligation to contribute is attributable to a liability for which the partner would have individual liability under section 7-60-115 (2).

**Source:** L. 31: p. 663, § 34. CSA: C. 123, § 34. CRS 53: § 104-1-34. C.R.S. 1963: § 104-1-34. L. 95: Entire section amended, p. 780, § 6, effective May 24. L. 2004: IP(2) amended, p. 1427, § 89, effective July 1.

**7-60-135. Power of partner to bind partnership after dissolution.** (1) After dissolution, a partner can bind the partnership, except as provided in subsection (3) of this section:

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, if the other party to the transaction:

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though the other party had not so extended credit, had nevertheless known of the partnership prior to dissolution, and had no knowledge or notice of dissolution, the fact of dissolution having not been advertised in a newspaper of general circulation in the place, or in each place if more than one, at which the partnership business was regularly carried on.

(2) The liability of a partner under subsection (1) (b) of this section shall be satisfied out of partnership assets alone when such partner had been, prior to dissolution:

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to the partner's connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution:

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs except by transaction with one who:

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the partner's want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and had no knowledge or notice of the partner's want of authority, the fact of the partner's want of



authority having not been advertised in the manner provided for advertising the fact of dissolution in subsection (1) (b) (II) of this section.

(4) Nothing in this section shall affect the liability under section 7-60-116 of any person who, after dissolution, purports to be a partner or consents to being represented by another as a partner in a partnership engaged in carrying on business.

**Source:** L. 31: p. 664, § 35. CSA: C. 123, § 35. CRS 53: § 104-1-35. C.R.S. 1963: § 104-1-35. L. 2004: (1)(b)(II), (2)(b), (3)(c)(I), (3)(c)(II), and (4) amended, p. 1428, § 90, effective July 1.

#### ANNOTATION

**Partner's filing of voluntary bankruptcy dissolved the partnership** and terminated his authority to receive service for the partnership. Bush v. Winker, 907 P.2d 79 (Colo. 1995).

**When new partner not liable for debt incurred after dissolution.** Where a partnership debt is incurred after dissolution and at that time a new member of the partnership is unknown to

the creditors as a partner and is so far unknown and inactive in the affairs of the partnership that the business reputation of the partnership could not be said to have been due to his connection with it, the new partner cannot be held personally liable. Van Andel v. Smith, 248 F.2d 915 (10th Cir. 1957).

**7-60-136. Effect of dissolution on existing liability.** (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between such partner, the partnership creditor, and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of the creditor's obligations.

(4) The individual property of a deceased person who was a partner shall be liable, to the extent the deceased person was or would have been liable under section 7-60-115, 7-60-118, or 7-60-134, for all obligations of the partnership incurred while the deceased person was a partner but subject to the prior payment of the deceased person's separate debts.

**Source:** L. 31: p. 666, § 36. CSA: C. 123, § 36. CRS 53: § 104-1-36. C.R.S. 1963: § 104-1-36. L. 95: (4) amended, p. 780, § 7, effective May 24. L. 2004: (2), (3), and (4) amended, p. 1428, § 91, effective July 1.

#### ANNOTATION

**Conditions for discharge from liability found to exist.** Wester & Co. v. Nestle, 669 P.2d 1046 (Colo. App. 1983).

**Trial court erred in entering summary judgment since dissolution of partnership, without more, did not determine partner's remaining obligations to his partners;** rather, obligations are dependent upon a variety of factual and legal issues, such as the partner's right to dissolve the partnership and the propriety of other partners' actions in winding-up or continuing the partnership. Travers v. Rainey, 888 P.2d 372 (Colo. App. 1994).

**One partner's liability for overdue employment taxes** was not discharged by an agreement concerning payment that was made by the other partner and the internal revenue service. Such agreement was merely an act of forbearance and did not constitute a material alteration of the nature or time of payment of the obligations as required by subsection (3) of this section. U.S. v. Hays, 877 F.2d 843 (10th Cir. 1989).

**Where the limited partnership benefited from the loan entered into after the filing of the partnership certificate,** the general partners were estopped from denying the validity of

their acts on behalf of the partnership, even though the limited partnership was declared void as to the limited partner. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**Partner could not avoid his liability to his partners or lessor under the Soldiers' and Sailors' Civil Relief Act** by providing notice of termination of a lease to his partners since termination of a lease under the Act can only be accomplished by providing notice in writing to the lessor. *Travers v. Rainey*, 888 P.2d 372 (Colo. App. 1994).

**A limited partnership that is void as to a limited partner is not void as to the general partners.** The general partners were liable because at the time the limited partnership's obligation to the lender arose, all parties had contracted in accordance with their belief based on the filing of a partnership certificate with the

secretary of state that a limited partnership existed. Therefore, the general partners were jointly and severally liable when they executed a note and deed of trust to the lender. Also, because the limited partnership benefitted from the proceeds of the loan, the general partners were estopped from denying the validity of their acts on behalf of the limited partnership. Finally, regardless of when the limited partnership was dissolved, the general partners were not relieved of their personal liability for the partnership's obligations by virtue of the dissolution. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**Applied in** *Faricy v. J. S. Brown Mercantile Co.*, 87 Colo. 427, 288 P. 639 (1930) (decided prior to the earliest source of § 7-60-136); *Colo-Tex Leasing, Inc. v. Neitzert*, 746 P.2d 972 (Colo. App. 1987); *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**7-60-137. Right to wind up.** Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; except that any partner or any partner's legal representative or assignee, upon cause shown, may obtain winding up by the court.

**Source:** L. 31: p. 667, § 37. CSA: C. 123, § 37. CRS 53: § 104-1-37. C.R.S. 1963: § 104-1-37. L. 2004: Entire section amended, p. 1429, § 92, effective July 1.

**7-60-138. Application of partnership property.** (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner as against the other partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 7-60-136 (2), the expelled partner shall receive in cash only the net amount due the expelled partner from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement, the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have:

(I) All the rights stated in subsection (1) of this section;

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name either by themselves or jointly with others, may do so during the agreed term of the partnership and for that purpose may possess the partnership property, if they secure the payment by bond approved by the court or pay to any partner who has caused the dissolution wrongfully the value of such partner's interest in the partnership at the dissolution, less any damages recoverable under subparagraph (II) of paragraph (a) of this subsection (2), and in like manner indemnify such partner against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (b) of this subsection (2), all the rights of a partner under subsection (1) of this section, subject to paragraph (a) (II) of this subsection (2);

(II) If the business is continued under paragraph (b) of this subsection (2), the right as against the other partners and all claiming through them, in respect of their interests in the



partnership, to have the value of such partner's interest in the partnership, less any damages caused to the other partners by the dissolution, ascertained and paid to such partner in cash or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; except that, in ascertaining the value of such partner's interest, the value of the goodwill of the business shall not be considered.

**Source:** L. 31: p. 667, § 38. CSA: C. 123, § 38. CRS 53: § 104-1-38. C.R.S. 1963: § 104-1-38. L. 2003: (2)(a)(I) amended, p. 2236, § 114, effective July 1, 2004. L. 2004: (1), (2)(b), and (2)(c)(II) amended, p. 1429, § 93, effective July 1.

#### ANNOTATION

##### **Partnership property converted into cash.**

This section embodies the essence of the rule that in an action for a partnership accounting and dissolution the entire partnership property will be converted into cash. Davis v. Davis, 149 Colo. 1, 366 P.2d 857 (1962).

##### **Date of dissolution if by court decree.**

Where trial court record was replete with state-

ments by partner of unwillingness to participate in partnership, the date partner filed action under § 7-60-132 was properly declared the date of dissolution for purposes of valuation of partnership interests. Master Garage, Inc. v. Bugdanowitz, 690 P.2d 879 (Colo. App. 1984).

**7-60-139. Rights dissolved for fraud.** (1) Where a partnership contract is rescinded on the ground of fraud or misrepresentation of one of the parties, the party entitled to rescind is, without prejudice to any other right, entitled:

(a) To a lien on or right of retention of the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by such party for the purchase of an interest in the partnership and for any capital or advances contributed by such party; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by such party in respect of the partnership liabilities, subject to the limitations in section 7-60-115, if the partnership was a limited liability partnership at the time of its dissolution; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

**Source:** L. 31: p. 669, § 39. CSA: C. 123, § 39. CRS 53: § 104-1-39. C.R.S. 1963: § 104-1-39. L. 95: (1)(b) amended, p. 780, § 8, effective May 24. L. 2004: (1)(a) and (1)(b) amended, p. 1430, § 94, effective July 1.

#### ANNOTATION

**This section means** that even though the partnership contract is procured by the fraud of one of the partners nevertheless the partnership entity is created, and until it is dissolved, the defrauded partner is liable for debts of the partnership to third persons incurred during the life of the partnership. Van Andel v. Smith, 248 F.2d 915 (10th Cir. 1957).

**And the phrase "without prejudice to any other right" does not permit** the defrauded

partner to plead the fraud as a bar to liability to creditors, for, if that were true, paragraphs (a), (b), and (c) of subsection (1) would be meaningless. Van Andel v. Smith, 248 F.2d 915 (10th Cir. 1957).

**This section does not authorize** the imposition of a lien on partnership property at the request of a limited partner. Central Allied Profit Sharing v. Bailey, 759 P.2d 849 (Colo. App. 1988).

**7-60-140. Rules for distribution.** (1) In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

(I) The partnership property;

(II) The contributions of the partners, as limited by paragraph (d) of this subsection (1),

necessary for the payment of all the liabilities specified in paragraph (b) of this subsection (1).

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than a partner;

(II) Those owing to partners other than for capital and profits;

(III) Those owing to partners in respect of capital;

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in paragraph (a) of this subsection (1) to the satisfaction of the liabilities.

(d) The partners shall contribute the amount necessary to satisfy the liabilities as provided by section 7-60-118 (1) (a) and as limited by said section and sections 7-60-115 and 7-60-134; but if any but not all of the partners are insolvent or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in paragraph (d) of this subsection (1).

(f) Any partner or legal representative of a partner shall have the right to enforce the contributions specified in paragraph (d) of this subsection (1), to the extent of the amount that the partner has paid in excess of the partner's share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in paragraph (d) of this subsection (1).

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or the estate of a partner is insolvent, the claims against the partner's separate property shall rank in the following order:

(I) Those owing to separate creditors;

(II) Those owing to partnership creditors;

(III) Those owing to partners by way of contributions.

**Source:** L. 31: p. 669, § 40. CSA: C. 123, § 40. CRS 53: § 104-1-40. C.R.S. 1963: § 104-1-40. L. 95: (1)(a) and (1)(d) amended, p. 781, § 9, effective May 24. L. 2004: (1)(f) and IP(1)(i) amended, p. 1430, § 95, effective July 1.

#### ANNOTATION

**In the settlement of accounts between the partners after dissolution** the individual partner shall be repaid his capital contributions. Rossi v. Rossi, 154 Colo. 21, 389 P.2d 191 (1963).

**Before division of net profits.** Upon a dissolution of the partnership and payment of its

debts, capital contributions (unless not paid or unless waived) are to be returned to the contributing partner before division of the net profits. Thompson v. McCormick, 149 Colo. 465, 370 P.2d 442 (1962).

**7-60-141. Liability of persons continuing business.** (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns or the representative of the deceased partner assigns the deceased partner's right in partnership property to two or more of the partners or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign or the representative of a deceased partner assigns the deceased partner's rights in the partnership property to the remaining partner who continues the business without liquidation of partnership affairs, either alone or



with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued, as set forth in subsections (1) and (2) of this section, with the consent of the retired partner or the representative of the deceased partner but without any assignment of such partner's right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When a partner wrongfully causes a dissolution and the remaining partners continue the business, under the provisions of section 7-60-138 (2) (b), either alone or with others and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person who becomes a partner in the partnership continuing the business under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section, the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for the retired or deceased partner's right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name or the name of a deceased partner as part thereof shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

(11) If the business of a limited liability partnership is continued after the death, retirement, or expulsion of a partner or the admission of a new partner, the partnership continuing the business is a limited liability partnership.

**Source:** L. 31: p. 671, § 41. **CSA:** C. 123, § 41. **CRS 53:** § 104-1-41. **C.R.S. 1963:** § 104-1-41. **L. 95:** (11) added, p. 781, § 10, effective May 24. **L. 2004:** (1), (2), (3), (8), and (11) amended, p. 1430, § 96, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Agencies, Partnerships, and Corporation", see 39 *Dicta* 61 (1962).

**7-60-142. Rights of retiring partner.** When any partner retires or dies and the business is continued under any of the conditions set forth in section 7-60-141 (1), (2), (3), (5), and (6), or in section 7-60-138 (2) (b), without any settlement of accounts as between the partner or the partner's estate and the person or partnership continuing the business, unless otherwise agreed, the partner or the partner's legal representative as against such persons or partnership may have the value of the partner's interest at the date of dissolution ascertained and shall receive as an ordinary creditor an amount equal to such value with interest, or, at

the partner's option or at the option of the partner's legal representative in lieu of interest, the profits attributable to the use of the partner's right in the property of the dissolved partnership; except that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section as provided by section 7-60-141 (8).

**Source:** L. 31: p. 674, § 42. CSA: C. 123, § 42. CRS 53: § 104-1-42. C.R.S. 1963: § 104-1-42. L. 2004: Entire section amended, p. 1431, § 97, effective July 1.

#### ANNOTATION

**Method of valuation of partnership interest.** In consideration of the uniformity, certainty, and ease of application promoted by adoption of a per se rule, as a matter of law, in the absence of a contractual provision to the contrary, an accounting between partners must be based on

the fair market value of partnership assets at the time of dissolution. *Rasheed v. Mubarak*, 695 P.2d 754 (Colo. App. 1984).

**Applied** in *Thompson v. McCormick*, 169 Colo. 151, 454 P.2d 934 (1969); *Jump v. Boardman*, 169 Colo. 274, 455 P.2d 206 (1969).

**7-60-143. Accrual of actions.** The right to an account of the partner's interest shall accrue to any partner or any partner's legal representative, as against the winding up partners, the surviving partners, or the person or partnership continuing the business at the date of dissolution, in the absence of any agreement to the contrary.

**Source:** L. 31: p. 675, § 43. CSA: C. 123, § 43. CRS 53: § 104-1-43. C.R.S. 1963: § 104-1-43. L. 2004: Entire section amended, p. 1431, § 98, effective July 1.

#### ANNOTATION

**For a withdrawing partner seeking an accounting against any partners who are winding up or continuing the business,** the cause of action accrues on the date the withdrawing partner ceases to be associated with the business, resulting in dissolution of the partnership. Once

the plaintiff ceased to be associated with the partnership, not only did this dissolve any still-existing partnership, it also caused the statute of limitations to begin to run on the plaintiff's own claim for an accounting. *Tafoya v. Perkins*, 932 P.2d 836 (Colo. App. 1996).

**7-60-144. Registration of partnerships.** (1) A partnership governed by this article may register as a limited liability partnership, and a limited partnership that has not made the election provided for in section 7-61-129 or 7-62-1104 may register as a limited liability limited partnership, by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of registration. If a certificate of limited partnership is being filed, the statement of registration may be included in the certificate of limited partnership. The statement of registration shall be approved in the manner provided in the partnership agreement or, if not so provided, shall be approved by all of the general partners. The statement of registration shall state:

(a) The name that has been the true name of the partnership or limited partnership and the name that will be the domestic entity name of the partnership or limited partnership, which domestic entity name shall comply with part 6 of article 90 of this title;

(b) The principal office address of its principal office; and

(c) The registered agent name and registered agent address of its registered agent.

(d) (Deleted by amendment, L. 2004, p. 1432, § 99, effective July 1, 2004.)

(2) (Deleted by amendment, L. 2003, p. 2236, § 115, effective July 1, 2004.)

(3) (Deleted by amendment, L. 2004, p. 1432, § 99, effective July 1, 2004.)

(4) Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign limited liability partnerships and foreign limited liability limited partnerships.

(4.5) A limited liability partnership or a limited liability limited partnership may cease to be a limited liability partnership or a limited liability limited partnership by delivering to



the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of withdrawal of registration. The statement of withdrawal of registration shall be approved in the manner provided in the partnership agreement or, if not so provided, shall be approved by all of the general partners. The withdrawal of registration shall be effective upon the effective date of the statement of withdrawal of registration.

(5) A partnership or a limited partnership that has been registered under this article is for all purposes the same entity that existed before it registered. A partnership or a limited partnership that withdraws its registration as a limited liability partnership or a limited liability limited partnership is for all purposes the same entity that existed before it withdrew its registration.

(6) Unless the partnership agreement otherwise provides, registration of a partnership shall require the unanimous consent of the general partners in the partnership at the time the statement of registration is delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title. The filing of a statement of registration shall be conclusive as to third parties and shall be incontestable by third parties that all conditions precedent to registering as a limited liability partnership or limited liability limited partnership, as the case may be, have been met.

(7) Except as to persons who were partners at the time of filing, the filing of a statement of registration shall be conclusive that all conditions precedent to registration under this section have been met.

**Source:** L. 95: Entire section added, p. 781, § 11, effective May 24. L. 2000: (1)(a) amended, p. 952, § 18, effective July 1. L. 2002: IP(1), (2)(b), and (3) amended, p. 1821, § 37, effective July 1; IP(1), (2)(b), and (3) amended, p. 1685, § 35, effective October 1. L. 2003: (1) to (4) and (6) amended, p. 2236, § 115, effective July 1, 2004. L. 2004: (1), (3), (5), and (6) amended and (4.5) and (7) added, p. 1432, § 99, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Limited Liability Partnerships and Other Entities Authorized in Colorado", see 24 Colo. Law. 1525 (1995).

**7-60-144.5. Statement of partnership authority or statement of denial.** With respect to a partnership governed by this article or a limited partnership that has not made the election provided for in section 7-61-129 (1) (a) or 7-62-1104 (1) (a), a statement of partnership authority may be delivered to the secretary of state pursuant to section 7-64-303, and a statement of denial may be delivered to the secretary of state pursuant to section 7-64-304, as if the partnership were governed by article 64 of this title or the limited partnership had made the election. Such statements shall have the effects specified in sections 7-64-303 and 7-64-304, respectively.

**Source:** L. 2004: Entire section added, p. 1433, § 100, effective July 1.

#### **7-60-145. Name of registered limited liability partnership. (Repealed)**

**Source:** L. 95: Entire section added, p. 783, § 11, effective May 24. L. 97: IP(1), (1)(a), and (3) amended, p. 1498, § 1, effective June 3. L. 2000: Entire section repealed, p. 990, § 109, effective July 1.

**7-60-146. Limitations on distribution from limited liability partnerships.** (1) A limited liability partnership or limited liability limited partnership shall not make a distribution to a general partner to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability partnership or limited liability limited partnership, other than liabilities to general partners on account of their partnership interests and liabilities for which the recourse of creditors is limited to specified property of

the partnership, exceed the fair value of the assets of the partnership; except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the partnership only to the extent that the fair value of that property exceeds that liability. For purposes of this section and sections 7-62-607 and 7-62-608, the term "distribution" shall not include payments to the extent that the payments do not exceed amounts equal to or constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

(2) A general partner in a limited liability partnership or limited liability limited partnership who receives a distribution in violation of subsection (1) of this section, and who knew at the time of the distribution that such distribution violated subsection (1) of this section, shall be liable to the partnership for the amount of the distribution. A general partner in a limited liability partnership or limited liability limited partnership who receives a distribution in violation of subsection (1) of this section, and who did not know at the time of the distribution that the distribution violated subsection (1) of this section, shall not be liable for the amount of the distribution. Subject to subsection (3) of this section, this subsection (2) shall not affect any obligation or liability of a general partner under an agreement or other applicable law for the amount of a distribution.

(3) Unless otherwise agreed, a partner in a limited liability partnership or limited liability limited partnership who receives a distribution from the partnership shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years after the date of the distribution unless an action to recover the distribution from such partner is commenced prior to the expiration of the said three-year period and an adjudication of liability against such partner is made in the said action.

**Source:** L. 95: Entire section added, p. 784, § 11, effective May 24. L. 2004: Entire section amended, p. 1433, § 101, effective July 1. L. 2006: Entire section amended, p. 849, § 8, effective July 1.

#### **7-60-147. Liability of partner in limited liability partnership upon return of contribution. (Repealed)**

**Source:** L. 95: Entire section added, p. 784, § 11, effective May 24. L. 2004: Entire section amended, p. 1433, § 102, effective July 1. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

#### **7-60-148. Law governing foreign limited liability partnerships - repeal. (Repealed)**

**Source:** L. 95: Entire section added, p. 784, § 11, effective May 24. L. 2003: (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-60-149. Limited liability partnership periodic reports.** Part 5 of article 90 of this title, providing for periodic reports from reporting entities, applies to limited liability partnerships subject to this article.

**Source:** L. 95: Entire section added, p. 784, § 11, effective May 24. L. 2000: Entire section repealed, p. 990, § 109, effective July 1. L. 2003: Entire section RC&RE, p. 2238, § 116, effective July 1, 2004. L. 2004: Entire section amended, p. 1434, § 103, effective July 1. L. 2010: Entire section amended, (HB 10-1403), ch. 404, p. 1994, § 5, effective August 11.



**7-60-150. Filing of report - repeal. (Repealed)**

**Source:** **L. 95:** Entire section added, p. 785, § 11, effective May 24. **L. 2003:** (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-60-151. Filing, service, and copying fees. (Repealed)**

**Source:** **L. 95:** Entire section added, p. 785, § 11, effective May 24. **L. 98:** (2) amended, p. 1321, § 16, effective June 1. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-60-152. Failure of limited liability partnerships to comply with part 5 of article 90 of this title. (Repealed)**

**Source:** **L. 95:** Entire section added, p. 786, § 11, effective May 24. **L. 2000:** (3)(d) amended, p. 952, § 19, effective July 1. **L. 2003:** Entire section amended, p. 2238, § 117, effective July 1, 2004. **L. 2004:** IP(1), (1)(a), and IP(4) amended, p. 1434, § 104, effective July 1. **L. 2005:** Entire section repealed, p. 1218, § 26, effective October 1.

**7-60-152.5. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, shall apply to limited liability partnerships and limited liability limited partnerships and to foreign limited liability partnerships and foreign limited liability limited partnerships that are authorized to transact business or conduct activities in this state pursuant to part 8 of article 90 of this title.

**Source:** **L. 2004:** Entire section added, p. 1434, § 105, effective July 1.

**7-60-153. Application of corporation case law to set aside limited liability.** (1) In any case in which a party seeks to hold the partners of a limited liability partnership or limited liability limited partnership personally responsible for the alleged improper actions of the limited liability partnership or limited liability limited partnership, the court shall apply the case law that interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

(2) For purposes of this section, the failure of a limited liability partnership or limited liability limited partnership to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the partners for liabilities of the limited liability partnership or limited liability limited partnership.

**Source:** **L. 95:** Entire section added, p. 787, § 11, effective May 24. **L. 2004:** Entire section amended, p. 1434, § 106, effective July 1.

**7-60-154. Scope of article - choice of law - application to professions and occupations.** (1) A partnership, including a limited liability partnership or limited liability limited partnership, may conduct its business, carry on its operations, and exercise the powers granted by this article within and without the state.

(2) (a) It is the intent of the general assembly that the legal existence of limited liability partnerships and limited liability limited partnerships be recognized outside the boundaries of this state and that the law of this state governing the limited liability partnership or limited liability limited partnership transacting business outside this state be granted the protection of full faith and credit under section 1 of article IV of the constitution of the United States.

(b) It is the intent of the general assembly that the internal affairs of a limited liability partnership or limited liability limited partnership formed in this state be subject to and governed by the law of this state, including the provisions governing liability of partners for debts, obligations, and liabilities chargeable to partnerships.

(3) Nothing in this article shall be construed to permit a limited liability partnership to engage in a profession or occupation as described in title 12, C.R.S., for which there is a specific statutory provision applicable to the practice of such profession or occupation by a corporation or professional corporation in this state unless authorized under applicable provisions of title 12, C.R.S.

**Source:** **L. 95:** Entire section added, p. 787, § 11, effective May 24. **L. 2003:** (2) amended, p. 2239, § 118, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1435, § 107, effective July 1.

## ARTICLE 61

### Uniform Limited Partnership Law of 1931

**Cross references:** (1) For definitions applicable to this article, see § 7-90-102.

(2) For application of general partnership law to limited partnerships, see § 7-60-106; for the "Colorado Uniform Limited Partnership Act of 1981", see article 62 of this title; for the "Uniform Records Retention Act", see article 17 of title 6.

**Law reviews:** For article, "Trade Name Registration Requirements and Customs in Colorado — Parts I and II", see 16 Colo. Law. 238 and 454 (1987); for article, "Colorado Choice of Entity 1998", see 27 Colo. Law. 5 (June 1998); for article, "Colorado Choice of Form of Organization and Structure 2001", see 30 Colo. Law. 11 (October 2001); for article "Entity and Trade Name Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001); for article "Entity and Trade Name Registration: 2004 Update", see 34 Colo. Law. 11 (January 2005).

7-61-101.	Short title.	7-61-116.	Compensation of limited partner.
7-61-102.	Definitions.	7-61-117.	Withdrawal or reduction of limited partner's contribution.
7-61-103.	Formation.		
7-61-104.	Business which may be carried on.	7-61-118.	Liability of limited partner to partnership.
7-61-105.	Limited partner's contribution.	7-61-119.	Nature of limited partner's interest.
7-61-106.	Name not to contain surname of limited partner - exceptions.	7-61-120.	Assignment of limited partner's interest.
7-61-107.	Liability for false statement in certificate.	7-61-121.	Effect of retirement, death, or insanity of a general partner.
7-61-108.	Limited partner not liable to creditors - when.	7-61-122.	Death of limited partner.
7-61-109.	Admission of additional limited partners.	7-61-123.	Rights of creditors of limited partner.
7-61-110.	General partner - rights - liabilities.	7-61-124.	Distribution of assets.
7-61-111.	Rights of a limited partner.	7-61-125.	When certificate shall be cancelled or amended.
7-61-112.	Status of person erroneously believing self to be a limited partner.	7-61-126.	Requirements for amendment and for cancellation of certificate.
7-61-113.	One person both general and limited partner.	7-61-127.	Parties to actions.
7-61-114.	Transactions with limited partner.	7-61-128.	Rules of construction.
7-61-115.	Relation of limited partners inter se.	7-61-129.	Law governing cases not covered.
		7-61-129.5.	Applicability.
		7-61-130.	Provisions for existing limited partnerships.

**7-61-101. Short title.** This article shall be known and may be cited as the "Uniform Limited Partnership Law of 1931", and shall be applicable to limited partnerships as provided in section 7-61-129.5.



**Source:** L. 31: p. 643, § 27. **CSA:** C. 123, § 70. **CRS 53:** § 104-2-27. **C.R.S. 1963:** § 104-2-27. **L. 81:** Entire section amended, p. 453, § 2, effective November 1.

#### ANNOTATION

**Law reviews.** For article, "Research and Development Tax Shelter Partnerships", see 11 Colo. Law. 1851 (1982). For comment, "The

Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982).

**7-61-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Limited partnership" means a partnership formed by two or more persons, under the provisions of section 7-61-103, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

(2) "Member" means a general partner or a limited partner.

**Source:** L. 31: p. 626, § 1. **CSA:** C. 123, § 44. **CRS 53:** § 104-2-1. **C.R.S. 1963:** § 104-2-1. **L. 2004:** Entire section amended, p. 1435, § 108, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Corporations, Partnership, and Agency", see 37 Dicta 11 (1960).

**That a limited partnership was discussed** by members of a partnership during its formative period but that the parties thereafter entered into a general partnership by articles signed by all the parties is insufficient to establish a claim of limited partnership. *Baumgartner v. Tweedy*, 143 Colo. 556, 354 P.2d 586 (1960).

**The article on limited partnerships does not have a comparable or parallel provision to § 7-60-108 dealing with partnership property.** *Wise v. Nu-Tone Prods. Co.*, 148 Colo. 574, 367 P.2d 346 (1961).

**Limited partnerships cannot exist without general partners.** *Skeen v. Harms*, 10 Bankr. 817 (Bankr. D. Colo. 1981).

**Applied in** *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**7-61-103. Formation.** (1) Two or more persons desiring to form a limited partnership shall:

(a) Sign and swear to a certificate which shall state:

(I) The name of the partnership;

(II) The character of the business;

(III) The location of the principal place of business;

(IV) The name and place of residence of each member, general and limited partners being respectively designated;

(V) The duration for which the partnership is to exist;

(VI) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner;

(VII) The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made;

(VIII) The time, if agreed upon, when the contribution of each limited partner is to be returned;

(IX) The share of the profits or the other compensation by way of income that each limited partner shall receive by reason of the limited partner's contribution;

(X) The right, if given, of a limited partner to substitute an assignee as contributor in the place of the limited partner and the terms and conditions of the substitution;

(XI) The right, if given, of the partners to admit additional limited partners;

(XII) The right, if given, of one or more of the limited partners to priority over other limited partners as to contributions or as to compensation by way of income and the nature of such priority;

(XIII) The right, if given, of remaining general partner or partners to continue the business on the death, retirement, or insanity of a general partner; and

(XIV) The right, if given, of a limited partner to demand and receive property other than cash in return for the limited partner's contribution.

(b) File for record the certificate in the office of the county clerk and recorder.

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of this section.

**Source:** L. 31: p. 626, § 2. CSA: C. 123, § 45. CRS 53: § 104-2-2. C.R.S. 1963: § 104-2-2. L. 2004: (1)(a)(V), (1)(a)(IX), (1)(a)(X), and (1)(a)(XIV) amended, p. 1436, § 109, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Guess Who's Coming to Closing", see 11 Colo. Law. 689 (1982).

**Annotator's note.** Since § 7-61-103 is similar to repealed laws antecedent to CSA, C. 123, § 80, a relevant case construing a prior provision has been included with the annotations to this section.

**The purpose of this section** is to prevent parties putting in property of uncertain and estimated value and calling it cash, thus obtaining a credit to which their capital would not entitle them. *Holliday v. Union Bag Co.*, 3 Colo. 342 (1877).

**However, this section does not require that capital should be paid in cash.** *Holliday v. Union Bag Co.*, 3 Colo. 342 (1877).

**7-61-104. Business which may be carried on.** A limited partnership may carry on any business which a partnership without limited partners may carry on.

**Source:** L. 31: p. 628, § 3. CSA: C. 123, § 46. CRS 53: § 104-2-3. C.R.S. 1963: § 104-2-3.

**7-61-105. Limited partner's contribution.** The contributions of a limited partner may be cash or other property but not services.

**Source:** L. 31: p. 628, § 4. CSA: C. 123, § 47. CRS 53: § 104-2-4. C.R.S. 1963: § 104-2-4.

#### ANNOTATION

**Law reviews.** For comment on *Silvola v. Rowlett* (cited below), see 27 Rocky Mt. L. Rev. 98 (1954). For article, "A Law Firm Pension Plan?", see 37 Dicta 351 (1960).

**The word "contributions" as it is used in this section is limited** to the contribution to be made by the limited partner at the time of the formation of the partnership for the benefit of the partnership's creditors, as there is a clear general purpose and intent by the general assembly to encourage trade by authorizing and permitting a capitalist to put his money into a partnership with general partners possessed of skill and business character only without be-

**Rather, this section intends that when capital is paid in property** it should be so stated, and its cash value given, for one of the essential precautions of the law is, that public notice must be given of the amount paid in so that the public may be enabled to estimate correctly the credit to be given to the partnership. *Holliday v. Union Bag Co.*, 3 Colo. 342 (1877).

**Section 7-61-117, when considered in conjunction with this section and § 7-61-118, does not bar suit nor entry of judgment** and only reflects that a limited partner "shall not receive" a cash distribution in preference to creditors of the partnership when such distribution would result in insufficient assets remaining to pay creditors. *Horizon Venture v. Horizon P'ship*, 791 P.2d 1223 (Colo. App. 1990).

coming a general partner or hazarding anything in the business except the capital originally subscribed. *Silvola v. Rowlett*, 129 Colo. 522, 272 P.2d 287 (1954).

**And services rendered by a limited partner after the formation of a limited partnership are not included** in the "contributions" as that term is used in the section. *Silvola v. Rowlett*, 129 Colo. 522, 272 P.2d 287 (1954).

**Hence, services rendered by a limited partner in the operation of a partnership does not deprive him of protection** as a limited partner, for the fact that he is interested in the success thereof to the extent of rendering services does



not, in and of itself, violate the provisions of this section nor does that alone charge him with

liability of a general partner. *Silvola v. Rowlett*, 129 Colo. 522, 272 P.2d 287 (1954).

**7-61-106. Name not to contain surname of limited partner - exceptions.** (1) The surname of a limited partner shall not appear in the partnership name, unless:

- (a) It is also the surname of a general partner; or
  - (b) Prior to the time when the limited partner became such, the business had been carried on under a name in which the limited partner's surname appeared.
- (2) A limited partner whose name appears in a partnership name contrary to the provisions of subsection (1) of this section is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that the limited partner is not a general partner.

**Source:** L. 31: p. 628, § 5. **CSA:** C. 123, § 48. **CRS 53:** § 104-2-5. **C.R.S. 1963:** § 104-2-5. **L. 2004:** (1)(b) and (2) amended, p. 1436, § 110, effective July 1.

**7-61-107. Liability for false statement in certificate.** (1) If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false:

- (a) At the time such party signed the certificate; or
- (b) Subsequently but within a sufficient time before the statement was relied upon to enable such party to cancel or amend the certificate or to file a petition for its cancellation or amendment as provided in section 7-61-126 (3).

**Source:** L. 31: p. 629, § 6. **CSA:** C. 123, § 49. **CRS 53:** § 104-2-6. **C.R.S. 1963:** § 104-2-6. **L. 2004:** Entire section amended, p. 1436, § 111, effective July 1.

**7-61-108. Limited partner not liable to creditors - when.** A limited partner shall not become liable as a general partner unless, in addition to the exercise of the limited partner's rights and powers as a limited partner, the limited partner takes part in the control of the business.

**Source:** L. 31: p. 629, § 7. **CSA:** C. 123, § 50. **CRS 53:** § 104-2-7. **C.R.S. 1963:** § 104-2-7. **L. 2004:** Entire section amended, p. 1436, § 112, effective July 1.

## ANNOTATION

This section provides for a limited liability if he who invokes its protection shows that he has both strictly and substantially complied with the conditions upon which immunity from common law liability is granted. *Holliday v. Union Bag Co.*, 3 Colo. 342 (1877) (decided under repealed laws antecedent to CSA, C. 123, § 74).

This section does not impose silence on a limited partner who has a material interest in the success of a partnership business, especially so when his opinion and suggestions are sought by a general partner. *Silvola v. Rowlett*, 129 Colo. 522, 272 P.2d 287 (1954).

A limited partner cannot be treated as a general partner for purposes of dissolution and winding up even though he performed some functions of a general partner. *Roeschlein v. Watkins*, 686 P.2d 1347 (Colo. App. 1983).

Provisions of a limited partnership agreement structuring expenses and establishing net profit and loss distribution formulae do

not in themselves render a limited partner liable as a general partner for partnership debts. *Alzado v. Blinder, Robinson & Co., Inc.*, 752 P.2d 544 (Colo. 1988).

A limited partner may become liable to partnership creditors as a general partner if the limited partner assumes control of partnership business. Whether limited partner's conduct amounts to assumption of control must be determined by consideration of several factors, including the purpose of the partnership, the administrative activities undertaken, the manner in which the entity actually functioned, and the nature and frequency of the limited partner's purported activities. *Alzado v. Blinder, Robinson & Co., Inc.*, 752 P.2d 544 (Colo. 1988).

Style of suit against limited partnership. A limited partnership may be used either in its common name or by naming the general partners and designating their capacity. *Frazier v.*

Carlin, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**And notice to general partners satisfactory.** Because the general partners possess sole management responsibility for a limited partnership,

notice to them in their capacities as general partners affords that notice to the limited partnership which is necessary to satisfy the demands of due process. *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**7-61-109. Admission of additional limited partners.** After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of section 7-61-126.

**Source:** L. 31: p. 630, § 8. CSA: C. 123, § 51. CRS 53: § 104-2-8. C.R.S. 1963: § 104-2-8.

**7-61-110. General partner - rights - liabilities.** (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, but without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to:

- (a) Do any act in contravention of the certificate;
- (b) Do any act which would make it impossible to carry on the ordinary business of the partnership;
- (c) Confess a judgment against the partnership;
- (d) Possess partnership property or assign their rights in specific partnership property for other than a partnership purpose;
- (e) Admit a person as a general partner;
- (f) Admit a person as a limited partner, unless the right to do so is given in the certificate;
- (g) Continue the business with partnership property on the death, retirement, or insanity of a general partner, unless the right to do so is given in the certificate.

(2) For a limited partnership that has made the election permitted by section 7-61-129, the article so elected shall be the governing law for purposes of subsection (1) of this section. For a limited partnership that has not made the election permitted by section 7-61-129, article 60 of this title shall be the governing law for purposes of subsection (1) of this section.

**Source:** L. 31: p. 630, § 9. CSA: C. 123, § 52. CRS 53: § 104-2-9. C.R.S. 1963: § 104-2-9. L. 97: (2) added, p. 915, § 2, effective January 1, 1998.

**Cross references:** For common law fiduciary duty of good faith, sound business judgment, candor, forthrightness, and fairness owed by a general partner to his limited partners in winding up partnership affairs, see *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972) and *Roeschlein v. Watkins*, 686 P.2d 1347 (Colo. App. 1984).

## ANNOTATION

**Law reviews.** For article, "One Year Review of Agencies, Partnerships, and Corporations", see 39 *Dicta* 61 (1962). For article, "Guess Who's Coming to Closing", see 11 *Colo. Law.* 689 (1982). For article, "The Fiduciary Duties of General Partners", see 17 *Colo. Law.* 1959 (1988). For article, "Contractually Binding Colorado Entities", see 28 *Colo. Law.* 33 (December 1999).

**Breach of fiduciary duty by general partner.** Since a general partner owes a fiduciary duty to the limited partners, the doing of an act

proscribed by this section is a breach of that duty. *Gundelach v. Gollehon*, 42 Colo. App. 437, 598 P.2d 521 (1979).

**Transfer of sole asset of limited partnership.** Upon transfer of the sole asset of a limited partnership, it is no longer possible for the partnership to carry on its ordinary business within the meaning of this section. *Gundelach v. Gollehon*, 42 Colo. App. 437, 598 P.2d 521 (1979).

**Remuneration of partner impermissible without express agreement.** The provisions of



§ 7-60-118 apply to limited partnerships. **Applied** in *Skeen v. Harms*, 10 Bankr. 817 Mahan v. Harst, 738 P.2d 1190 (Colo. App. (Bankr. D. Colo. 1981). 1987).

**7-61-111. Rights of a limited partner.** (1) A limited partner shall have the same rights as a general partner to:

- (a) Have the partnership books kept at the principal place of business of the partnership and at all times to inspect and copy any of them;
  - (b) Have on demand true and full information of all things affecting the partnership and a formal account of partnership affairs whenever circumstances render it just and reasonable; and
  - (c) Have dissolution and winding up by decree of court.
- (2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income and to the return of the limited partner's contribution as provided in sections 7-61-116 and 7-61-117.

**Source:** L. 31: p. 631, § 10. CSA: C. 123, § 53. CRS 53: § 104-2-10. C.R.S. 1963: § 104-2-10. L. 2004: (2) amended, p. 1437, § 113, effective July 1.

#### ANNOTATION

**Right to sue derivatively.** The right of the limited partners of a limited partnership formed prior to 1981 to sue derivatively is governed by this article and the common law, not § 7-62-1001. *Moore v. 1600 Downing St., Ltd.*, 668 P.2d 16 (Colo. App. 1983).

**Absent a statement in the certificate to the contrary and irrespective of the nature of the contributions, a limited partner has only the right to demand and receive cash in return**

**for his contribution.** *Horizon Venture v. Horizon P'ship*, 791 P.2d 1223 (Colo. App. 1990).

**Membership interest may be a "security".** The presumption that a general partnership interest is not a security is not applicable to a limited liability partnership interest in Colorado. Instead, the structure of the entity and the terms of the agreement will control. *Toothman v. Freeborn & Peters*, 80 P.3d 804 (Colo. App. 2002).

**7-61-112. Status of person erroneously believing self to be a limited partner.** A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that the person has become a limited partner in a limited partnership is not, by reason of the person's exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business or bound by the obligations of such person or partnership if, on ascertaining the mistake, the person promptly renounces the person's interest in the profits of the business or other compensation by way of income.

**Source:** L. 31: p. 631, § 11. CSA: C. 123, § 54. CRS 53: § 104-2-11. C.R.S. 1963: § 104-2-11. L. 2004: Entire section amended, p. 1437, § 114, effective July 1.

**7-61-113. One person both general and limited partner.** (1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general partner and at the same time a limited partner shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to such person's contribution, the person shall have the rights against the other members that the person would have had if the person were not also a general partner.

**Source:** L. 31: p. 632, § 12. CSA: C. 123, § 55. CRS 53: § 104-2-12. C.R.S. 1963: § 104-2-12. L. 2004: (2) amended, p. 1437, § 115, effective July 1.

**7-61-114. Transactions with limited partner.** (1) A limited partner also may loan money to and transact other business with the partnership and, unless the limited partner is also a general partner, receive, on account of resulting claims against the partnership, a pro rata share of the assets with general creditors.

- (2) No limited partner shall, in respect to any such claim:
- (a) Receive or hold as collateral security any partnership property; or
  - (b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.
- (3) The receiving of collateral security or a payment, conveyance, or release in violation of the provisions of subsection (1) of this section is a fraud on the creditors of the partnership.

**Source:** L. 31: p. 632, § 13. CSA: C. 123, § 56. CRS 53: § 104-2-13. C.R.S. 1963: § 104-2-13. L. 2004: (1) amended, p. 1437, § 116, effective July 1.

**7-61-115. Relation of limited partners inter se.** Where there are several limited partners, the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and, in the absence of such a statement, all the limited partners shall stand upon equal footing.

**Source:** L. 31: p. 633, § 14. CSA: C. 123, § 57. CRS 53: § 104-2-14. C.R.S. 1963: § 104-2-14.

**7-61-116. Compensation of limited partner.** A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate, if after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

**Source:** L. 31: p. 633, § 15. CSA: C. 123, § 58. CRS 53: § 104-2-15. C.R.S. 1963: § 104-2-15.

#### ANNOTATION

**Absent a statement in the certificate to the contrary and irrespective of the nature of the contributions, a limited partner has only the right to demand and receive cash in return for his contribution.** *Horizon Venture v. Horizon P'ship*, 791 P.2d 1223 (Colo. App. 1990).

**7-61-117. Withdrawal or reduction of limited partner's contribution.** (1) A limited partner shall not receive from a general partner or out of partnership property any part of the limited partner's contributions until:

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them;

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of subsection (2) of this section; and

(c) The certificate is canceled or so amended as to state the withdrawal or reduction.

(2) Subject to the provisions of subsection (1) of this section, a limited partner may rightfully demand the return of the limited partner's contribution:

(a) On the dissolution of a partnership;

(b) When the date stated in the certificate for its return has arrived; or

(c) After the limited partner has given six months' notice in writing to all other members if no time is stated in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary or the consent of



all members, a limited partner, irrespective of the nature of the limited partner's contribution, has only the right to demand and receive cash in return for such contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when:

(a) The limited partner rightfully but unsuccessfully demands the return of the limited partner's contribution; or

(b) The other liabilities of the partnership have not been paid or the partnership property is insufficient for their payment as required by subsection (1) (a) of this section and the limited partner would otherwise be entitled to the return of the limited partner's contribution.

**Source:** L. 31: p. 633, § 16. CSA: C. 123, § 59. CRS 53: § 104-2-16. C.R.S. 1963: § 104-2-16. L. 2003: (1)(c), (2)(b), and (2)(c) amended, p. 2240, § 119, effective July 1, 2004. L. 2004: IP(1), IP(2), (2)(c), (3), and (4) amended, p. 1437, § 117, effective July 1.

#### ANNOTATION

**Damages for breach of fiduciary duty.** This section does not limit damages for a breach of fiduciary duty, but rather, the amount upon nonbreaching partner's contribution is the minimum assessable damages. *Gundelach v. Gollehon*, 42 Colo. App. 437, 598 P.2d 521 (1979).

**Limited partner's remedy in a derivative suit** is not limited to the return of his contribution with interest. Such a remedy is nonexclusive. *Moore v. 1600 Downing St., Ltd.*, 668 P.2d 16 (Colo. App. 1983).

**Partnership agreement is not void on its face and does not violate this section** where agreement did not on its face guarantee that the limited partner would receive an unlawful priority over other partnership creditors. *Alzado v. Blinder, Robinson & Co., Inc.*, 752 P.2d 544 (Colo. 1988).

**Entry of a judgment against a partnership by a limited partner was not violative of this**

**section.** This section merely provides that the liabilities owed by the partnership to general creditors must be paid before such judgment is satisfied. *Horizon Venture v. Horizon P'ship*, 791 P.2d 1223 (Colo. App. 1990).

**This section, considered in conjunction with §§ 7-61-103 and 7-61-118, does not bar suit nor entry of judgment** and only reflects that a limited partner "shall not receive" a cash distribution in preference to creditors of the partnership when such distribution would result in insufficient assets remaining to pay creditors. *Horizon Venture v. Horizon P'ship*, 791 P.2d 1223 (Colo. App. 1990).

**Absent a statement in the certificate to the contrary and irrespective of the nature of the contributions, a limited partner has only the right to demand and receive cash in return for his contribution.** *Horizon Venture v. Horizon P'ship*, 791 P.2d 1223 (Colo. App. 1990).

**7-61-118. Liability of limited partner to partnership.** (1) A limited partner is liable to the partnership:

(a) For the difference between the contribution as actually made by the limited partner and that stated in the certificate as having been made; and

(b) For any unpaid contribution that the limited partner agreed in the certificate to make in the future, at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership:

(a) Specific property stated in the certificate as contributed by the limited partner but that was not contributed or that has been wrongfully returned; and

(b) Money or other property wrongfully paid or conveyed to the limited partner on account of the limited partner's contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of the contributor's contribution, the contributor is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

**Source:** L. 31: p. 635, § 17. CSA: C. 123, § 60. CRS 53: § 104-2-17. C.R.S. 1963: § 104-2-17. L. 2004: (1), (2), and (4) amended, p. 1438, § 118, effective July 1.

#### ANNOTATION

**This section, when considered in conjunction with §§ 7-61-103 and 7-61-117, does not bar suit nor entry of judgment** and only reflects that a limited partner “shall not receive” a cash distribution in preference to creditors of the

partnership when such distribution would result in insufficient assets remaining to pay creditors. *Horizon Venture v. Horizon P’ship*, 791 P.2d 1223 (Colo. App. 1990).

**7-61-119. Nature of limited partner’s interest.** A limited partner’s interest in the partnership is personal property.

**Source:** L. 31: p. 636, § 18. CSA: C. 123, § 61. CRS 53: § 104-2-18. C.R.S. 1963: § 104-2-18.

#### ANNOTATION

**Law reviews.** For article, “Financing Real Estate Developments”, see 11 Colo. Law. 2093 (1982).

**7-61-120. Assignment of limited partner’s interest.** (1) A limited partner’s interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned the limited partner’s interest in a partnership.

(3) An assignee who does not become a substituted limited partner has no right to require any information or accounting of the partnership transactions or to inspect the partnership books. The assignee is only entitled to receive the share of the profits or other compensation by way of income or the return of the contribution to which the assignee’s assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members, except the assignor, consent thereto or if the assignor, being empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with section 7-61-126.

(6) The substituted limited partner has all the rights and powers and is subject to all the restrictions and liabilities of the substituted limited partner’s assignor, except those liabilities of which the substituted limited partner was ignorant at the time the substituted limited partner became a limited partner and that could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under sections 7-61-108 and 7-61-118.

**Source:** L. 31: p. 636, § 19. CSA: C. 123, § 62. CRS 53: § 104-2-19. C.R.S. 1963: § 104-2-19. L. 2004: (2), (3), and (6) amended, p. 1438, § 119, effective July 1.

**7-61-121. Effect of retirement, death, or insanity of a general partner.** (1) The retirement, death, or insanity of a general partner dissolves the partnership unless the business is continued by the remaining general partners:

- (a) Under a right to do so as stated in the certificate; or
- (b) With the consent of all members.

**Source:** L. 31: p. 638, § 20. CSA: C. 123, § 63. CRS 53: § 104-2-20. C.R.S. 1963: § 104-2-20.



**7-61-122. Death of limited partner.** (1) On the death of a limited partner, the deceased limited partner's executor or administrator shall have all the rights of a limited partner for the purpose of settling the deceased limited partner's estate and such power as the deceased limited partner had to constitute the deceased limited partner's assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all of the liabilities of the deceased limited partner as a limited partner.

**Source:** L. 31: p. 638, § 21. **CSA:** C. 123, § 64. **CRS 53:** § 104-2-21. **C.R.S. 1963:** § 104-2-21. **L. 2004:** Entire section amended, p. 1439, § 120, effective July 1.

**7-61-123. Rights of creditors of limited partner.** (1) On due application to a court of competent jurisdiction by any creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of such claim and may appoint a receiver and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner but may not be redeemed with partnership property.

(3) The remedies conferred by subsection (1) of this section shall not be deemed exclusive of others which may exist.

(4) Nothing in this article shall be held to deprive a limited partner of the limited partner's statutory exemption.

**Source:** L. 31: p. 638, § 22. **CSA:** C. 123, § 65. **CRS 53:** § 104-2-22. **C.R.S. 1963:** § 104-2-22. **L. 2004:** (4) amended, p. 1439, § 121, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Letters of Credit in Limited Partnership Financing — A Legal Time Bomb?", see 13 Colo. Law. 1989 (1984).

**7-61-124. Distribution of assets.** (1) In settling accounts after dissolution, the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions and to general partners;

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions;

(c) Those to limited partners in respect to the capital of their contributions;

(d) Those to general partners other than for capital and profits;

(e) Those to general partners in respect to profits;

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

**Source:** L. 31: p. 639, § 23. **CSA:** C. 123, § 66. **CRS 53:** § 104-2-23. **C.R.S. 1963:** § 104-2-23.

#### ANNOTATION

**Applied** in *Beals v. Tri-B Assocs.*, 644 P.2d 78 (Colo. App. 1982).

**7-61-125. When certificate shall be cancelled or amended.** (1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when:

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner;

(b) A person is substituted as a limited partner;

(c) An additional limited partner is admitted;

(d) A person is admitted as a general partner;

(e) A general partner retires, dies, or becomes insane and the business is continued under section 7-61-121;

(f) There is a change in the character of the business of the partnership;

(g) There is a false or erroneous statement in the certificate;

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution;

(i) A time is fixed for the dissolution of the partnership or the return of a contribution, no time having been stated in the certificate; or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

**Source:** L. 31: p. 640, § 24. CSA: C. 123, § 67. CRS 53: § 104-2-24. C.R.S. 1963: § 104-2-24. L. 2003: (2)(i) amended, p. 2240, § 120, effective July 1, 2004.

**7-61-126. Requirements for amendment and for cancellation of certificate.**

(1) The writing to amend a certificate shall:

(a) Conform to the requirements of section 7-61-103 insofar as necessary to state clearly the change in the certificate that is desired; and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) If any person designated in subsections (1) and (2) of this section as a person who must execute the writing to cancel a certificate refuses to do so, a person desiring the cancellation or amendment of such certificate may petition the district court to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the county clerk and recorder in the office in which the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree stating the amendment.

(5) A certificate is amended or cancelled when there is filed for record in the office of the county clerk and recorder in which the certificate is recorded:

(a) A writing in accordance with the provisions of subsections (1) and (2) of this section; or

(b) A certified copy of the order of court in accordance with the provisions of subsection (4) of this section.

(6) After the certificate is duly amended in accordance with this section, the amended certificate thereafter shall be for all purposes the certificate provided for by this article.

**Source:** L. 31: p. 641, § 25. CSA: C. 123, § 68. CRS 53: § 104-2-25. C.R.S. 1963: § 104-2-25. L. 2003: (1)(a), (4), and IP(5) amended, p. 2240, § 121, effective July 1, 2004.

**7-61-127. Parties to actions.** A contributor, unless the contributor is a general partner, is not a proper party to proceedings by or against a partnership except where the object is to enforce a limited partner's right against or liability to the partnership.



**Source:** L. 31: p. 642, § 26. CSA: C. 123, § 69. CRS 53: § 104-2-26. C.R.S. 1963: § 104-2-26. L. 2004: Entire section amended, p. 1439, § 122, effective July 1.

#### ANNOTATION

**Derivative action under the common law.**

Under the common law, a limited partner may bring a derivative action against the general partners for breach of fiduciary duty in the management of the affairs of the partnership if the general partners refuse to or are unable to bring such an action, and this section does not prevent such an action. *Moore v. 1600 Downing St., Ltd.*, 668 P.2d 16 (Colo. App. 1983).

**Determining federal diversity jurisdiction.**

A limited partnership is basically an association

of individuals, and the uniform act has no effect on the determination of federal diversity jurisdiction. The question of federal jurisdiction cannot be decided according to what various states determine the state substantive law should be. *Grynberg v. B.B.L. Assocs.*, 436 F. Supp. 564 (D. Colo. 1977).

**Applied** in *Frazier v. Carlin*, 42 Colo. App. 226, 591 P.2d 1348 (1979).

**7-61-128. Rules of construction.** (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(2) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This article shall not be so construed as to impair the obligations of any contract existing on April 11, 1931, nor to affect any action on proceedings begun or right accrued before said date.

**Source:** L. 31: p. 643, § 28. CSA: C. 123, § 71. CRS 53: § 104-2-28. C.R.S. 1963: § 104-2-28.

**7-61-129. Law governing cases not covered.** (1) In any case not provided for in this article, the provisions of either article 60 or 64 of this title shall govern, to the extent applicable, as follows:

(a) A limited partnership may elect to be governed by article 64 of this title by filing for record in the office of the county clerk and recorder in which its certificate of limited partnership is filed of record an amendment which includes a declaration that it elects to be governed by such article. If the election is made, the amendment shall be signed by all general partners, notwithstanding section 7-61-126 (1) (b).

(b) A limited partnership that has made the election in paragraph (a) of this subsection (1) shall be governed by article 64 of this title.

(c) A limited partnership that has not made the election in paragraph (a) of this subsection (1) shall be governed by article 60 of this title.

**Source:** L. 31: p. 643, § 29. CSA: C. 123, § 72. CRS 53: § 104-2-29. C.R.S. 1963: § 104-2-29. L. 97: Entire section amended, p. 916, § 3, effective January 1, 1998.

**7-61-129.5. Applicability.** Except as provided in section 7-62-1103, this article shall apply to limited partnerships formed between April 11, 1931, and prior to November 1, 1981. On or after November 1, 1981, all limited partnerships shall be formed under the provisions of article 62 of this title.

**Source:** L. 81: Entire section added, p. 453, § 3, effective November 1.

**7-61-130. Provisions for existing limited partnerships.** (1) A limited partnership formed under any statute of this state prior to April 11, 1931, may become a limited partnership under this article by complying with the provisions of section 7-61-103 if the certificate states:

(a) The amount of the original contributions of each limited partner and the time when the contribution was made; and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this state prior to April 11, 1931, unless it becomes a limited partnership under this article, shall continue to be governed by the provisions of prior existing law, except that such partnership shall not be renewed unless so provided in the original agreement.

**Source:** L. 31: p. 643, § 30. CSA: C. 123, § 73. CRS 53: § 104-2-30. C.R.S. 1963: § 104-2-30. L. 2003: IP(1) amended, p. 2241, § 122, effective July 1, 2004.

## ARTICLE 62

### Colorado Uniform Limited Partnership Act of 1981

**Cross references:** For application of general partnership law to limited partnerships, see § 7-60-106; for applicability and short title of this article, see §§ 7-62-1101 and 7-62-1105; for the "Uniform Records Retention Act", see article 17 of title 6.

**Law reviews:** For article, "FLPs for Family Asset Management and Transfer Tax Planning", see 24 Colo. Law. 1245 (1995); for article, "Colorado Choice of Entity 1998", see 27 Colo. Law. 5 (June 1998); for article, "Colorado Choice of Form of Organization and Structure 2001", see 30 Colo. Law. 11 (October 2001); for article "Entity and Trade Name Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001); for article "Entity and Trade Name Registration: 2004 Update", see 34 Colo. Law. 11 (January 2005).

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## PART 1

## GENERAL PROVISIONS

**7-62-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Certificate of limited partnership" means the certificate referred to in section 7-62-201, and the certificate as amended.

(2) "Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services that a partner contributes to a limited partnership in the partner's capacity as a partner.

(3) "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in section 7-62-402.

(3.5) and (4) (Deleted by amendment, L. 2003, p. 2241, § 123, effective July 1, 2004.)

(5) "General partner" means a person:

(a) Who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement or this article, including a person who is admitted as a general partner without making or being obligated to make a contribution or without acquiring a partnership interest, if in either case such admission is pursuant to a written partnership agreement or other writing confirming the admission; and

(b) Who is named in the certificate of limited partnership as a general partner.

(5.5) "Limited liability partnership" means a limited liability partnership as defined in section 7-60-102 (4.7) or section 7-64-101 (13).

(6) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement or this article, including a person who is admitted as a limited partner without making or being obligated to make a contribution or without acquiring a partnership interest, if in either case such admission is pursuant to a written partnership agreement or other writing confirming the admission, as provided in sections 7-62-301 and 7-62-306 or, in the case of a foreign limited partnership, in accordance with the law of the foreign jurisdiction under which the limited partnership is formed.

(7) "Limited partnership" or "domestic limited partnership" means an entity formed under this article by two or more persons and having one or more general partners and one or more limited partners. A limited liability limited partnership is for all purposes a limited partnership. At formation, a limited partnership shall have at least one partner who has a partnership interest.

(8) "Partner" means a limited or general partner.

(9) "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.

(10) "Partnership interest" means a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets.

(11) (Deleted by amendment, L. 2003, p. 2241, § 123, effective July 1, 2004.)

(12) "Limited liability limited partnership" means a domestic limited partnership that has registered under section 7-60-144 or 7-64-1002.

**Source:** **L. 81:** Entire article added, p. 433, § 1, effective November 1. **L. 86:** (6) amended, p. 448, § 1, effective July 1. **L. 95:** (4) and (7) amended and (3.5), (5.5), and (12) added, p. 787, § 12, effective May 24. **L. 97:** (5.5) and (12) amended, p. 916, § 4, effective January 1, 1998. **L. 2003:** (3.5), (4), (6), (7), (11), and (12) amended, p. 2241, § 123, effective July 1, 2004. **L. 2004:** (2), (5.5), (7), and (12) amended, p. 1439, § 123, effective July 1. **L. 2009:** (5), (6), and (7) amended, (HB 09-1248), ch. 252, p. 1129, § 4, effective May 14.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

#### ANNOTATION

**Law reviews.** For comment, "The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982).

**A partnership that was part of a Ponzi scheme was void and therefore the provisions**

**of the Colorado Limited Partnership Act of 1981 did not apply.** *Sender v. Simon*, 174 Bankr. 601 (D. Colo. 1994).

#### 7-62-102. Name of limited partnership. (Repealed)

**Source:** **L. 81:** Entire article added, p. 434, § 1, effective November 1. **L. 86:** (2) added, p. 448, § 2, effective July 1. **L. 90:** (1)(c) amended, p. 446, § 7, effective April 18. **L. 97:** (1)(a) and (1)(b) amended and (3) added, p. 1498, § 2, effective June 3. **L. 2000:** Entire section repealed, p. 990, § 109, effective July 1.



**7-62-103. Reservation of name. (Repealed)**

**Source:** **L. 81:** Entire article added, p. 434, § 1, effective November 1. **L. 2000:** Entire section repealed, p. 990, § 109, effective July 1.

**7-62-104. Registered office - registered agent - repeal. (Repealed)**

**Source:** **L. 81:** Entire article added, p. 435, § 1, effective November 1. **L. 86:** Entire section amended, p. 449, § 3, effective July 1. **L. 2003:** (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-62-104.5. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, applies to limited partnerships.

**Source:** **L. 2003:** Entire section added, p. 2241, § 124, effective July 1, 2004.

**7-62-105. Records.** (1) Each limited partnership shall keep at an office stated in the manner provided in the partnership agreement or, if no such provision is made, at the street address of the principal office, if any, of the limited partnership or, if none, at the street address of the registered agent, the following:

(a) A current list of the full name and last-known business, residence, or mailing address of each partner, stating separately the general partners and the limited partners, stated in alphabetical order;

(b) A copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed or delivered to the secretary of state for filing;

(c) Copies of the limited partnership's federal, state, and local income tax returns and reports, if any, for the three most recent years;

(d) Copies of any currently effective written partnership agreements, copies of any writings permitted or required under section 7-62-502 (2) and (3), and copies of any financial statements of the limited partnership for the three most recent years; and

(e) Unless contained in a written partnership agreement or in a writing permitted or required under section 7-62-502 (2) and (3), a statement prepared and certified as accurate by the general partners which describes:

(I) The amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute in the future;

(II) The times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;

(III) If agreed upon, the time at which or the events on the happening of which a partner may terminate the partner's membership in the limited partnership and the amount of, or the method of determining, the distribution to which the partner may be entitled respecting the partner's partnership interest and the terms and conditions of the termination and distribution;

(IV) Any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution.

(2) Such records are subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours.

**Source:** **L. 81:** Entire article added, p. 435, § 1, effective November 1. **L. 86:** IP(1), (1)(a), (1)(c), and (1)(d) amended and (1)(e) added, p. 449, § 4, effective July 1. **L. 2003:** IP(1), (1)(a), and (1)(b) amended, p. 2241, § 125, effective July 1, 2004. **L. 2004:** (1)(a) and (1)(e)(III) amended, p. 1440, § 124, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986).

**7-62-106. Nature of business.** A limited partnership may carry on any business that a partnership without limited partners may carry on except as prohibited by law.

**Source: L. 81:** Entire article added, p. 435, § 1, effective November 1.

## ANNOTATION

**Law reviews.** For article, "Research and Development Tax Shelter Partnership", see 11 Colo. Law. 1851 (1982). For article, "Partner-

ship or LLC: Alternative to an Irrevocable Life Insurance Trust?", see 25 Colo. Law. 43 (January 1996).

**7-62-107. Business transactions of partner with the partnership.** Except as provided in the partnership agreement, a partner may lend money to, act as surety for, and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

**Source: L. 81:** Entire article added, p. 435, § 1, effective November 1.

## ANNOTATION

**Law reviews.** For article, "Limited Partnership Act Update", see 11 Colo. Law. 688 (1982).

**A special district which was a limited partner** is authorized to contract with the partner-

ship unless the contract is unconstitutional in which event the contract is ultra vires and void. *Black v. First Federal Savings and Loan*, 830 P.2d 1103 (Colo. App. 1992).

**7-62-108. Service of process on limited partnership - repeal. (Repealed)**

**Source: L. 81:** Entire article added, p. 435, § 1, effective November 1. **L. 2003:** (6) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (6) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-62-109. Conversion of limited partnership into other entities - repeal. (Repealed)**

**Source: L. 95:** Entire section added, p. 788, § 13, effective May 24. **L. 97:** Entire section amended, p. 916, § 5, effective January 1, 1998. **L. 2003:** (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

## PART 2

## CERTIFICATE OF LIMITED PARTNERSHIP

**7-62-201. Certificates - contents - filing with secretary of state.** (1) In order to form a limited partnership, a certificate of limited partnership shall be delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title. The certificate of limited partnership shall state:



(a) The domestic entity name of the limited partnership, which domestic entity name shall comply with part 6 of article 90 of this title;

(b) The registered agent name and registered agent address of the limited partnership's initial registered agent;

(c) The true name and mailing address of each general partner;

(c.5) The principal office address of the limited partnership's initial principal office;

(d) That there are at least two partners in the partnership, at least one of whom is a limited partner; and

(e) Any other matters relating to the limited partnership or the certificate the general partners determine to include therein.

(2) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the secretary of state, or at any later time not more than ninety days after the date of the filing of the certificate, stated in the certificate of limited partnership, if, in either case, there has been substantial compliance with the requirements of this section.

**Source:** L. 81: Entire article added, p. 436, § 1, effective November 1. L. 86: (1) R&RE, p. 450, § 5, effective July 1. L. 2000: (1)(a) amended, p. 952, § 20, effective July 1. L. 2002: IP(1) amended, p. 1821, § 38, effective July 1; IP(1) amended, p. 1685, § 36, effective October 1. L. 2003: IP(1), (1)(a) to (1)(c), (1)(e), and (2) amended and (1)(c.5) added, p. 2242, § 126, effective July 1, 2004. L. 2004: IP(1) and (1)(c) amended, p. 1440, § 125, effective July 1. L. 2006: (1)(d) amended, p. 850, § 9, effective July 1. L. 2008: (1)(c) amended, p. 19, § 3, effective August 5.

#### ANNOTATION

**Law reviews.** For comment, "The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982). For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986). For article, "Trade Name Registration Requirements and Customs in Colorado — Parts I and II", see 16 Colo. Law. 238 and 454 (1987).

**Where the certificate of limited partnership was properly filed and there was no evidence to suggest the limited partner and the general partners did not have a good faith belief that they had formed a limited partnership,** the partnership and limited partnership statutes concerning liability applied for the protection of the limited partnership's creditors. *Black v. First Federal Savings and Loan*, 830 P.2d 1103 (Colo. App. 1992).

**Because all of the parties at the time of contract believed that a limited partnership existed based on the filing of the certificate,** the general partners were jointly and severally liable on the note and deed of trust. *Black v. First Federal Savings and Loan*, 830 P.2d 1103 (Colo. App. 1992).

**Where the limited partnership benefited from the loan entered into after the filing of the partnership certificate,** the general partners were estopped from denying the validity of their acts on behalf of the partnership, even though the limited partnership was declared void as to the limited partner. *Black v. First*

*Federal Savings and Loan*, 830 P.2d 1103 (Colo. App. 1992).

**A limited partnership is formed when there is good faith, substantial compliance with the statutory requirements to execute and file a certificate of limited partnership in the office of the secretary of state.** *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**The law does not intend for the certificate of limited partnership to control the rights and obligations of the partners among themselves.** The statutory provisions that require that the certificate of limited partnership specify the amount of cash and property contributed by each partner and the times at which any additional contributions will be made by each partner do not prohibit limited partners from contractually agreeing to allow an increase in capital contributions by majority vote. *Fox v. I-10, Ltd.*, 957 P.2d 1018 (Colo. 1998) (decided under former § 7-62-201(1)(e) and (f) prior to the 1986 amendments that eliminated these certificate requirements).

**Certificate does not need to indicate the process by which partners to a partnership may amend their agreement in the future.** Instead, certificate must merely specify the initial contribution agreed upon by the partners. *Fox v. I-10, Ltd.*, 957 P.2d 1018 (Colo. 1998) (decided under former § 7-62-201 prior to the 1986 amendments that eliminated certificate requirement of § 7-62-201 (1)(f)).

**7-62-202. Amendment to certificate.** (1) A limited partnership may amend its certificate of limited partnership by delivering a certificate of amendment to the secretary of state, for filing pursuant to part 3 of article 90 of this title, stating:

- (a) The domestic entity name of the limited partnership; and
- (b) (Deleted by amendment, L. 2004, p. 1440, § 126, effective July 1, 2004.)
- (c) The amendment to the certificate.

(2) Within thirty days after the happening of any of the following events, an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed:

- (a) The admission of a new general partner; or
- (b) The withdrawal of a general partner.

(3) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, including but not limited to a change in the registered agent name or registered agent address of the registered agent, shall promptly amend the certificate.

(4) A certificate of limited partnership may be amended at any time for any other proper purpose the general partners may determine.

(5) No person has any liability because an amendment to a certificate of limited partnership has not been filed in the records of the secretary of state to reflect the occurrence of any event referred to in subsection (2) or (3) of this section if the amendment is filed within the time periods specified.

**Source:** L. 81: Entire article added, p. 437, § 1, effective November 1. L. 86: (1)(b) and (3) amended and (2) R&RE, p. 450, §§ 6, 7, effective July 1. L. 2003: IP(1), (1)(a), (3), and (5) amended, p. 2242, § 127, effective July 1, 2004. L. 2004: IP(1), (1)(a), and (1)(b) amended, p. 1440, § 126, effective July 1.

#### ANNOTATION

**Change in amount or character of the contribution of any partner or in any partner's obligation to make a contribution** as determined by amendment to the certificate, must be recorded. Subsection (2)(a) requires the partners

to record any change in obligation accomplished by amendment. *Fox v. I-10, Ltd.*, 957 P.2d 1018 (Colo. 1998) (decided under former § 7-62-202 prior to the 1986 amendments that eliminated certificate requirement of subsection (2)(a)).

**7-62-203. Statement of dissolution.** (1) Upon the dissolution of the partnership or at any time there are no limited partners, the partnership shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of dissolution stating:

- (a) The domestic entity name of the limited partnership;
- (b) (Deleted by amendment, L. 2003, p. 2243, § 128, effective July 1, 2004.)
- (b.5) The principal office address of the limited partnership's principal office; and
- (c) That the partnership is dissolved.
- (d) and (e) (Deleted by amendment, L. 2004, p. 1441, § 127, effective July 1, 2004.)

(2) The statement of dissolution shall not affect the limited liability of the partners during the period of winding up and termination of the partnership.

**Source:** L. 81: Entire article added, p. 438, § 1, effective November 1. L. 86: (1)(b) and (1)(e) amended, p. 450, § 8, effective July 1. L. 97: (2) amended, p. 1499, § 3, effective June 3. L. 2000: (1)(a) amended, p. 952, § 21, effective July 1. L. 2003: IP(1), (1)(b) to (1)(e), and (2) amended, p. 2243, § 128, effective July 1, 2004. L. 2004: (1)(b.5) added and (1)(c), (1)(d), and (1)(e) amended, p. 1441, § 127, effective July 1.

**7-62-204. Approval of certificates.** (1) Certificates and statements required by this article to be filed in the office of the secretary of state shall be approved in the following manner:



(a) An original certificate of limited partnership shall be approved by all general partners;

(b) A certificate of amendment shall be approved by at least one general partner and by each other general partner designated in the certificate as a new general partner; and

(c) A statement of dissolution shall be approved by all general partners or, if there are no general partners as a result of the application of section 7-62-402, by any person authorized under the partnership agreement or, if the partnership agreement does not so provide, by a person designated by a majority of the limited partners.

(2) Any person may approve a certificate or statement by an attorney-in-fact.

(3) (Deleted by amendment, L. 2002, p. 1821, § 39, effective July 1, 2002; p. 1686, § 37, effective October 1, 2002.)

**Source:** L. 81: Entire article added, p. 438, § 1, effective November 1. L. 86: (1)(a), (1)(b), (1)(c), and (3) amended, p. 451, § 9, effective July 1. L. 2002: Entire section amended, p. 1821, § 39, effective July 1; entire section amended, p. 1686, § 37, effective October 1. L. 2003: IP(1), (1)(c), and (2) amended, p. 2243, § 129, effective July 1, 2004.

**Cross references:** For penalties for perjury, see part 5 of article 8 of title 18.

### ANNOTATION

**Law reviews.** For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986).

#### 7-62-205. Presumptions.

(1) (Deleted by amendment, L. 2003, p. 2244, § 130, effective July 1, 2004.)

(2) (a) For the purposes of this subsection (2), the definitions in section 7-62-101 shall apply; except that:

(I) "General partner" includes a partner who is identified or otherwise classified as a general partner by or in accordance with the agreement of the partners, notwithstanding any delay or failure to file an original certificate of limited partnership naming the general partner as such.

(II) "Limited partner" includes a partner who is identified or otherwise classified as a limited partner by or in accordance with the agreement of the partners, notwithstanding any delay or failure to file an original certificate of limited partnership.

(III) "Limited partnership" includes a partnership before the filing of the original certificate of limited partnership with the secretary of state and in which there is at least one general partner and one limited partner.

(IV) "Partner" includes a person who enters into the agreement contemplated in paragraph (b) of this subsection (2) as a co-owner with the rights of a general partner or a limited partner or who acquires an interest in a limited partnership as a co-owner with such rights.

(b) The presumptions set forth in this subsection (2) shall apply to each limited partnership whose partners enter into an agreement on or after October 31, 1981, to form such limited partnership, and to which a contribution is made by or on behalf of one or more of such partners before the filing of an original certificate of limited partnership for such partnership.

(c) It shall be presumed that the partners of such limited partnership shall have agreed that:

(I) The relationship of the partners with respect to any contributions made to the partnership and relations among the partners and between the partners and the partnership shall be the same as if a certificate of limited partnership had been filed pursuant to section 7-62-201 at the time the partners entered into the agreement contemplated in paragraph (b) of this subsection (2); and

(II) The general partners of such limited partnership shall approve such certificate and

that the same shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title.

(III) (Deleted by amendment, L. 2003, p. 2244, § 130, effective July 1, 2004.)

(c.5) The failure or refusal of the general partners to approve such certificate or to deliver such certificate to the secretary of state, for filing pursuant to part 3 of article 90 of this title, shall entitle any partner to obtain a court order pursuant to section 7-90-313 approving an appropriate certificate and ordering the secretary of state to file the approved certificate.

(d) The presumptions set forth in this subsection (2) shall apply to such a limited partnership, notwithstanding any one or more provisions of any agreement of the partners of such limited partnership that:

(I) The term of such partnership shall commence upon the filing of such certificate;

(II) An agreement sets forth the entire understanding of the parties; or

(III) The agreement of the parties shall be in writing.

(e) The presumption set forth in subparagraph (II) of paragraph (c) of this subsection (2) shall not apply in an action for damages against a general partner by the other partners based on any delay or failure in the filing of a certificate of limited partnership.

**Source:** L. 81: Entire article added, p. 439, § 1, effective November 1. L. 86: Entire section R&RE, p. 451, § 10, effective July 1. L. 99: Entire section amended, p. 143, § 1, effective March 24. L. 2002: (1), (2)(c)(II), (2)(c)(III), and (2)(e) amended, p. 1822, § 40, effective July 1; (1), (2)(c)(II), (2)(c)(III), and (2)(e) amended, p. 1686, § 38, effective October 1. L. 2003: (1) and (2)(c) amended and (2)(c.5) added, p. 2244, § 130, effective July 1, 2004.

#### **7-62-206. Filing in office of secretary of state. (Repealed)**

**Source:** L. 81: Entire article added, p. 439, § 1, effective November 1. L. 86: IP(1) and (2) amended, p. 451, § 11, effective July 1. L. 2002: Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-62-207. Liability for false statement in certificate.** (1) If any certificate of limited partnership, certificate of amendment, or statement of dissolution containing a false statement is delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title, one who suffers loss by reliance on the statement may recover damages for the loss from:

(a) Any general partner who knew or should have known the certificate of limited partnership, certificate of amendment, or statement of dissolution to be false at the time the same was approved; and

(b) Any general partner who thereafter knows or should have known that any statement in the certificate of limited partnership, certificate of amendment, or statement of dissolution has changed, making the same inaccurate in any respect within a sufficient time before the certificate of limited partnership, certificate of amendment, or statement of dissolution was relied upon reasonably to have enabled that general partner to correct the inaccuracy or to file a petition for its correction under section 7-90-313.

**Source:** L. 81: Entire article added, p. 439, § 1, effective November 1. L. 2002: IP(1) and (1)(a) amended, p. 1822, § 41, effective July 1; IP(1) and (1)(a) amended, p. 1687, § 39, effective October 1. L. 2003: IP(1) and (1)(b) amended, p. 2244, § 131, effective July 1, 2004. L. 2004: (1)(a) and (1)(b) amended, p. 1441, § 128, effective July 1.

**7-62-208. Notice of existence of limited partnership.** The fact that a certificate of limited partnership is on file in the records of the secretary of state is notice that the partnership is a limited partnership and is notice of all other facts stated therein that are required to be stated in a certificate of limited partnership by section 7-62-201 (1).



**Source:** **L. 81:** Entire article added, p. 439, § 1, effective November 1. **L. 86:** Entire section amended, p. 451, § 12, effective July 1. **L. 2003:** Entire section amended, p. 2245, § 132, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1441, § 129, effective July 1. **L. 2006:** Entire section amended, p. 850, § 10, effective July 1.

#### ANNOTATION

**Public recordation of the certificate of limited partnership protects third parties who deal with the partnership.** *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**Where a certificate of limited partnership was properly filed and there is no evidence suggesting the limited partner or the general partners lacked a good faith belief that they had substantially conformed with the statu-**

**tory requirements for creating a limited partnership,** a lender that funded a loan to the limited partnership was entitled to rely on the certificate as evidence that the limited partnership was in existence. Therefore, the partnership and limited partnership statutes concerning contractual liability to creditors applied at the time the limited partnership's obligation to the lender arose. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

#### **7-62-209. Delivery of certificates to limited partners - repeal. (Repealed)**

**Source:** **L. 81:** Entire article added, p. 439, § 1, effective November 1. **L. 2002:** Entire section amended, p. 1823, § 42, effective July 1; entire section amended, p. 1687, § 40, effective October 1. **L. 2003:** (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

#### **7-62-210. Merger and consolidation of limited partnerships - repeal. (Repealed)**

**Source:** **L. 86:** Entire section added, p. 452, § 13, effective July 1. **L. 2002:** IP(3) amended, p. 1823, § 43, effective July 1; IP(3) amended, p. 1687, § 41, effective October 1. **L. 2003:** (5) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

### PART 3

#### LIMITED PARTNERS

**7-62-301. Admission of limited partners.** (1) After the filing of a limited partnership's original certificate of limited partnership, a person may be admitted as an additional limited partner:

(a) In the case of a person acquiring a partnership interest directly from the limited partnership, upon compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the written consent of all partners;

(b) In the case of an assignee of a partnership interest of a partner who has the power, as provided in section 7-62-704, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power; and

(c) Either upon formation of the limited partnership or thereafter without making a contribution or being obligated to make a contribution to the limited partnership or acquiring a partnership interest, if in either case such admission is pursuant to a written partnership agreement or other writing confirming the admission.

(2) A person becomes a limited partner on the later of:

(a) The date the original certificate of limited partnership is filed in the records of the secretary of state; and

(b) The date reflected in the records of the limited partnership as the date that person becomes a limited partner.

**Source:** **L. 81:** Entire article added, p. 440, § 1, effective November 1. **L. 86:** (2) R&RE, p. 453, § 14, effective July 1. **L. 2003:** (2)(a) amended, p. 2245, § 133, effective July 1, 2004. **L. 2009:** (1) amended, (HB 09-1248), ch. 252, p. 1130, § 5, effective May 14.

#### ANNOTATION

**Law reviews.** For comment, "The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823

(1982). For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986).

**7-62-302. Voting.** Subject to the provisions of section 7-62-303, the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter.

**Source:** **L. 81:** Entire article added, p. 440, § 1, effective November 1.

#### ANNOTATION

**Law reviews.** For article, "Limited Partnership Act Update", see 11 Colo. Law. 688 (1982).

**7-62-303. Liability to third parties.** (1) (a) A limited partner is not liable for the obligations of a limited partnership incurred while it is not a limited liability limited partnership unless the limited partner is also a general partner or, in addition to the exercise of the limited partner's rights and powers as a limited partner, the limited partner participates in the control of the business. However, if the limited partner participates in the control of the business at the time such liability is incurred, the limited partner is liable only to persons who transact business or conduct activities with the limited partnership reasonably believing, notwithstanding the fact that the limited partner is not designated as a general partner in the certificate of limited partnership, based upon the limited partner's conduct, that the limited partner is a general partner at the time such liability is incurred.

(b) A limited partner of a limited liability limited partnership is not liable for the obligations of the partnership incurred while it is a limited liability limited partnership.

(2) A limited partner does not participate in the control of the business within the meaning of subsection (1) of this section solely by doing one or more of the following:

(a) Being a contractor for or an agent or employee of the limited partnership or of a general partner;

(b) Being an officer, director, or shareholder of a corporate general partner;

(c) Consulting with and advising a general partner with respect to the business of the limited partnership;

(d) Acting as surety for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership or providing collateral for an obligation of the limited partnership;

(e) Bringing an action in the right of a limited partnership to recover a judgment in its favor pursuant to part 10 of this article;

(f) Calling, requesting, or participating in a meeting of the partners;

(g) Proposing or approving or disapproving, by voting or otherwise, one or more of the following matters:

(I) The dissolution and winding up or continuation of the limited partnership;

(II) The sale, exchange, lease, mortgage, pledge, or other transfer of any assets of the limited partnership;



- (III) The incurrence of indebtedness by the limited partnership;
  - (IV) A change in the nature of the business;
  - (V) The admission or removal of a partner;
  - (VI) A transaction or other matter involving an actual or potential conflict of interest;
  - (VII) An amendment to the partnership agreement or certificate of limited partnership;
- or
- (VIII) Such other matters as are stated in writing in the partnership agreement;
  - (h) Winding up the limited partnership pursuant to section 7-62-803; or
  - (i) Exercising any right or power permitted to limited partners under this article and not specifically enumerated in this subsection (2).
- (3) The enumeration in subsection (2) of this section does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by the limited partner in the business of the limited partnership.
- (4) Repealed.

**Source:** **L. 81:** Entire article added, p. 440, § 1, November 1. **L. 86:** (1) amended and (2) R&RE, p. 453, §§ 15, 16, effective July 1. **L. 97:** (1) amended and (4) repealed, pp. 1499, 1500, §§ 4, 5, effective June 3. **L. 2003:** (1)(a) amended, p. 2245, § 134, effective July 1, 2004. **L. 2004:** (1)(a), (1)(b), and (3) amended, p. 1442, § 130, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Limited Partnership Act Update", see 11 Colo. Law. 688 (1982). For article, "The Tax Status of Limited Partnerships Formed Under CULPA", see 11 Colo. Law. 1193 (1982). For comment, "The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982). For article, "The Convertible, Participating Mortgage: Planning Opportunities and Legal Pitfalls in Structuring the Transaction", see 54 U. Colo. L. Rev. 295 (1983). For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986).

**Where a limited partner can not maintain its position as a limited partner and protect**

**itself from participation in an ultra vires contract**, the limited partner's participation in the limited partnership is void and the limited partner is not liable for the debts and obligations incurred by the limited partnership. *Black v. First Federal Savings and Loan*, 830 P.2d 1103 (Colo. App. 1992).

**While a limited partnership protects the partners from liability for partnership debt and obligations, it does not necessarily protect the partners from liability to the partnership.** With respect to capital contribution, liability to the partnership is defined by the partnership agreement itself. *Fox v. I-10, Ltd.*, 957 P.2d 1018 (Colo. 1998).

**7-62-304. Person erroneously believing self to be a limited partner.** (1) Except as provided in subsection (2) of this section, a person who makes a contribution to a business enterprise and erroneously, but in good faith, believes that the person has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, the person causes an appropriate certificate of limited partnership or a certificate of amendment to be delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title.

(2) A person who makes a contribution of the kind described in subsection (1) of this section is liable as a general partner to any third party who transacts business with the enterprise before an appropriate certificate is filed in the records of the secretary of state to show that the person is not a general partner, but only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

**Source:** **L. 81:** Entire article added, p. 441, § 1, effective November 1. **L. 86:** (2) amended, p. 454, § 17, effective July 1. **L. 2002:** (1) amended, p. 1823, § 44, effective July 1; (1) amended, p. 1687, § 42, effective October 1. **L. 2003:** Entire section amended, p. 2245, § 135, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1442, § 131, effective July 1.

## ANNOTATION

**Law reviews.** For article "Limited Partnership Act Update", see 11 Colo. Law. 688 (1982). For comment, "The Colorado Changes

to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982).

**7-62-305. Information and accounting.** (1) Each limited partner has the right to:

(a) Inspect and copy partnership records, as provided by section 7-62-105; and  
(b) Obtain from the general partners from time to time, subject to such reasonable standards as may be stated in the partnership agreement or otherwise established by the general partners, upon reasonable demand for any purpose reasonably related to the limited partner's interest as a limited partner:

(I) True and full information regarding the state of the business and financial condition of the limited partnership and any other information regarding the affairs of the limited partnership; and

(II) Promptly after becoming available, a copy of the limited partnership's federal, state, and local income tax returns for each year; and

(c) Have a formal accounting of partnership affairs whenever circumstances render it just and reasonable.

**Source: L. 81:** Entire article added, p. 441, § 1, effective November 1. **L. 86:** (1)(a) and IP(1)(b) amended, p. 454, § 18, effective July 1. **L. 2003:** IP(1)(b) amended, p. 2246, § 136, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986).

**7-62-306. Time of admission.** A person acquiring a partnership interest is admitted as a limited partner upon the later to occur of the formation of the limited partnership and the time provided in the partnership agreement or, if no such time is provided, when the person's admission is reflected in the records of the limited partnership.

**Source: L. 86:** Entire section added, p. 454, § 19, effective July 1.

## PART 4

## GENERAL PARTNERS

**7-62-401. Admission of general partners.** (1) After the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted as provided in writing in the partnership agreement or, if the partnership agreement does not so provide, with the written consent of all partners.

(1.5) A person may be admitted as a general partner to a limited partnership either upon formation of the limited partnership or thereafter without making a contribution or being obligated to make a contribution to the limited partnership or acquiring a partnership interest, if in either case such admission is pursuant to a written partnership agreement or other writing confirming the admission.

(2) Upon the withdrawal of the last remaining general partner, unless otherwise provided in writing in the partnership agreement for the admission of a general partner, one or more persons who consent to be general partners shall be admitted as follows:

(a) A majority of the limited partners may admit one or more general partners; and

(b) If a majority of the limited partners fails to act within a reasonable time, the district court for the county in this state in which the street address of the limited partnership's principal office is located, or, if the limited partnership has no principal office in this state,



the district court for the county in which the street address of its registered agent is located, or, if the limited partnership has no registered agent, the district court for the city and county of Denver shall, upon the application of any limited partner, admit one or more general partners. Such court may appoint a custodian to manage the business of the limited partnership during the pendency of the proceedings.

(3) Subsection (2) of this section shall not apply to a limited partnership formed prior to June 3, 1997, if on or before one year after June 3, 1997, one or more partners signs and delivers to a general partner an election in writing against the application of subsection (2) of this section. The general partner shall file any such election with the records required to be kept by section 7-62-105. The absence of such an election in the records shall give rise to a presumption that no such election has been delivered.

**Source:** L. 81: Entire article added, p. 442, § 1, November 1. L. 86: Entire section amended, p. 455, § 20, effective July 1. L. 97: Entire section amended, p. 1500, § 6, effective June 3. L. 2003: (2)(b) amended, p. 2246, § 137, effective July 1, 2004. L. 2009: (1.5) added, (HB 09-1248), ch. 252, p. 1130, § 6, effective May 14.

### ANNOTATION

**Law reviews.** For comment, "The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823

(1982). For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986).

**7-62-402. Events of withdrawal.** (1) A person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

(a) The general partner withdraws from the limited partnership as provided in section 7-62-602;

(b) The general partner ceases to be a member of the limited partnership as provided in section 7-62-702;

(c) The general partner is removed as a general partner in accordance with the partnership agreement;

(d) Unless otherwise provided in writing in the partnership agreement or unless all partners give their consent in writing at the time, the general partner:

(I) Makes an assignment for the benefit of creditors;

(II) Files a voluntary petition in bankruptcy;

(III) Is adjudicated a bankrupt or insolvent;

(IV) Files a petition or answer seeking for the general partner any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation;

(V) Files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the general partner in any proceeding of this nature; or

(VI) Seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of the general partner's properties;

(e) Unless otherwise provided in writing in the partnership agreement or unless all partners give their consent in writing at the time, if, one hundred twenty days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed; or if, within ninety days after the appointment without the general partner's consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of the general partner's properties, the appointment is not vacated or stayed; or if, within ninety days after the expiration of any such stay, the appointment is not vacated;

(f) In the case of a general partner who is an individual:

(I) The general partner's death; or

(II) The appointment of a guardian or general conservator for the general partner;

(g) In the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(h) In the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

(i) In the case of a general partner that is a corporation, the filing of articles of dissolution, or its equivalent, for the corporation or the revocation of its charter or articles of incorporation; or

(j) In the case of a general partner that is an estate, the distribution by the fiduciary of the estate's entire interest in the partnership.

**Source:** **L. 81:** Entire article added, p. 442, § 1, effective November 1. **L. 86:** IP(1)(d) and (1)(e) amended, p. 455, § 21, effective July 1. **L. 2004:** (1)(d)(IV), (1)(d)(V), (1)(d)(VI), (1)(e), and (1)(f) amended, p. 1442, § 132, effective July 1. **L. 2008:** (1)(i) amended, p. 19, § 4, effective August 5.

### ANNOTATION

**Law reviews.** For article "Limited Partnership Act Update", see 11 Colo. Law. 688 (1982).

**7-62-403. General powers and liabilities.** (1) Except as provided in this article or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.

(2) (a) Except as provided in this article:

(I) A general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners; and

(II) A general partner of a limited liability limited partnership has the liabilities of a partner in a limited liability partnership to persons other than the partnership and the other partners.

(b) Except as provided in this article or in the partnership agreement:

(I) A general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners; and

(II) A general partner of a limited liability limited partnership has the liabilities of a partner in a limited liability partnership to the partnership and to the other partners.

(3) For a limited partnership that has made the election permitted by section 7-62-1104, the article so elected shall be the governing law for purposes of subsections (1) and (2) of this section. For a limited partnership that has not made the election permitted by section 7-62-1104, article 60 of this title shall be the governing law for purposes of subsections (1) and (2) of this section.

**Source:** **L. 81:** Entire article added, p. 443, § 1, effective November 1. **L. 83:** Entire section amended, p. 400, § 1, effective May 23. **L. 95:** (2) amended, p. 788, § 14, effective May 24. **L. 97:** (3) added, p. 916, § 6, effective January 1, 1998. **L. 2004:** (2)(a)(II) and (2)(b)(II) amended, p. 1443, § 133, effective July 1.

### ANNOTATION

**Law reviews.** For article, "Limited Partnership Act Update", see 11 Colo. Law. 688 (1982). For article, "The Tax Status of Limited Partnerships Formed Under CULPA", see 11 Colo. Law. 1193 (1982). For article, "The Fidu-

ciary Duties of General Partners", see 17 Colo. Law. 1959 (1988). For article, "Contractually Binding Colorado Entities", see 28 Colo. Law. 33 (December 1999).

**Because all of the parties at the time of**



contract believed that a limited partnership existed based on the filing of the certificate, the general partners were jointly and severally liable on the note and deed of trust. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

Where partnership is assessed for use taxes and incurs liability owing to its failure to protest liability, taxpayer, as general partner of a limited partnership, is jointly and severally liable therefor. *AF Prop. v. Dept. of Rev.*, 852 P.2d 1267 (Colo. App. 1992).

When issue of material fact existed as to whether general partnership had been assessed with a use tax, trial court erred in entering motion for summary judgment in favor of individual partner on grounds that partner could not be held jointly and severally liable for deficiency owed by partnership. *AF Prop. v. Dept. of Rev.*, 852 P.2d 1267 (Colo. App. 1992).

Where the limited partnership benefited from the loan entered into after the filing of

the partnership certificate, the general partners were estopped from denying the validity of their acts on behalf of the partnership, even though the limited partnership was declared void as to the limited partner. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

A district that acted as both a special district and as a limited partner could not maintain its position as a limited partner and also protect itself from becoming a party to an ultra vires contract, therefore, the district's participation in the limited partnership was void and consequently the district was not liable for debts and obligations incurred by the limited partnership. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

A limited partner who does not participate in the control of the business is liable to third persons only to the extent of the limited partner's contribution. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**7-62-404. Contributions by a general partner.** A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of the person's participation in the partnership as a limited partner.

**Source:** L. 81: Entire article added, p. 443, § 1, effective November 1. L. 2004: Entire section amended, p. 1443, § 134, effective July 1.

**7-62-405. Voting.** The partnership agreement may grant to all or certain identified general partners the right to vote (on a per capita or any other basis), separately or with all or any class of the limited partners on any matter.

**Source:** L. 81: Entire article added, p. 443, § 1, November 1.

## PART 5

### FINANCE

**7-62-501. Form of contribution.** The contribution of a partner may be in cash, property, or services rendered or a promissory note or other obligation to contribute cash or property or to perform services.

**Source:** L. 81: Entire article added, p. 443, § 1, effective November 1.

### ANNOTATION

**Law reviews.** For comment, "The Colorado Changes to the Revised Uniform Limited Part-

nership Act", see 53 U. Colo. L. Rev. 823 (1982).

**7-62-502. Liability for contributions.** (1) Except as provided in the partnership agreement, a partner is obligated to the limited partnership to perform any enforceable

promise to contribute cash or property or to perform services, even if the partner is unable to perform because of death, disability, or any other reason. If a partner does not make the required contribution of property or services, the partner is obligated at the option of the limited partnership to contribute cash equal to that portion of the value, as stated in the partnership records required to be kept by section 7-62-105, of the stated contribution that has not been made.

(2) Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this article may be compromised only by consent in writing of all the partners. Notwithstanding the compromise, a creditor of a limited partnership who extends credit or otherwise acts in reliance on the original obligation may enforce the original obligation.

(3) No promise by a limited partner to contribute to the limited partnership is enforceable unless set out in a writing signed by the limited partner.

**Source:** **L. 81:** Entire article added, p. 443, § 1, effective November 1. **L. 86:** Entire section amended, p. 455, § 22, effective July 1. **L. 2004:** (1) amended, p. 1444, § 135, effective July 1.

#### ANNOTATION

**Partnership agreement held sufficient "writing" under subsection (3) to obligate additional capital contribution by limited partner.**

*Fox v. I-10, Ltd.*, 936 P.2d 580 (Colo. App. 1996), *aff'd*, 957 P.2d 1018 (Colo. 1998).

**7-62-503. Sharing of profits and losses.** The profits and losses of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, profits and losses shall be allocated on the basis of the value (as stated in the partnership records required to be kept pursuant to section 7-62-105) of the contributions made by each partner.

**Source:** **L. 81:** Entire article added, p. 456, § 1, effective November 1. **L. 86:** Entire section amended, p. 456, § 23, effective July 1.

**7-62-504. Sharing of distributions.** Distributions of cash or other assets of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, distributions shall be made on the basis of the value (as stated in the partnership records required to be kept pursuant to section 7-62-105) of the contributions made by each partner.

**Source:** **L. 81:** Entire article added, p. 444, § 1, effective November 1. **L. 86:** Entire section amended, p. 456, § 24, effective July 1.

#### PART 6

#### DISTRIBUTIONS AND WITHDRAWAL

**7-62-601. Interim distributions.** Except as provided in this part 6, a partner is entitled to receive distributions from a limited partnership before the partner's withdrawal from the limited partnership and before the dissolution and winding up thereof to the extent and at the times or upon the happening of the events stated in the partnership agreement.

**Source:** **L. 81:** Entire article added, p. 444, § 1, effective November 1. **L. 86:** Entire section R&RE, p. 456, § 25, effective July 1. **L. 2003:** Entire section amended, p. 2246, § 138, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1444, § 136, effective July 1.



## ANNOTATION

**Law reviews.** For article, "The Tax Status of Limited Partnerships Formed Under CULPA", see 11 Colo. Law. 1193 (1982). For comment,

"The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982).

**7-62-602. Withdrawal of general partner.** A general partner may withdraw from a limited partnership at any time by giving written notice to the other partners, but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement and offset the damages against the amount otherwise distributable to the general partner. The withdrawal of a general partner who is also a limited partner shall not constitute the withdrawal of the partner as a limited partner or affect the partner's rights as a limited partner.

**Source:** L. 81: Entire article added, p. 444, § 1, effective November 1. L. 97: Entire section amended, p. 1501, § 7, effective June 3.

**7-62-603. Withdrawal of limited partner.** A limited partner may only withdraw from a limited partnership at the time or upon the happening of events stated in writing in the partnership agreement.

**Source:** L. 81: Entire article added, p. 444, § 1, effective November 1. L. 86: Entire section amended, p. 456, § 26, effective July 1. L. 95: Entire section amended, p. 789, § 15, effective May 24. L. 2003: Entire section amended, p. 2246, § 139, effective July 1, 2004.

**7-62-604. Distribution upon withdrawal.** Except as provided in this part 6, upon withdrawal, any withdrawing partner is entitled to receive any distribution to which the withdrawing partner is entitled under the partnership agreement, and, if not otherwise provided in the agreement, the withdrawing partner is entitled to receive, within a reasonable time after withdrawal, the fair value of the withdrawing partner's partnership interest in the limited partnership as of the date of withdrawal based upon the withdrawing partner's right to share in distributions from the limited partnership.

**Source:** L. 81: Entire article added, p. 445, § 1, effective November 1. L. 2004: Entire section amended, p. 1444, § 137, effective July 1.

**7-62-605. Distribution in kind.** Except as provided in writing in the partnership agreement, a partner, regardless of the nature of the partner's contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in writing in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to the partner exceeds a percentage of that asset that is equal to the percentage in which the partner shares in distributions from the limited partnership.

**Source:** L. 81: Entire article added, p. 445, § 1, effective November 1. L. 86: Entire section amended, p. 456, § 27, effective July 1. L. 2004: Entire section amended, p. 1444, § 138, effective July 1.

**7-62-606. Right to distribution.** At the time a partner becomes entitled to receive a distribution, the partner has the status of and is entitled to all remedies available to a creditor of the limited partnership with respect to the distribution.

**Source:** L. 81: Entire article added, p. 445, § 1, effective November 1. L. 2004: Entire section amended, p. 1445, § 139, effective July 1.

**7-62-607. Limitations on distribution.** A partner may not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of the partnership assets.

**Source: L. 81:** Entire article added, p. 445, § 1, effective November 1.

**Cross references:** For exclusions from the term “distribution” see §§ 7-60-146 (1) and 7-64-1004 (1).

#### ANNOTATION

**A partner need not have violated the act or the partnership agreement to be liable under this section and § 7-62-608.** The only act necessary by the partner is the receipt of a return of

contribution, such return exceeding that amount permitted by the partnership agreement. Sender v. C & R Co., 149 Bankr. 941 (D. Colo. 1992).

**7-62-608. Liability upon return of contribution.** (1) If a partner has received the return of any part of the partner’s contribution without violation of the partnership agreement or this article, the partner is liable to the limited partnership for a period of one year thereafter for the amount of the returned contribution, but only to the extent necessary to discharge the limited partnership’s liability to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership.

(2) If a partner has received the return of any part of the partner’s contribution in violation of the partnership agreement or this article, the partner is liable to the limited partnership for a period of three years thereafter for the amount of the contribution wrongfully returned.

(3) A partner receives a return of the partner’s contribution to the extent that a distribution to the partner reduces the partner’s share of the fair value of the net assets of the limited partnership below the value, as stated in the partnership records required to be kept pursuant to section 7-62-105, of the partner’s contribution that has not been distributed to the partner.

**Source: L. 81:** Entire article added, p. 445, § 1, effective November 1. **L. 86:** (3) amended, p. 457, § 28, effective July 1. **L. 2003:** (3) amended, p. 2247, § 140, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1445, § 140, effective July 1. **L. 2007:** (2) amended, p. 225, § 11, effective May 29.

**Cross references:** For exclusions from the term “distribution” see §§ 7-60-146 (1) and 7-64-1004 (1).

#### ANNOTATION

**A partner need not have violated the act or the partnership agreement to be liable under this section and § 7-62-607.** The only act necessary by the partner is the receipt of a return of

contribution, such return exceeding that amount permitted by the partnership agreement. Sender v. C & R Co., 149 Bankr. 941 (D. Colo. 1992).

### PART 7

#### ASSIGNMENT OF PARTNERSHIP INTERESTS

**7-62-701. Nature of partnership interest.** A partnership interest is personal property.

**Source: L. 81:** Entire article added, p. 445, § 1, effective November 1.



## ANNOTATION

**Law reviews.** For article, "Financing Real Estate Developments", see 11 Colo. Law. 2093 (1982). For comment, "The Colorado Changes to the Revised Uniform Limited Partnership

Act", see 53 U. Colo. L. Rev. 823 (1982). For article, "Campbell: A Caveat for Service Partners", see 20 Colo. Law. 75 (1991).

**7-62-702. Assignment of partnership interest.** Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all of the partner's partnership interest.

**Source: L. 81:** Entire article added, p. 445, § 1, effective November 1. **L. 2004:** Entire section amended, p. 1445, § 141, effective July 1.

**7-62-703. Rights of creditor.** On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This article shall not deprive any partner of the benefit of any exemption laws applicable to the partner's partnership interest.

**Source: L. 81:** Entire article added, p. 446, § 1, effective November 1. **L. 2004:** Entire section amended, p. 1445, § 142, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Charging Partnership and LLC Interests To Satisfy Debts of Individuals", see 23 Colo. Law. 2743 (1994).

**Entry of judgment is a prerequisite** to a charging order under this section. Trial court erred in dismissing plaintiffs' request for a charging order along with other claims in com-

plaint without first conducting an inquiry to determine the interest of individual defendant in defendant partnership. *Sands v. New Age Family P'ship, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

**Applied** in *Yetter Well Serv., Inc. v. Cimarron Oil Co., Inc.*, 841 P.2d 1068 (Colo. App. 1992).

**7-62-704. Right of assignee to become limited partner.** (1) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that the assignor gives the assignee that right in accordance with authority described in writing in the partnership agreement or all other partners consent.

(2) An assignee who has become a limited partner has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a limited partner under the partnership agreement and this article. An assignee who becomes a limited partner also is liable for the obligations of the assignee's assignor to make and return contributions as provided in parts 5 and 6 of this article. However, the assignee is not obligated for liabilities unknown to the assignee at the time the assignee became a limited partner.

(3) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from the assignor's liability to the limited partnership under sections 7-62-207 and 7-62-502.

**Source: L. 81:** Entire article added, p. 446, § 1, effective November 1. **L. 86:** (1) and (2) amended, p. 457, § 29, effective July 1. **L. 2004:** (2) and (3) amended, p. 1445, § 143, effective July 1.

**7-62-705. Deceased or incompetent individual partners - dissolved or terminated corporate partners.** (1) If a partner who is an individual dies or a court of competent

jurisdiction appoints a guardian or general conservator for the partner, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all of the partner's rights for the purpose of settling the partner's estate or administering the partner's property, including any power the partner had to give an assignee the right to become a limited partner.

(2) If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

**Source:** **L. 81:** Entire article added, p. 446, § 1, effective November 1. **L. 2004:** (1) amended, p. 1446, § 144, effective July 1.

## PART 8

### DISSOLUTION

**Editor's note:** For common law fiduciary duty of good faith, sound business judgment, candor, forthrightness, and fairness owed by a general partner to his limited partners in winding up partnership affairs, see *Herald Co. v. Bonfils*, 315 F.Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972) and *Roeschlein v. Watkins*, 686 P.2d 1347 (Colo. App. 1984).

**7-62-801. Dissolution - general rules.** (1) A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

(a) At the time or upon the happening of events stated in writing in the partnership agreement;

(b) Written consent of all partners;

(c) Except as otherwise provided in the written provisions of a partnership agreement, written consent of a majority of the limited partners within ninety days after an event of withdrawal of the last remaining general partner; and

(d) Entry of a decree of judicial dissolution under section 7-62-802.

**Source:** **L. 81:** Entire article added, p. 446, § 1, effective November 1. **L. 86:** (1)(a) and (1)(c) amended, p. 457, § 30, effective July 1. **L. 97:** (1)(c) amended, p. 1501, § 8, effective June 3. **L. 2003:** (1)(a) amended, p. 2247, § 141, effective July 1, 2004.

### ANNOTATION

**Law reviews.** For article, "The Tax Status of Limited Partnerships Formed Under CULPA", see 11 Colo. Law. 1193 (1982). For comment, "The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982).

**A limited partnership that is void as to a limited partner is not void as to the general partners.** The general partners were liable because at the time the limited partnership's obligation to the lender arose, all parties had contracted in accordance with their belief based on the filing of a partnership certificate with the secretary of state that a limited partnership existed. Therefore, the general partners were

jointly and severally liable when they executed a note and deed of trust to the lender. Also, because the limited partnership benefitted from the proceeds of the loan, the general partners were estopped from denying the validity of their acts on behalf of the limited partnership. Finally, regardless of when the limited partnership was dissolved, the general partners were not relieved of their personal liability for the partnership's obligations by virtue of the dissolution. *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**Applied** in *Black v. First Fed. Sav. & Loan Ass'n*, 830 P.2d 1103 (Colo. App. 1992).

**7-62-802. Judicial dissolution.** On application by or for a partner, the district court for the county in this state in which the street address of the partnership's principal office is located, or, if the partnership has no principal office in this state, the district court for the county in which the street address of its registered agent is located, or, if the partnership has no registered agent, the district court for the city and county of Denver may decree



dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

**Source:** L. 81: Entire article added, p. 447, § 1, effective November 1. L. 2003: Entire section amended, p. 2247, § 142, effective July 1, 2004.

**7-62-803. Winding up.** Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners may wind up the limited partnership's affairs; except that, upon cause shown, the district court for the county in this state in which the street address of the limited partnership's principal office is located, or, if the limited partnership has no principal office in this state, the district court for the county in which the street address of its registered agent is located, or, if the limited partnership has no registered agent, the district court for the city and county of Denver may wind up the limited partnership's affairs upon application of any partner, the partner's legal representative, or the partner's assignee.

**Source:** L. 81: Entire article added, p. 447, § 1, effective November 1. L. 2003: Entire section amended, p. 2247, § 143, effective July 1, 2004. L. 2004: Entire section amended, p. 1446, § 145, effective July 1.

**7-62-804. Distribution of assets.** (1) Upon the winding up of a limited partnership, the assets shall be distributed as follows:

(a) To creditors, including partners who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under section 7-62-601 or 7-62-604;

(b) Except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under section 7-62-601 or 7-62-604;

(c) Except as provided in the partnership agreement, to partners for the return of their contributions and respecting their partnership interests in the proportions in which the partners share in distributions.

**Source:** L. 81: Entire article added, p. 447, § 1, effective November 1.

**7-62-805. Domestic entity names - dissolution - repeal. (Repealed)**

**Source:** L. 2000: Entire section added, p. 953, § 22, effective July 1. L. 2003: (3) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (3) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

## PART 9

### FOREIGN LIMITED PARTNERSHIPS

**Editor's note:** This part 9 was added in 1981. This part 9 was repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 9 prior to 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**7-62-901. Law governing foreign limited partnership or foreign limited liability limited partnership. (Repealed)**

**Source:** L. 2003: Entire part R&RE, p. 2247, § 144, effective July 1, 2004. L. 2004: Entire section repealed, p. 1446, § 146, effective July 1.

**7-62-902. Authority to transact business or conduct activities required.** Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign limited partnerships and foreign limited liability limited partnerships.

**Source:** L. 2003: Entire part R&RE, p. 2247, § 144, effective July 1, 2004.

**7-62-903. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, applies to foreign limited partnerships.

**Source:** L. 2003: Entire part R&RE, p. 2247, § 144, effective July 1, 2004. L. 2004: Entire section amended, p. 1446, § 147, effective July 1.

## PART 10

### DERIVATIVE ACTIONS

**7-62-1001. Right of action.** (1) A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor. In order to bring the action, a limited partner must establish the following:

(a) That those general partners with authority to do so have refused to bring the action or that an effort to cause those general partners to bring the action is not likely to succeed;

(b) That the general partners' decision not to sue constitutes an abuse of discretion or involves a conflict of interest that prevents an unprejudiced exercise of judgment; and

(c) That the plaintiff was a limited partner at the time of the transaction of which the plaintiff complains or the plaintiff's status as a limited partner had devolved upon the plaintiff by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction.

**Source:** L. 81: Entire article added, p. 450, § 1, effective November 1. L. 2004: (1)(c) amended, p. 1447, § 148, effective July 1.

### ANNOTATION

**Law reviews.** For comment, "The Colorado Changes to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982).

**Partnership formed prior to 1981.** The right of the limited partners of a limited partnership formed prior to 1981 to sue derivatively is governed by the Uniform Limited Partnership Law and the common law, and not by this section. *Moore v. 1600 Downing St., Ltd.*, 668 P.2d 16 (Colo. App. 1983).

**Compliance with rules of civil procedure required.** To bring derivative action, limited partners must comply with this section and also the requirements of C.R.C.P. 23.1. *Caley Investments v. Lowe Family Assoc.*, 754 P.2d 793 (Colo. App. 1988).

**Trial court erred in disregarding an independent counsel's conclusion that litigation should not proceed without first addressing whether the independent counsel lacked the**

**authority or ability to make a disinterested and independent decision.** *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629 (Colo. 1999).

**The purpose of a special litigation committee (SLC) is to substitute its independent and objective judgment for that of the directors who have been accused of wrongdoing. Such purpose cannot be fulfilled where the committee is given only the power of recommendation while the power of ultimate decision is still retained in the hands of the accused wrongdoers.** *Greenfield v. Hamilton Oil Corp.*, 760 P.2d 664 (Colo. App. 1988); *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629 (Colo. 1999).

**New York law adopted as the standard for reviewing the decision of an SLC, because "most courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments." The court is limited to one inquiry: Whether the members of the committee are disinterested and indepen-**



dent. The court cannot inquire into the actions of corporate directors taken in good faith and in the exercise of honest judgment. *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629 (Colo. 1999).

**Burden of persuasion is on those seeking dismissal based on an SLC's report.** *Day v. Stascavage*, 251 P.3d 1225 (Colo. App. 2010).

**SLC's investigation, which never sought independently to value the property sold at the time of an insider sale, was patently inadequate** to reach an informed decision as to the merits of the derivative claims. *Day v. Stascavage*, 251 P.3d 1225 (Colo. App. 2010).

**7-62-1002. Expenses.** In any action instituted in the right of any domestic or foreign limited partnership by a limited partner, the court having jurisdiction, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff to pay to the parties named as defendant the costs and reasonable expenses directly attributable to the defense of such action, but not including fees of attorneys.

**Source: L. 81:** Entire article added, p. 450, § 1, effective November 1.

**7-62-1003. Security and costs.** In any action instituted in the right of any domestic or foreign limited partnership, unless the contributions of or allocable to plaintiff to partnership property amount to five percent or more of the contributions of all limited partners, in their status as limited partners, or such contributions of or allocable to the plaintiff have a market value in excess of twenty-five thousand dollars, the limited partnership in whose right such action is brought shall be entitled, at any time before final judgment, to require the plaintiff to give security for the costs and reasonable expenses that may be directly attributable to and incurred by it in the defense of such action or may be incurred by other parties named as defendant for which it may become legally liable, but not including fees of attorneys. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervenor, as of the date that the intervenor becomes a party to the action. The amount of such security may from time to time be increased or decreased, in the discretion of the court, upon showing that the security provided has or may become inadequate or is excessive. The limited partnership shall have recourse to such security in such amount as the court having jurisdiction shall determine upon the termination of such action if the court finds the action was brought without reasonable cause.

**Source: L. 81:** Entire article added, p. 450, § 1, effective November 1. **L. 2004:** Entire section amended, p. 1447, § 149, effective July 1.

## PART 11

### MISCELLANEOUS

**7-62-1101. Applicability.** This article shall apply to all limited partnerships formed on or after November 1, 1981.

**Source: L. 81:** Entire article added, p. 451, § 1, effective November 1.

### ANNOTATION

**Law reviews.** For article, "Guess Who's Coming to Closing", see 11 Colo. Law. 689 (1982). For comment, "The Colorado Changes

to the Revised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982).

**7-62-1102. Construction and application.** (1) This article shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

(2) This article shall not be construed so as to impair the obligations of any contract existing on November 1, 1981, nor to affect any action or proceeding begun or right accrued before such date.

(3) No amendment of this article shall impair or otherwise affect the organization, registration, or continued existence of a limited partnership existing on July 1, 1986, nor shall any such amendment be construed or applied so as to impair any contract or affect any right accrued prior to July 1, 1986.

**Source: L. 81:** Entire article added, p. 451, § 1, effective November 1. **L. 86:** (3) added, p. 458, § 36, effective July 1.

**7-62-1103. Provisions for existing limited partnerships.** (1) A limited partnership formed under any statute of this state prior to November 1, 1981, may elect to be governed by the provisions of this article. The general partner or partners may make the election for the limited partnership at any time on or after November 1, 1981, by complying with the provisions of section 7-62-201; except that the limited partners shall not be required to execute a new certificate of limited partnership. Notwithstanding such election by the general partner or partners, the following rules shall apply:

(a) Sections 7-62-501, 7-62-502, and 7-62-608 apply only to contributions and distributions made after the date of the election;

(b) Section 7-62-704 applies only to assignments made after the date of the election; and

(c) Section 7-62-804 shall not be construed so as to change the priority of creditors for transactions entered into prior to the date of the election.

(2) A limited partnership formed under any statute of this state prior to November 1, 1981, until or unless it elects to be governed by this article, shall be governed by the provisions of article 61 of this title, or other applicable prior law; except that such limited partnership shall not be renewed unless provision therefor is specifically provided in the original partnership agreement or any amendment thereto prior to November 1, 1981.

**Source: L. 81:** Entire article added, p. 451, § 1, effective November 1.

#### ANNOTATION

**Law reviews.** For article, "Limited Partnership Act Update", see 11 Colo. Law. 688 (1982). For article, "Guess Who's Coming to Closing", see 11 Colo. Law. 689 (1982). For comment, "The Colorado Changes to the Re-

vised Uniform Limited Partnership Act", see 53 U. Colo. L. Rev. 823 (1982). For article, "Trade Name Registration Requirements and Customs in Colorado — Parts I and II", see 16 Colo. Law. 238 and 454 (1987).

**7-62-1104. Rules for cases not provided for in this article - registration as limited liability limited partnership.** (1) In any case not provided for in this article, the provisions of either article 60 or 64 of this title shall govern, to the extent applicable, as follows:

(a) A limited partnership may elect to be governed by article 64 of this title by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a certificate of limited partnership or a certificate of amendment of limited partnership that includes a declaration that it elects to be governed by such article. If the election is made by a certificate of amendment, the certificate of amendment shall be approved by all general partners, notwithstanding section 7-62-204 (1) (b).

(b) A limited partnership that has made the election in paragraph (a) of this subsection (1) shall be governed by article 64 of this title.

(c) A limited partnership that has not made the election in paragraph (a) of this subsection (1) shall be governed by article 60 of this title.

**Source: L. 81:** Entire article added, p. 451, § 1, effective November 1. **L. 95:** Entire section amended, p. 789, § 17, effective May 24. **L. 97:** Entire section amended, p. 916, § 7, effective January 1, 1998. **L. 2002:** (1)(a) amended, p. 1824, § 47, effective July 1; (1)(a) amended, p. 1688, § 45, effective October 1.



**7-62-1105. Short title.** This article shall be known and may be cited as the “Colorado Uniform Limited Partnership Act of 1981”.

**Source: L. 81:** Entire article added, p. 452, § 1, effective November 1.

## PART 12

### FEES

#### **7-62-1201. Fees for filing documents and certificates - other charges. (Repealed)**

**Source: L. 81:** Entire article added, p. 452, § 1, effective November 1. **L. 83:** Entire section R&RE, p. 873, § 32, effective July 1. **L. 98:** (2) amended, p. 1322, § 17, effective June 1. **L. 2000:** (1)(c) and (1)(d) amended, p. 953, § 25, effective July 1. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

## ARTICLE 63

### Colorado Limited Partnership Association Act

**Law reviews:** For article, “Limited Liability Partnerships and Other Entities Authorized in Colorado”, see 24 Colo. Law. 1525 (1995); for article, “Colorado Choice of Entity 1998”, see 27 Colo. Law. 5 (June 1998); for article, “Colorado Choice of Form of Organization and Structure 2001”, see 30 Colo. Law. 11 (October 2001).

7-63-101.	Short title.	7-63-110.	Management - officers, managers, and members.
7-63-102.	Definitions.	7-63-111.	Dealings on behalf of association.
7-63-103.	Nature of business.	7-63-112.	Capital contributions.
7-63-104.	Formation of association.	7-63-113.	Dividends.
7-63-105.	Articles.	7-63-114.	Membership participation - interests.
7-63-106.	Names. (Repealed)	7-63-115.	Information and accounting.
7-63-107.	Limited liability.	7-63-116.	Dissolution and termination.
7-63-108.	Reference to corporation law.	7-63-117.	Conversion - repeal. (Repealed)
7-63-109.	Bylaws.		

**7-63-101. Short title.** This article shall be known and may be cited as the “Colorado Limited Partnership Association Act”.

**Source: L. 95:** Entire article added, p. 790, § 18, effective May 24.

**7-63-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Articles of association” and “bylaws” include amendments and restatements of the same.

(2) “Limited partnership association” or “association” means an unincorporated business association formed under this article.

**Source: L. 95:** Entire article added, p. 790, § 18, effective May 24.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

**7-63-103. Nature of business.** A limited partnership association may be formed under this article for any lawful activity, including ownership of real or personal property, subject to any provisions of law governing or regulating such activity within this state.

**Source: L. 95:** Entire article added, p. 790, § 18, effective May 24.

**7-63-104. Formation of association.** Any two or more persons may form a limited partnership association by subscribing to the capital of the association and by approving and delivering articles of association to the secretary of state for filing pursuant to part 3 of article 90 of this title. The association shall be formed upon the effective date of the filing of the articles by the secretary of state.

**Source:** L. 95: Entire article added, p. 790, § 18, effective May 24. L. 2002: Entire section amended, p. 1824, § 48, effective July 1; entire section amended, p. 1688, § 46, effective October 1.

**7-63-105. Articles.** (1) The articles of association shall state:

(a) The domestic entity name of the association, which domestic entity name shall comply with part 6 of article 90 of this title;

(b) A statement that the association is formed under this article;

(c) If management is vested in the members or in one or more classes of members as provided in section 7-63-110 (3), a statement to that effect and, if any class or classes of members, but not all, are so vested with management, the name of each of the classes of members indicating which are and which are not so vested with management;

(d) Any notice of provisions of the bylaws permitted by section 7-63-111 (3) concerning the authority of officers and managers or otherwise restricting the application of section 7-63-111 (4);

(e) The principal office address of the association's initial principal office; and

(f) The registered agent name and registered agent address of the association's initial registered agent.

(g) (Deleted by amendment, L. 2003, p. 2248, § 145, effective July 1, 2004.)

(2) Any amendment to or restatement of the articles of association shall be approved in a separate writing or writings by all of the members. This subsection (2) is a default rule, subject to the bylaws.

(3) (Deleted by amendment, L. 2002, p. 1824, § 49, effective July 1, 2002; p. 1688, § 47, effective October 1, 2002.)

(4) Except in a proceeding by the state to involuntarily dissolve an association, the filing of the articles of association by the secretary of state is conclusive as to formation of the association and it shall be incontestable that all conditions precedent to formation have been met.

**Source:** L. 95: Entire article added, p. 790, § 18, effective May 24. L. 2000: (1)(a) amended, p. 953, § 26, effective July 1. L. 2002: (2) and (3) amended, p. 1824, § 49, effective July 1; (2) and (3) amended, p. 1688, § 47, effective October 1. L. 2003: IP(1), (1)(a), (1)(e), (1)(f), and (1)(g) amended, p. 2248, § 145, effective July 1, 2004.

**7-63-106. Names. (Repealed)**

**Source:** L. 95: Entire article added, p. 791, § 18, effective May 24. L. 2000: Entire section repealed, p. 990, § 109, effective July 1.

**7-63-107. Limited liability.** The managers, officers, and members, including their transferees and other successors, of an association shall not be liable under any judgment, decree, or order of any court, or in any other manner, for a debt, obligation, or other liability of the association. This section is a default rule, subject to the bylaws.

**Source:** L. 95: Entire article added, p. 791, § 18, effective May 24.

**7-63-108. Reference to corporation law.** (1) In a case in which a party seeks to hold the members of an association personally responsible for the alleged improper actions of the association, the court shall apply the case law that interprets the conditions and circum-



stances under which the corporate veil of a corporation may be pierced under the law of this state.

(2) For purposes of subsection (1) of this section, the failure of an association to observe the formalities or requirements relating to the management of the association's business and affairs is not in itself a ground for imposing personal liability on the members for the liabilities of the association.

(3) Except as otherwise provided in this article, article 90 of this title and, to the extent not addressed in said article 90, the law of this state applicable to a corporation formed under the "Colorado Business Corporation Act", articles 101 to 117 of this title, apply to an association with respect to the following matters:

(a) The filing by the secretary of state of articles for the formation or dissolution of an association, periodic reports concerning an association, change of principal office, change of registered agent or registered agent address, and other documents including withdrawal and restatement of, amendments to, and statements with respect to any articles, periodic reports, and other documents;

(b) Certification of documents and facts of record and provision of other information and services by the secretary of state;

(c) The effect of approving documents to be filed by the secretary of state, the effective date and effect of any filing by or certification of documents or facts by the secretary of state, and the effect and effective date of any filing or recording of a document with a clerk and recorder;

(d) The penalties payable to the secretary of state and other civil and criminal penalties with respect to documents permitted or required to be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title;

(e) (Deleted by amendment, L. 2002, p. 1824, § 50, effective July 1, 2002; p. 1689, § 48, effective October 1, 2002.)

(f) The maintenance of a registered agent, the designation of a principal office, and service of process upon the association;

(g) The judicial dissolution of an association; and

(h) The election to reject worker's compensation coverage under section 8-41-202, C.R.S., and, for this purpose, the term "corporate officer" as used in said section includes any manager who owns at least a ten percent interest in the association.

(4) Service of process may also be made on any manager, the chairperson or secretary of the association, or any agent of the association appointed for that purpose.

(5) The prohibition against and the penalties and liabilities imposed upon persons doing business as a corporation without authority under the "Colorado Business Corporation Act", articles 101 to 117 of this title, shall apply to persons doing business in this state as an association without authority under this article or in this state as a limited partnership association, formed under the law of another jurisdiction, without authority as provided in subsection (6) of this section.

(6) The provisions of part 8 of article 90 of this title shall apply with respect to a limited partnership association formed under the law of a jurisdiction other than this state.

**Source: L. 95:** Entire article added, p. 791, § 18, effective May 24. **L. 2000:** (3)(e) amended, p. 953, § 27, effective July 1. **L. 2002:** (3)(a), (3)(c), (3)(d), and (3)(e) amended, p. 1824, § 50, effective July 1; (3)(a), (3)(c), (3)(d), and (3)(e) amended, p. 1689, § 48, effective October 1. **L. 2003:** IP(3), (3)(a), (3)(f), and (6) amended, p. 2248, § 146, effective July 1, 2004. **L. 2004:** (4) and (5) amended, p. 1447, § 150, effective July 1. **L. 2005:** IP(3) and (3)(g) amended, p. 1203, § 1, effective October 1. **L. 2010:** IP(3) and (3)(a) amended, (HB 10-1403), ch. 404, p. 1994, § 6, effective August 11.

**7-63-109. Bylaws.** (1) The initial bylaws shall be adopted by all of the members either before or after its articles of association are filed.

(2) The bylaws may be amended at any time, either before or after the articles of association are filed, by all of the members.

(3) Except as otherwise provided in subsection (4) or (6) of this section:

(a) The bylaws govern all matters relating to the business and affairs of an association;

(b) The affairs of an association governed by the bylaws include, without limitation, the rights; duties; authority; liability; indemnification; admission and qualifications of; limitations on and dealings and other relations among and between the managers, officers, agents, members, transferees and other successors to the interest of a member; and the association; and

(c) The bylaws may confer rights on and impose duties, limitations, and other provisions for the protection or benefit of any other person or persons, including the public, as third-party beneficiaries.

(4) Except as otherwise provided in subsection (6) of this section:

(a) The bylaws shall control over any provision of this article to the contrary that is designated in this article as "a default rule, subject to the bylaws";

(b) The provisions of this article that are so designated shall control only to the extent that the bylaws do not otherwise provide;

(c) The other provisions of this article shall control over provisions of the bylaws to the contrary; and

(d) The bylaws shall control only to the extent that such other provisions of this article do not otherwise provide.

(5) The references in this article to matters that may be addressed in the bylaws and to matters designated as "default rules, subject to the bylaws" or with respect to which provisions of this article otherwise defer shall not be construed to limit the scope of the matters governed or controlled by the bylaws.

(6) The bylaws may not:

(a) Unreasonably restrict a member's right of access to books and records;

(b) Unreasonably reduce the duty of care of a manager to the association and its members;

(c) Eliminate the obligation of a manager to perform the manager's duty of care in good faith; except that the bylaws may determine the standards by which the performance of the obligation is to be measured if such standards are not manifestly unreasonable; or

(d) Except as provided in section 7-63-111 (3) or for the restriction of rights conferred by or arising under the bylaws, restrict the rights of, or impose duties on, persons other than the managers, officers, agents, members and their transferees and other successors, and the association, without the consent of such persons.

(7) Subsections (2) and (3) (c) of this section are default rules, subject to the bylaws.

**Source: L. 95:** Entire article added, p. 793, § 18, effective May 24.

**7-63-110. Management - officers, managers, and members.** (1) Subsection (2) of this section shall apply to an association unless its articles of association have vested management in the members or one or more classes of members.

(2) There shall be at least one meeting of the members in each year. At least two managers shall be elected at such meeting by the members from among their number. Such managers shall hold their respective managerships for one year and until their successors have been elected and qualified. The members shall also elect the officers at such meeting. The election of a manager or officer shall require a majority vote of the members in number and interest.

(3) The management of the business and affairs of an association may be vested by the articles of association in the members as members or in one or more classes of members as members of such class or classes. If management is so vested, then:

(a) Any reference in this article to a manager or managers shall be deemed to refer to the member or members who are so vested with management authority; and

(b) Subsection (4) of this section shall apply to the association in lieu of subsection (2) of this section.

(4) There shall be at least one meeting of the managers in each year. The managers shall elect the officers at such meeting. The election of an officer shall require a vote of a majority in number of the managers.

(5) An association may have more than one class of members and more than one class of managers. Any class may consist of one or more members or managers. The bylaws may



provide that all or any number or portion of the members or managers or any class or classes of members or managers consent, vote, elect, determine, exercise authority, or otherwise act, with or without a meeting, on a per capita or other basis on any matter, or not act or have authority on any matter. Members and managers may be compensated for services performed for an association as a manager, officer, member, employee, agent, or other contractor.

(6) The duties of a manager shall be discharged in good faith, with the degree of care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner that the manager reasonably believes to be in the best interests of the association. Managers and officers may rely in good faith on the same kinds of opinions, reports, statements, data, and other information and shall have the same kinds of defenses, limitations on liability, and other protections as directors of a corporation formed under the "Colorado Business Corporation Act", articles 101 to 117 of this title.

(7) An association shall have officers, including a chairperson with responsibility for presiding at meetings of managers and members and a secretary with responsibility for the preparation, maintenance, and authentication of minutes and the other records of the association. The officers shall be chosen from among the managers including the representatives of any manager who is not an individual, and shall hold their respective offices for one year and until their successors have been elected and qualified.

(8) Officers must be individuals at least eighteen years of age.

(9) The failure to hold annual or other meetings of or elections by the members or managers does not affect the continuation of the term of any person elected or any other association action and does not work a dissolution or termination of the association.

(10) Subsections (2), (4) to (7), and (9) of this section are default rules, subject to the bylaws.

**Source:** L. 95: Entire article added, p. 794, § 18, effective May 24. L. 2003: (6) amended, p. 2249, § 147, effective July 1, 2004. L. 2004: (7) amended, p. 1448, § 151, effective July 1.

**7-63-111. Dealings on behalf of association.** (1) As used in this section, "property" includes property wherever located, tangible personal property, intangible personal property, including interests in the association or any other entity, and real property and any legal or equitable interest in property.

(2) Subject to subsections (4) and (6) of this section, each manager shall have agency authority to bind and otherwise represent the association and may, in the exercise of such authority, on behalf of the association and in its domestic entity name, do anything that an individual may do, including:

(a) Make contracts and guarantees, incur liabilities, borrow money or other property, issue notes, bonds, and other obligations, secure obligations by mortgage or pledge of any of its property, lend money or other property, receive and hold property as security for repayment or other performance, and invest and reinvest funds;

(b) Sue and be sued, complain, and defend;

(c) Be a promoter, partner, member, associate, manager, trustee or other fiduciary, or nominee or other agent of, or hold any similar position with, any person;

(d) Purchase, lease, take by donative transfer, devise or bequest, and otherwise acquire, disclaim, or renounce property, and own, hold, use, improve, exchange, sell, convey, endorse, transfer, lease, mortgage, pledge, encumber, and otherwise deal with or dispose of property, including all or any part of the property of the association;

(e) Execute, acknowledge, and deliver a conveyance or other transfer, contract, or other instrument with respect to any property or other dealings;

(f) Locate offices, conduct business, have dealings, and carry on other activities, including the holding of property, and otherwise exercise the authority pursuant to this article and the bylaws, whether within or without this state; and

(g) Appoint, compensate, and define the duties and authority, including any authority conferred upon a manager by this subsection (2) or by the bylaws, of agents of the

association and delegate such authority to officers and direct the performance of duties and the exercise of authority by the agents and officers.

(3) Provisions of the bylaws may eliminate, limit, and otherwise restrict the application of all or any portion of subsection (4) of this section; except that such provisions of the bylaws shall not take effect until stated in the articles of association. The provisions stated shall only have prospective effect.

(4) Except as otherwise provided in subsection (3) of this section:

(a) As used in this subsection (4), the term "instrument":

(I) Includes any contract, conveyance, transfer, mortgage, pledge, encumbrance, note, endorsement, or other writing and any authentication of records; designation or authorization of or delegation to any officer, manager, or agent; acknowledgment; or other statement or representation of any fact; and

(II) Implies the requirement of a writing and excludes anything that is not in writing.

(b) Every manager is an agent of the association for the purpose of its business, and the act of every manager, including the signing in the domestic entity name of any instrument for apparently carrying on in the usual way the business of the association of which the manager is a manager, binds the association, unless the manager so acting has in fact no authority to act for the association in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the manager has no such authority.

(c) Except as otherwise provided in paragraph (d) of this subsection (4), an act of a manager which is not apparently for carrying on the business of the association in the usual way does not bind the association.

(d) No instrument signed by the chairperson, any manager or vice-chairperson, and by the secretary or any assistant secretary nor the delivery of any such instrument shall be invalidated as to the association by any lack of authority of any officer or manager of the association signing or delivering the instrument, if:

(I) The instrument is in the domestic entity name of the association and signed or entered into with or issued or delivered to a person or the instrument evidences, authorizes, or facilitates a transaction on behalf of the association with a person; and

(II) The person gives value for the instrument or in the transaction and the person is without knowledge that the officer or manager did not have authority to so act or was acting in contravention of a restriction on such authority.

(5) No act of a manager who in fact has no authority to act for the association in a particular matter shall bind the association to persons having knowledge of the fact that the manager does not have such authority. No act of a manager in contravention of a restriction on authority shall bind the association to persons having knowledge of the restriction.

(6) An interest in the association may be issued or redeemed only as authorized in writing by all of the members.

(7) Subsections (2) and (6) of this section are default rules, subject to the bylaws.

**Source:** L. 95: Entire article added, p. 795, § 18, effective May 24. L. 2000: IP(2), (4)(b), and (4)(d)(I) amended, p. 954, § 28, effective July 1. L. 2003: (3) amended, p. 2249, § 148, effective July 1, 2004. L. 2004: (4)(b) and IP(4)(d) amended, p. 1448, § 152, effective July 1.

**7-63-112. Capital contributions.** (1) The persons forming an association shall make contribution to its capital in cash or in other property.

(2) The valuation of property contributed as contemplated in subsection (1) of this section must be approved by all of the initial members. This subsection (2) is a default rule, subject to the bylaws.

**Source:** L. 95: Entire article added, p. 797, § 18, effective May 24.

**7-63-113. Dividends.** (1) As used in this section, the term "dividend" includes all distributions by an association to its members in respect of their interests in the association as members.



(2) An association may pay dividends from time to time to its members in cash or other property as its managers determine pursuant to this section and the bylaws. For principal and income accounting purposes of a fiduciary, and subject to the instrument under which the fiduciary acts, a dividend shall constitute income unless otherwise declared by the managers as chargeable to the capital accounts of the members.

(3) The determinations and declarations concerning a dividend shall be made by a majority in number of the managers; except that, if management is vested in the members or one or more classes of members, such determinations must also be approved by a majority in number and interest of the members. No debt or interest in the association may be paid as a dividend unless authorized in writing by all of the members.

(4) No dividend may be paid if, after giving it effect:

(a) The association would not be able to pay its debts as they become due in the usual course of business; or

(b) The association's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the association were to be dissolved, to satisfy the preferential rights of members whose preferential rights are superior to those receiving the dividend.

(5) The managers authorizing a dividend contrary to subsection (4) of this section shall be jointly and severally liable to the association in the amount by which the dividend exceeds the dividend that could have been paid without violating said subsection (4) if it is established, subject to section 7-63-110 (6), that such managers did not perform their duties in compliance with section 7-63-110 (6). Section 7-63-110 (6) shall be applied for purposes of this subsection (5) without taking any contrary provisions of the bylaws into account.

(6) Managers shall also have the same rights of contribution from other managers and members as directors have against other directors and shareholders under the "Colorado Business Corporation Act", articles 101 to 117 of this title.

(7) Subsections (3) and (6) of this section are default rules, subject to the bylaws.

**Source: L. 95:** Entire article added, p. 797, § 18, effective May 24.

**7-63-114. Membership participation - interests.** (1) Any person, except an individual under the age of eighteen years or a person prohibited from so acting, may participate in the formation or become a member or manager of an association; except that a custodian, conservator, guardian, or other fiduciary may participate in the formation or become and act as a member or manager on behalf of the estate of an individual under the age of eighteen years. Notwithstanding any provision of this subsection (1) to the contrary, the bylaws may set qualifications for and otherwise restrict the eligibility of persons to become or act as members or managers.

(2) Members may vote, exercise their rights, and otherwise act by proxy or other agent.

(3) The interest of a member in an association is personal property.

(4) An interest in the association may be transferred or encumbered only as provided in the bylaws. A member may not resign or withdraw.

(5) A person may be admitted to membership by a vote of all of the members. If there are no members and there is no other provision for admission of successor members, then a majority in number and interest of the transferees of, and other successors in interest to, the members may admit one or more of the transferees and successors as members. Such majority in number shall be determined by counting all of the transferees and other successors of each former member as one.

(6) Except for persons forming an association or admitted to its membership, no transferee; representative of the estate of a deceased, incompetent, insolvent, or bankrupt member; or other successor to an interest of a member or any other person shall be entitled to any participation in the management of the business and affairs of the association or have any right to become a member. No transfer, succession, encumbrance, judgment, decree, order, or other claim upon the interest of a member or against a member, shall give a person any of the rights of the member or with respect to the member's interest other than the right to be paid the dividends and other distributions when and to the extent that the member would otherwise have been paid.

(7) Subsections (2) and (4) to (6) of this section are default rules, subject to the bylaws.

**Source: L. 95:** Entire article added, p. 798, § 18, effective May 24.

**7-63-115. Information and accounting.** (1) Each member has the right to:

(a) Inspect and copy the books and records of account, the records of the contributions and holdings of the members and their transferees and other successors, the bylaws, and the minutes of the members and of the managers;

(b) Obtain from the managers true and full information regarding the state of the business and the financial condition of the association and any other information regarding the affairs of the association;

(c) Obtain copies from the managers, upon becoming available, of the association's federal, state, and local income tax returns for each year; and

(d) Have a formal accounting of association affairs whenever circumstances render it just and reasonable.

(2) Subsection (1) of this section is a default rule, subject to the bylaws.

**Source: L. 95:** Entire article added, p. 799, § 18, effective May 24.

**7-63-116. Dissolution and termination.** (1) An association shall have indefinite duration and shall continue until terminated as provided in this section. An association shall continue even though it has only one member or only one person owning all of the interests in the association. An association may be dissolved by a vote of all of its members or upon the other events or circumstances as may be provided in the bylaws.

(2) After an association is dissolved, its business and affairs shall be wound up and its property distributed; except that the property of the association shall be applied first to the satisfaction of its liabilities and indebtedness and then to distributions among the members with respect to their interests as members.

(3) If assets of an association have been distributed to members in the winding up of the association before its liabilities and indebtedness have been paid or adequately provided for, the association before its termination, and, after its termination, the creditors of an association shall have a claim against members receiving distributions for such liabilities and indebtedness not barred by applicable statutes of limitation; except that a member's total liability for all claims under this section may not exceed the total value of assets distributed to the member, as such value is determined at the time of distribution. Any member required to return any portion of the value of assets received by the member in liquidation shall be entitled to contribution from all other members. Each such contribution shall be in accordance with the contributing member's rights and interests and shall not exceed the value of the assets received by the contributing member in dissolution.

(4) Distributions among members shall be in accordance with the priorities and proportions of their respective claims and interests.

(5) Upon the apparent completion of the winding up and distribution, the association shall file articles of dissolution with the secretary of state stating the domestic entity name of the association, the principal office address of the association's principal office, and that the association is dissolved. After the filing of articles of dissolution, the association's managers and agents shall continue to have authority to convey any real or personal property held in the domestic entity name of the association and otherwise act as provided in the bylaws or, subject to the bylaws, as provided in this article to complete the winding up or distribution.

(6) Subsections (1) and (4) of this section are default rules, subject to the bylaws.

(7) (Deleted by amendment, L. 2004, p. 1448, § 153, effective July 1, 2004.)

**Source: L. 95:** Entire article added, p. 800, § 18, effective May 24. **L. 2000:** (5) amended and (7) added, p. 954, § 29, effective July 1. **L. 2004:** (5) and (7) amended, p. 1448, § 153, effective July 1.



7-63-117. Conversion - repeal. (Repealed)

**Source:** L. 95: Entire article added, p. 801, § 18, effective May 24. L. 2002: (4) amended, p. 1825, § 51, effective July 1; (4) amended, p. 1689, § 49, effective October 1. L. 2003: (6) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor’s note:** Subsection (6) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

ARTICLE 64

Colorado Uniform Partnership Act (1997)

**Cross references:** For the “Uniform Partnership Law”, see article 60 of this title.

**Law reviews:** For article, “Limited Liability Partnerships and Other Entities Authorized in Colorado”, see 24 Colo. Law. 1525 (1995); for article, “Colorado Choice of Entity 1998”, see 27 Colo. Law. 5 (June 1998); for article, “Contractually Binding Colorado Entities”, see 28 Colo. Law. 33 (December 1999); for article, “Colorado Choice of Form of Organization and Structure 2001”, see 30 Colo. Law. 11 (October 2001); for article “Entity and Trade Name Registration: 2001 Update”, see 30 Colo. Law. 81 (October 2001); for article “Entity and Trade Name Registration: 2004 Update”, see 34 Colo. Law. 11 (January 2005).

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## PART 1

## GENERAL PROVISIONS

**7-64-101. Definitions.** As used in this article, unless the context otherwise requires:

- (1) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (2) "Business" includes every trade, occupation, and profession.
- (3) "Debtor in bankruptcy" means a person who is the subject of:
  - (a) An order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or



- (b) A comparable order under federal, state, or foreign law governing insolvency.
- (4) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (5) "Distribution" means a transfer of money or other property from a partnership to a partner in the partner's capacity as a partner or to a transferee of all or a part of a partner's transferable interest.
- (6) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (7) "Filed statement" means a statement that has been filed by the secretary of state pursuant to part 3 of article 90 of this title. A copy of a filed statement means a copy of the filed statement that the secretary of state has certified to be in the records of the secretary of state.
- (8) to (10) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (11) (Deleted by amendment, L. 2004, p. 1448, § 154, effective July 1, 2004.)
- (12) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (13) "Limited liability partnership" means a partnership that is registered as a limited liability partnership under section 7-64-1002 (1).
- (14) and (15) (Deleted by amendment, L. 2004, p. 1448, § 154, effective July 1, 2004.)
- (16) and (17) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (18) "Partner" means a person who is admitted to a partnership as a partner of the partnership.
- (19) "Partnership" shall have the meaning set forth in section 7-64-202 (1).
- (20) "Partnership agreement" means the agreement, whether written, oral, or implied, among the partners that governs relations among the partners and between the partners and the partnership. For purposes of part 10 of this article, the term "partnership agreement" shall have the meaning set forth in section 7-64-1001 (2).
- (21) "Partnership at will" means a partnership that is not a partnership for a definite term or particular undertaking.
- (22) "Partnership for a definite term or particular undertaking" means a partnership in which the partners have agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.
- (23) "Partnership interest" or "partner's interest in the partnership" means all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights.
- (24) "Partnership obligation" means any debt, obligation, or liability of the partnership, whether sounding in tort, contract, or otherwise.
- (25) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (26) "Property" means all property, real, personal, or mixed, tangible or intangible, or any interest therein.
- (27) "Registrant" means a person that is registered under section 7-64-1002.
- (28) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (29) "Statement" means a statement of partnership authority under section 7-64-303, a statement of denial under section 7-64-304, a statement of dissociation under section 7-64-704, a statement of dissolution under section 7-64-805, a statement of registration under section 7-64-1002, a statement of withdrawal of registration under section 7-64-1002, a statement of correction under section 7-90-305, or a statement of change under section 7-90-305.5 of any of the foregoing.
- (30) (Deleted by amendment, L. 2003, p. 2249, § 149, effective July 1, 2004.)
- (31) "Transfer" includes an assignment, conveyance, lease, mortgage, deed, and encumbrance.
- (32) "Transferable interest" means a partner's share of the profits and losses of the partnership and the partner's right to receive distributions.

**Source:** L. 97: Entire article added, p. 866, § 1, effective January 1, 1998. L. 2002: (6), (7), and (29) amended, p. 1825, § 52, effective July 1; (6), (7), and (29) amended, p. 1690, § 50, effective October 1. L. 2003: (1), (4), (6), (8), (9), (10), (12), (15) to (20), (25), (28),

(29), and (30) amended, p. 2249, § 149, effective July 1, 2004. **L. 2004:** (11), (14), (15), (18), and (20) amended, p. 1448, § 154, effective July 1. **L. 2009:** (18) amended, (HB 09-1248), ch. 252, p. 1130, § 7, effective May 14.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

**7-64-102. Knowledge and notice.** (1) A person knows or has knowledge of a fact if the person has conscious awareness of the fact.

(2) A person has notice of a fact:

- (a) If the person knows of the fact;
- (b) If the person has received a notification of the fact;
- (c) If the person has reason to know the fact exists from all of the facts known to the person at the time in question; or

(d) By reason of a filing or recording to the extent provided by and subject to limitations set forth in section 7-64-303 (4) and (5), 7-64-704 (3), or 7-64-805 (3).

(3) A person notifies or gives a notification to another by taking steps reasonably appropriate to inform the other person in ordinary course, whether or not the other person thereby obtains knowledge of the fact.

(4) A person receives a notification when the notification:

- (a) Comes to the person's attention; or
- (b) Is received at the person's place of business or at any other place held out by the person as a place for receiving communications, or is received by a person who is apparently authorized to receive the notification; or

(c) Has been given and the circumstances are such that it is fair and reasonable, as against the person to whom such notice has been given, to treat the notice as having been received.

(5) Except as otherwise provided in subsection (6) of this section, a person other than an individual knows, has notice, or receives a notification of a fact for purposes of a particular transaction when an individual conducting the transaction on that person's behalf knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to such an individual's attention if the person had exercised reasonable diligence. The person exercises reasonable diligence if the person maintains reasonable routines for communicating significant information to an individual conducting the transaction on the person's behalf and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the person to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(6) A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

**Source:** **L. 97:** Entire article added, p. 869, § 1, effective January 1, 1998.

**7-64-103. Effect of partnership agreement - nonwaivable provisions.** (1) To the extent the partnership agreement does not otherwise provide, this article governs relations among the partners and between the partners and the partnership.

(2) The partnership agreement may not:

(a) Vary the rights and duties under section 7-64-105, except to eliminate the duty to provide copies of statements to all of the partners;

(b) Unreasonably restrict the right of access to books and records under section 7-64-403 (2) or unreasonably limit the obligations of the partners or the partnership under section 7-64-403 (3);

(c) Eliminate any of the duties specified in section 7-64-404 (1) (a), (1) (b), or (1) (c) or in section 7-64-603 (2) (c); except that:



(I) The partnership agreement may identify types or categories of activities that do not violate any of the duties specified in section 7-64-404 (1) (a), (1) (b), or (1) (c), if not manifestly unreasonable; or

(II) All of the partners or a number or percentage stated in the partnership agreement may authorize or ratify, after full disclosure of all material facts, an act or transaction that otherwise would violate any of the duties stated in section 7-64-404 (1) (a), (1) (b), or (1) (c);

(d) Unreasonably reduce the duty of care under section 7-64-404 (3) or 7-64-603 (2) (c);

(e) Eliminate the obligation of good faith and fair dealing under section 7-64-404 (3), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(f) Vary the power to dissociate as a partner under section 7-64-602 (1), except to require the notice under section 7-64-601 (1) (a) to be in writing;

(g) Vary the right of a court to expel a partner in the events specified in section 7-64-601 (1) (e);

(h) Vary the requirement to wind up the partnership business in cases specified in section 7-64-801 (1) (d), (1) (e), or (1) (f);

(i) Restrict rights of third persons under this article; or

(j) Vary the law applicable to limited liability partnerships as set forth in section 7-64-106 (3).

**Source:** L. 97: Entire article added, p. 870, § 1, effective January 1, 1998. L. 2003: (2)(c)(II) amended, p. 2251, § 150, effective July 1, 2004. L. 2004: IP(2)(c) and (2)(c)(II) amended, p. 1449, § 155, effective July 1.

**7-64-104. Supplemental principles of law.** (1) Unless displaced by particular provisions of this article, the principles of law and equity supplement this article.

(2) If an obligation to pay interest arises under this article and the rate is not specified, the rate is that specified in section 5-12-102, C.R.S.

**Source:** L. 97: Entire article added, p. 871, § 1, effective January 1, 1998.

**7-64-105. Filing and recording of statements.** (1) A statement may be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title. A certified copy of a statement that is filed in an office in another jurisdiction may be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title. Either filing in this state has the effect provided in this article with respect to partnership property located in or transactions that occur in this state.

(2) Only a copy of a filed statement recorded in the office for recording transfers of real property has the effect provided for recorded statements in this article.

(3) and (4) (Deleted by amendment, L. 2003, p. 2251, § 151, effective July 1, 2004.)

(5) A person who delivers or causes a statement to be delivered to the secretary of state for filing pursuant to this section shall promptly deliver a copy of the statement to every nonfiling partner and to any other person named as a partner in the statement. Failure to deliver a copy of a statement to a partner or other person does not limit the effectiveness of the statement as to a person not a partner.

**Source:** L. 97: Entire article added, p. 871, § 1, effective January 1, 1998. L. 2002: (4) amended, p. 1826, § 53, effective July 1; (4) amended, p. 1690, § 51, effective October 1. L. 2003: (1), (3), (4), and (5) amended, p. 2251, § 151, effective July 1, 2004.

**7-64-106. Law governing internal relations.** (1) Except as provided in subsection (3) of this section, the law of the jurisdiction under which a partnership is formed governs relations among the partners and between the partners and the partnership.

(2) A partnership is presumed to have been formed in the jurisdiction in which it has its chief executive office.

(3) The law of this state shall govern relations among the partners and between the partners and the partnership, and the liability of partners for partnership obligations, in a partnership that has filed a statement of registration as a limited liability partnership in this state.

**Source:** L. 97: Entire article added, p. 872, § 1, effective January 1, 1998. L. 2003: (3) amended, p. 2252, § 152, effective July 1, 2004.

**7-64-107. Partnership subject to amendment or repeal of article.** A partnership governed by this article is subject to any amendment to or repeal of this article.

**Source:** L. 97: Entire article added, p. 872, § 1, effective January 1, 1998.

## PART 2

### NATURE OF PARTNERSHIP

**7-64-201. Partnership as entity.** A partnership is an entity distinct from its partners.

**Source:** L. 97: Entire article added, p. 872, § 1, effective January 1, 1998.

**7-64-202. Formation of partnership.** (1) Except as otherwise provided in subsection (2) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership. A limited liability partnership is for all purposes a partnership.

(2) Subject to section 7-64-1205, an association is not a partnership under this article if it is formed under a statute other than:

- (a) This article;
- (b) Article 60 of this title; or
- (c) A comparable statute of another jurisdiction. A partnership that is subject to article 60 of this title by reason of the first sentence of subsection (2) of section 7-60-106 shall be deemed to be formed under article 60 for purposes of this subsection (2).

(3) In determining whether a partnership is formed, the following rules apply:

(a) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(b) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(c) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

- (I) Of a debt by installments or otherwise;
- (II) For services as an independent contractor or of wages or other compensation to an employee;
- (III) Of rent;
- (IV) Of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
- (V) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral or rights to income, proceeds, or increase in value derived from the collateral; or
- (VI) For the sale of the goodwill of a business or other property by installments or otherwise.

**Source:** L. 97: Entire article added, p. 872, § 1, effective January 1, 1998.



**7-64-203. Partnership property.** Property acquired by a partnership is property of the partnership and not of the partners individually.

**Source: L. 97:** Entire article added, p. 874, § 1, effective January 1, 1998.

**7-64-204. When property is partnership property.** (1) Property is partnership property if acquired in the name of:

(a) The partnership; or  
(b) One or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

(2) Property is acquired in the name of the partnership by a transfer to:

(a) The partnership in its name; or  
(b) One or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

(3) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

(4) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets is presumed to be separate property, even if used for partnership purposes.

**Source: L. 97:** Entire article added, p. 874, § 1, effective January 1, 1998.

**7-64-205. Admission without contribution or transferrable interest.** A person may be admitted as a partner to a partnership either upon formation of the partnership or thereafter without making a contribution or being obligated to make a contribution to the partnership, and a person may be admitted as a partner to a partnership either upon formation of the partnership or thereafter without acquiring a transferrable interest, if in either case such admission is pursuant to a written partnership agreement or other writing confirming the admission.

**Source: L. 2009:** Entire section added, (HB 09-1248), ch. 252, p. 1130, § 8, effective May 14.

### PART 3

#### RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

**7-64-301. Partner agent of partnership.** (1) Subject to the effect of a statement of partnership authority under section 7-64-303:

(a) Each partner is an agent of the partnership for the purposes of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing had notice that the partner lacked authority.

(b) An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.

**Source: L. 97:** Entire article added, p. 874, § 1, effective January 1, 1998.

**7-64-302. Transfer of partnership property.** (1) Partnership property may be transferred as follows:

(a) Subject to the effect of a statement of partnership authority under section 7-64-303, partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership name.

(b) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(c) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(2) A partnership may recover partnership property from a transferee only if it proves that execution of the instrument of initial transfer did not bind the partnership under section 7-64-301 and:

(a) As to a subsequent transferee who gave value for property transferred under paragraph (a) or (b) of subsection (1) of this section, proves that the subsequent transferee had notice that the person who executed the instrument of initial transfer lacked authority to bind the partnership; or

(b) As to a transferee who gave value for property transferred under paragraph (c) of subsection (1) of this section, proves that the transferee had notice that the property was partnership property and that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(3) A partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to recover the property, under subsection (2) of this section, from any earlier transferee of the property.

(4) If a person holds all of the partners' interests in the partnership, all of the partnership property vests in that person. The person may execute a document in the name of the partnership to evidence vesting of the property in that person and may file or record the document.

**Source: L. 97:** Entire article added, p. 875, § 1, effective January 1, 1998.

**7-64-303. Statement of partnership authority.** (1) A partnership may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of partnership authority, which statement shall include:

(a) The true name of the partnership;

(b) The principal office address of its principal office, if any, or, if it has no principal office, the street address, and, if different, the mailing address, of its chief executive office, and, in either case, the street address, and, if different, the mailing address, of one office in this state, if there is one; and

(c) The true names or a description of the partners as to which the partnership makes a statement of partnership authority to execute an instrument transferring real property held in the name of the partnership or to enter into other transactions on behalf of the partnership and the authority, or limitations on authority, of such partners, which authority and limitations may vary among such partners as such variations are stated in the statement of partnership authority.

(2) If a filed statement of partnership authority states the true name of the partnership but does not contain all of the other information required by subsection (1) of this section, the statement nevertheless operates with respect to a person not a partner as provided in subsections (3) and (4) of this section.

(3) A filed statement of partnership authority is prima facie evidence of the existence of the partnership and of the facts stated therein and supplements the authority of a partner to enter into transactions on behalf of the partnership as follows:



(a) Except for transfers of real property, a grant of authority contained in a filed statement of partnership authority is conclusive in favor of a person who gives value without notice to the contrary, so long as and to the extent that a limitation on that authority is not then contained in that or another filed statement. A filed cancellation of a limitation on authority revives the previous grant of authority.

(b) A grant of authority to transfer real property held in the true name of the partnership, contained in a copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property, is conclusive in favor of a person who gives value without having notice to the contrary, so long as and to the extent that a copy of a filed statement containing a limitation on that authority is not then of record in the office for recording transfers of that real property. The recording in the office for recording transfers of that real property of a copy of a filed statement canceling a limitation on authority revives the previous grant of authority.

(4) A person not a partner has notice of a limitation on the authority of a partner to transfer real property held in the true name of the partnership if a copy of a filed statement containing the limitation on authority is of record in the office for recording transfers of that real property.

(5) Except as otherwise provided in subsections (3) and (4) of this section and in sections 7-64-704 (3) and 7-64-805 (3), a person not a partner does not have notice of a limitation on the authority of a partner merely because the limitation is contained in a filed statement.

**Source:** L. 97: Entire article added, p. 876, § 1, effective January 1, 1998. L. 2000: (1)(a)(I), (3), (4)(b), and (5) amended, p. 955, § 30, effective July 1. L. 2002: IP(1) amended, p. 1826, § 54, effective July 1; IP(1) amended, p. 1690, § 52, effective October 1. L. 2003: (1)(a)(I), (1)(a)(II), (3), (4)(b), and (5) amended, p. 2252, § 153, effective July 1, 2004. L. 2004: Entire section amended, p. 1449, § 156, effective July 1.

**7-64-304. Statement of denial.** A partner or other person named as a partner in a filed statement of partnership authority may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of denial stating the true name of the partnership and the fact that is being denied, which may include denial of a person's authority or status as a partner. A statement of denial is a limitation on authority as provided in section 7-64-303 (3) and (4).

**Source:** L. 97: Entire article added, p. 877, § 1, effective January 1, 1998. L. 2000: Entire section amended, p. 955, § 31, effective July 1. L. 2002: Entire section amended, 1826, § 55, effective July 1; entire section amended, p. 1690, § 53, effective October 1. L. 2003: Entire section amended, p. 2253, § 154, effective July 1, 2004. L. 2004: Entire section amended, p. 1451, § 157, effective July 1. L. 2006: Entire section amended, p. 851, § 11, effective July 1.

**7-64-305. Partnership liable for partner's actionable conduct.** (1) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.

(2) If, in the course of the partnership's business or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss.

**Source:** L. 97: Entire article added, p. 877, § 1, effective January 1, 1998.

**7-64-306. Partner's liability.** (1) Except as otherwise provided in this section, all partners are liable jointly and severally for all partnership obligations unless otherwise agreed by the claimant or provided by law.

(2) A person admitted as a partner into an existing partnership is not personally liable for any partnership obligations incurred before the person's admission as a partner.

(3) Except as otherwise provided in a written partnership agreement, a person is not, solely by reason of being a partner, liable, directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for partnership obligations which are incurred, created, or assumed by the partnership while the partnership is a limited liability partnership.

(4) A partner in a limited liability partnership does not become liable, directly or indirectly, for partnership obligations incurred, created, or assumed while the partnership was a limited liability partnership merely because the partnership ceases to be a limited liability partnership.

**Source:** L. 97: Entire article added, p. 877, § 1, effective January 1, 1998.

**7-64-307. Actions by and against partnership and partners.** (1) A partnership may sue and be sued in the name of the partnership.

(2) An action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

(3) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from the assets of a partner liable as provided in section 7-64-306 for the partnership obligation unless there is also a judgment against the partner for such obligation.

(4) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless:

(a) The claim is for a partnership obligation for which the partner is liable as provided in section 7-64-306 and either:

(I) A judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(II) The partnership is a debtor in bankruptcy;

(III) The partner has agreed that the creditor need not exhaust partnership assets; or

(IV) A court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or

(b) Liability is imposed on the partner by law or contract independent of the existence of the partnership.

(5) This section applies to any partnership obligation resulting from a representation by a partner or purported partner under section 7-64-308.

**Source:** L. 97: Entire article added, p. 878, § 1, effective January 1, 1998. L. 2003: (1) amended, p. 2253, § 155, effective July 1, 2004. L. 2004: (1) amended, p. 1451, § 158, effective July 1.

**7-64-308. Liability of purported partner.** (1) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If a partnership obligation results, the purported partner is liable with respect to that obligation as if the purported partner were a partner in the partnership, and, if the partnership is a limited liability partnership, the purported partner's liability is subject to section 7-64-306 as if the purported partner were a partner in the limited liability



partnership. If no partnership obligation results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(2) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or partnership obligation results. If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(3) A person is not liable as a partner merely because the person is named by another in a statement of partnership authority.

(4) A person does not continue to be liable as a partner merely because of a failure to deliver to the secretary of state for filing a statement of dissociation or an amendment of a statement of partnership authority to indicate the partner's dissociation from the partnership.

(5) Except as otherwise provided in subsections (1) and (2) of this section, persons who are not partners as to each other are not liable as partners to other persons.

**Source: L. 97:** Entire article added, p. 879, § 1, effective January 1, 1998. **L. 2004:** (1) amended, p. 1451, § 159, effective July 1.

## PART 4

### RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

**7-64-401. Partner's rights and duties.** (1) Each partner is deemed to have an account that is:

(a) Credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and

(b) Charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(2) Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

(3) A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for the preservation of its business or property; provided, however, that such payments were made or liabilities incurred without violation of the partner's duties to the partnership or the other partners.

(4) A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.

(5) A payment or advance made by a partner which gives rise to a partnership obligation under subsection (3) or (4) of this section constitutes a loan to the partnership which accrues interest from the date of the payment or advance.

(6) Each partner has equal rights in the management and conduct of the partnership business.

(7) A partner may use or possess partnership property only on behalf of the partnership.

(8) A partner is not entitled to remuneration for services performed for the partnership except for reasonable compensation for services rendered in winding up the business of the partnership.

(9) A person may become a partner only with the consent of all of the partners.

(10) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.

(11) This section does not affect the obligations of a partnership to other persons under section 7-64-301.

**Source: L. 97:** Entire article added, p. 879, § 1, effective January 1, 1998.

**7-64-402. Distributions in kind.** A partner has no right to receive, and may not be required to accept, a distribution in kind.

**Source: L. 97:** Entire article added, p. 881, § 1, effective January 1, 1998.

**7-64-403. Partner's rights and duties with respect to information.** (1) A partnership shall keep its books and records, if any, at its chief executive office.

(2) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

(3) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:

(a) Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this article; and

(b) On demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

**Source: L. 97:** Entire article added, p. 881, § 1, effective January 1, 1998.

**7-64-404. General standards of partner's conduct.** (1) The duties a partner owes to the partnership and the other partners, in addition to those established elsewhere in this article, include the duties to:

(a) Account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct or winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) Refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership;

(c) Refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership; and

(d) Comply with the provisions of the partnership agreement.

(2) A partner owes to the partnership and the other partners a duty of care in the conduct and winding up of the partnership business which shall be limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(3) A partner shall discharge the partner's duties to the partnership and the other partners and exercise any rights consistently with the obligation of good faith and fair dealing.

(4) A partner does not violate a duty or obligation to the partnership or the other partners solely because the partner's conduct furthers the partner's own interest.

(5) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner may be exercised or performed in the same manner as those of a person who is not a partner, subject to other applicable law.



(6) If a partnership is formed, the duties a partner owes to the partnership and the other partners pertain to all transactions connected with the formation, conduct, or liquidation of the partnership.

(7) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

**Source: L. 97:** Entire article added, p. 881, § 1, effective January 1, 1998.

**7-64-405. Actions by partnership and partners.** (1) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

(2) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

(a) Enforce the partner's rights under the partnership agreement;

(b) Enforce the partner's rights under this article, including:

(I) The partner's rights under section 7-64-401, 7-64-403, or 7-64-404;

(II) The partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to section 7-64-701 or enforce any other right under part 6 or part 7 of this article; or

(III) The partner's right to compel a dissolution and winding up of the partnership business under section 7-64-801 or enforce any other right under part 8 of this article; or

(c) Enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(3) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

**Source: L. 97:** Entire article added, p. 882, § 1, effective January 1, 1998.

**7-64-406. Continuation of partnership beyond definite term or particular undertaking.**

(1) If a partnership for a definite term or particular undertaking is continued, without an express agreement, after the expiration of the term or completion of the undertaking, the rights and duties of the partners remain the same as they were at the expiration or completion, so far as is consistent with a partnership at will.

(2) If the partners, or those of them who habitually acted in the business during the term or undertaking, continue the business without any settlement or liquidation of the partnership, they are presumed to have agreed that the partnership will continue.

**Source: L. 97:** Entire article added, p. 883, § 1, effective January 1, 1998.

## PART 5

### TRANSFEREES AND CREDITORS OF PARTNER

**7-64-501. Partner not co-owner of partnership property.** A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily.

**Source: L. 97:** Entire article added, p. 883, § 1, effective January 1, 1998.

**7-64-502. Partner's transferable interest in partnership.** A partner's transferable interest is personal property. Only a partner's transferable interest may be transferred.

**Source: L. 97:** Entire article added, p. 883, § 1, effective January 1, 1998.

**7-64-503. Transfer of partner's transferable interest.** (1) A transfer, in whole or in part, of a partner's transferable interest in the partnership:

(a) Is permissible;

(b) Does not by itself cause the partner's dissociation or a dissolution and winding up of the partnership business; and

(c) Does not entitle the transferee to participate in the management or conduct of the partnership business, to require access to information concerning partnership transactions, or to inspect or copy the partnership books or records.

(2) A transferee of a partner's transferable interest in the partnership has a right:

(a) To receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

(b) To receive upon the dissolution and winding up of the partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor; and

(c) To seek under section 7-64-801 (1) (f) a judicial determination that it is equitable to wind up the partnership business.

(3) In a dissolution and winding up, a transferee is entitled to an account of partnership transactions only from the date of the latest account agreed to by all of the partners.

(4) Upon transfer, the transferor retains the rights and duties of a partner other than the interest transferred.

(5) A partnership need not give effect to a transferee's rights under this section until it has notice of the transfer. On request of the partnership or any partner, the transferee shall furnish reasonable proof of the transfer.

(6) A transfer of a partner's transferable interest in the partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer.

**Source: L. 97:** Entire article added, p. 883, § 1, effective January 1, 1998.

**7-64-504. Partner's transferable interest subject to charging order.** (1) On application by a judgment creditor of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require.

(2) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the transferable interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

(3) At any time before foreclosure, a transferable interest charged may be redeemed:

(a) By the judgment debtor;

(b) With property other than partnership property, by one or more of the other partners; or

(c) By the partnership with the consent of all of the partners whose transferable interests are not so charged or with such lesser consent as may be permitted by the partnership agreement.

(4) This article does not deprive a partner of a right under exemption laws with respect to the partner's transferable interest in the partnership.

(5) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.

**Source: L. 97:** Entire article added, p. 884, § 1, effective January 1, 1998.



## PART 6

## PARTNER'S DISSOCIATION

**7-64-601. Events causing partner's dissociation.** (1) A partner is dissociated from a partnership upon the occurrence of any of the following events:

(a) The partnership's having notice of the partner's express will to withdraw as a partner; except that, if the partnership has notice that the partner's will is to withdraw at a later date, then the dissociation shall occur at the later date stated by the partner;

(b) An event agreed to in the partnership agreement as causing the partner's dissociation;

(c) The partner's expulsion pursuant to the partnership agreement;

(d) The partner's expulsion by the unanimous vote of the other partners if:

(I) It is unlawful to carry on the partnership business with that partner;

(II) There has been a transfer of all or substantially all of that partner's transferable interest, other than a transfer for security purposes which has not been foreclosed, or a court order charging the partner's interest which has not been foreclosed;

(III) Within ninety days after the partnership notifies a corporate partner that it will be expelled because it has been dissolved or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the dissolution or no reinstatement of its right to conduct business; or

(IV) A partnership, limited partnership, limited partnership association, or limited liability company that is a partner has been dissolved and its business is being wound up;

(e) On application by the partnership or another partner, the partner's expulsion by judicial determination because:

(I) The partner engaged in wrongful conduct that adversely and materially affected the partnership business;

(II) The partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under section 7-64-404; or

(III) The partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner;

(f) The partner's:

(I) Becoming a debtor in bankruptcy;

(II) Executing an assignment for the benefit of creditors;

(III) Seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of that partner or of all or substantially all of that partner's property; or

(IV) Failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated;

(g) In the case of a partner who is an individual:

(I) The partner's death;

(II) The appointment of a guardian or general conservator for the partner; or

(III) A judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;

(h) In the case of a partner that is a trust or is acting as a partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor trustee;

(i) In the case of a partner that is an estate or is acting as a partner by virtue of being a personal representative of an estate, distribution of the estate's entire transferable interest in the partnership, but not merely by reason of the substitution of a successor personal representative; or

(j) Termination of a partner's existence.

**Source:** L. 97: Entire article added, p. 885, § 1, effective January 1, 1998. L. 2003: (1)(a) amended, p. 2253, § 156, effective July 1, 2004.

**7-64-602. Partner's power to dissociate - wrongful dissociation.** (1) A partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to section 7-64-601 (1) (a).

(2) A partner's dissociation is wrongful only if:

(a) It is in breach of an express provision of the partnership agreement; or  
(b) In the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

(I) The partner withdraws by express will, unless the withdrawal follows within ninety days after another partner's dissociation by death or otherwise under section 7-64-601 (1) (f) to (1) (j) or wrongful dissociation under this subsection (2);

(II) The partner is expelled by judicial determination under section 7-64-601 (1) (e);

(III) The partner is dissociated under section 7-64-601 (1) (f); or

(IV) In the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.

(3) A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the partner to the partnership or to the other partners.

**Source: L. 97:** Entire article added, p. 887, § 1, effective January 1, 1998.

**7-64-603. Effect of partner's dissociation.** (1) If a partner's dissociation results in a dissolution and winding up of the partnership business, part 8 of this article applies; otherwise, part 7 of this article applies.

(2) Upon a partner's dissociation:

(a) The partner's right to participate in the management and conduct of the partnership business terminates, except as otherwise provided in section 7-64-803;

(b) The partner's duties under section 7-64-404 (1) (c) terminate; and

(c) The partner's duties under section 7-64-404 (1) (a), (1) (b), and (2) continue only with regard to matters arising and events occurring before the partner's dissociation, unless the partner participates in winding up the partnership's business pursuant to section 7-64-803.

**Source: L. 97:** Entire article added, p. 887, § 1, effective January 1, 1998.

## PART 7

### PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP

**7-64-701. Purchase of dissociated partner's interest.** (1) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under section 7-64-801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (2) of this section.

(2) The buyout price of a dissociated partner's interest is an amount equal to the value of the partner's interest in the partnership. Interest shall be paid from the date of dissociation to the date of payment.

(3) Damages for wrongful dissociation under section 7-64-602 (2), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, shall be offset against the buyout price. Interest shall be paid from the date the amount owed becomes due to the date of payment.

(4) A partnership shall indemnify a dissociated partner whose interest is being purchased against all partnership obligations, whether incurred before or after the dissociation, except partnership obligations incurred by an act of the dissociated partner under section 7-64-702.



(5) If no agreement for the purchase of a dissociated partner's interest is reached within one hundred twenty days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (3) of this section.

(6) If a deferred payment is authorized under subsection (8) of this section, the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (3) of this section, stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(7) The payment or tender required by subsection (5) or (6) of this section shall be accompanied by the following:

- (a) A written statement of partnership assets and liabilities as of the date of dissociation;
  - (b) The latest available partnership balance sheet and income statement, if any;
  - (c) A written explanation of how the estimated amount of the payment was calculated;
- and

(d) A written statement that the payment is in full satisfaction of the obligation to purchase unless, within one hundred twenty days after receipt of the written statement, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (3) of this section, or other terms of the obligation to purchase.

(8) Payment of any portion of the buyout price to a partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking may be deferred until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment shall be adequately secured and bear interest.

(9) A dissociated partner may maintain an action against the partnership, pursuant to section 7-64-405 (2) (b) (II), to determine the buyout price of that partner's interest, any offsets under subsection (3) of this section, or other terms of the obligation to purchase. The action shall be commenced within one hundred twenty days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (3) of this section, and accrued interest and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (8) of this section, the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorneys' fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with subsection (7) of this section.

**Source:** L. 97: Entire article added, p. 888, § 1, effective January 1, 1998.

**7-64-702. Dissociated partner's power to bind and liability to partnership.**

(1) For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including a surviving partnership under part 2 of article 90 of this title, is bound by an act of the dissociated partner that would have bound the partnership under section 7-64-301 before dissociation only if at the time of entering into the transaction the other party:

- (a) Reasonably believed that the dissociated partner was then a partner; and
  - (b) Did not have notice of the partner's dissociation.
- (2) A dissociated partner is liable to the partnership for any damage caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation for which the partnership is liable under subsection (1) of this section.

**Source: L. 97:** Entire article added, p. 889, § 1, effective January 1, 1998. **L. 2003:** IP(1) amended, p. 2253, § 157, effective July 1, 2004.

**7-64-703. Dissociated partner's liability to other persons.** (1) A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation. A dissociated partner is not liable for a partnership obligation incurred after dissociation, except as otherwise provided in subsection (2) of this section.

(2) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership, or a surviving partnership under part 2 of article 90 of this title, within two years after the partner's dissociation, only if the partnership obligation arising from such transaction is one for which the partner would have been liable under section 7-64-306 had such partner not dissociated and, at the time of entering into the transaction, the other party:

(a) Substantially relied on a reasonable belief that the dissociated partner was then a partner; and

(b) Did not have notice of the partner's dissociation.

(3) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.

(4) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

**Source: L. 97:** Entire article added, p. 890, § 1, effective January 1, 1998. **L. 2003:** IP(2) amended, p. 2253, § 158, effective July 1, 2004.

**7-64-704. Statement of dissociation.** (1) A dissociated partner or the partnership may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of dissociation stating the true name of the partnership and that the partner is dissociated from the partnership.

(2) A statement of dissociation is a limitation on the authority of a dissociated partner for purposes of section 7-64-303 (3) and (4).

(3) For purposes of sections 7-64-702 (1) (b) and 7-64-703 (2) (b), a person other than the partnership or one of its partners has notice of the dissociation ninety days after the statement of dissociation is filed in the records of the secretary of state.

**Source: L. 97:** Entire article added, p. 890, § 1, effective January 1, 1998. **L. 2000:** (1) amended, p. 955, § 32, effective July 1. **L. 2002:** (1) amended, p. 1826, § 56, effective July 1; (1) amended, p. 1691, § 54, effective October 1. **L. 2003:** (1) and (3) amended, p. 2254, § 159, effective July 1, 2004. **L. 2004:** (1) and (2) amended, p. 1451, § 160, effective July 1.

**7-64-705. Continued use of partnership name.** Continued use of a partnership name, or a dissociated partner's name as part thereof, by partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership continuing the business.

**Source: L. 97:** Entire article added, p. 890, § 1, effective January 1, 1998.

## PART 8

### WINDING UP PARTNERSHIP BUSINESS

**7-64-801. Events causing dissolution and winding up of partnership business.**

(1) A partnership is dissolved, and its business shall be wound up, only upon the occurrence of any of the following events:



(a) In a partnership at will, the partnership's having notice from a partner, other than a partner who is dissociated under section 7-64-601 (1) (b) to (1) (j), of that partner's express will to withdraw as a partner; except that, if the partnership has notice that the partner's will is to withdraw at a later date, then the dissolution shall occur at the later date stated by the partner;

(b) In a partnership for a definite term or particular undertaking:

(I) Within ninety days after a partner's wrongful dissociation under section 7-64-602 (2) or a partner's dissociation by death or otherwise under section 7-64-601 (1) (f) to (1) (j), the express will of at least half of the remaining partners to wind up the partnership business, for which purpose a partner's rightful dissociation, pursuant to section 7-64-602 (2) (b) (I), constitutes the expression of that partner's will;

(II) The express will of all of the partners to wind up the partnership business; or

(III) The expiration of the term or the completion of the undertaking;

(c) An event agreed to in the partnership agreement resulting in the winding up of the partnership business;

(d) An event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but a cure of illegality within ninety days after the partnership has notice of the event is effective retroactively to the date of the event for purposes of this section;

(e) On application by a partner, a judicial determination that:

(I) The economic purpose of the partnership is likely to be unreasonably frustrated;

(II) Another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner;

(III) It is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or

(IV) The partnership is not reasonably likely to pay liabilities against which it indemnifies the dissociated partner;

(f) On application by a transferee of a partner's transferable interest, a judicial determination that it is equitable to wind up the partnership business:

(I) After the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or

(II) At any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer.

**Source:** L. 97: Entire article added, p. 891, § 1, effective January 1, 1998. L. 2003: (1)(a) amended, p. 2254, § 160, effective July 1, 2004.

**7-64-802. Partnership continues after dissolution.** (1) Subject to subsection (2) of this section, a partnership continues after dissolution only for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed.

(2) At any time after the dissolution of a partnership and before the winding up of its business is completed, all of the partners, including any dissociating partner other than a wrongfully dissociating partner, may waive the right to have the partnership's business wound up and the partnership terminated. In that event:

(a) The partnership resumes carrying on its business as if dissolution had never occurred, and any debt, obligation, or liability incurred by the partnership or a partner after the dissolution and before the waiver is determined as if dissolution had never occurred; and

(b) The rights of a third party accruing under section 7-64-804 (1) or arising out of conduct in reliance on the dissolution before the third party has notice of the waiver may not be adversely affected.

**Source:** L. 97: Entire article added, p. 892, § 1, effective January 1, 1998.

**7-64-803. Right to wind up partnership business.** (1) After dissolution, a partner who has not wrongfully dissociated may participate in winding up the partnership's

business, but on application of any partner, partner's legal representative, or transferee, the district court, for good cause shown, may order judicial supervision of the winding up.

(2) The legal representative of the last surviving partner may wind up a partnership's business.

(3) A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle disputes, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge or provide for the partnership obligations, distribute the assets of the partnership pursuant to section 7-64-807, and perform other necessary acts.

**Source: L. 97:** Entire article added, p. 892, § 1, effective January 1, 1998.

**7-64-804. Partner's power to bind partnership after dissolution.** (1) Subject to section 7-64-805, a partnership is bound by a partner's act after dissolution that:

- (a) Is appropriate for winding up the partnership business; or
- (b) Would have bound the partnership under section 7-64-301 before dissolution, if the other party to the transaction did not have notice of the dissolution.

**Source: L. 97:** Entire article added, p. 893, § 1, effective January 1, 1998.

**7-64-805. Statement of dissolution.** (1) After dissolution, a partner who has not wrongfully dissociated may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of dissolution stating the true name of the partnership, the principal office address of the principal office of the partnership, and that the partnership has dissolved and is winding up its business.

(2) A statement of dissolution cancels a filed statement of partnership authority for purposes of section 7-64-303 (3) and is a limitation on authority for purposes of section 7-64-303 (4).

(3) For purposes of sections 7-64-301 and 7-64-804, a person not a partner has notice of the dissolution and the limitation on the partners' authority as a result of the statement of dissolution ninety days after it is filed in the records of the secretary of state.

(4) Notwithstanding dissolution or the filing or recording of a statement of dissolution, a partnership may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, and, if appropriate, record a statement of partnership authority that will operate with respect to a person not a partner as provided in section 7-64-303 (3) and (4) in any transaction, whether or not the transaction is appropriate for winding up the partnership business.

**Source: L. 97:** Entire article added, p. 893, § 1, effective January 1, 1998. **L. 2000:** (1) amended, p. 956, § 33, effective July 1. **L. 2002:** (1) and (4) amended, p. 1826, § 57, effective July 1; (1) and (4) amended, p. 1691, § 55, effective October 1. **L. 2003:** (1) and (3) amended, p. 2254, § 161, effective July 1, 2004. **L. 2004:** (1), (2), and (4) amended, p. 1452, § 161, effective July 1. **L. 2006:** (2) amended, p. 851, § 12, effective July 1.

**7-64-806. Partner's liability to other partners after dissolution.** (1) Except as otherwise provided in subsection (2) of this section or in section 7-64-306, after dissolution a partner is liable to the other partners for the partner's share of any partnership obligation incurred under section 7-64-804.

(2) A partner who, with knowledge of the dissolution, incurs a partnership obligation under section 7-64-804 (1) (b) by an act that is not appropriate for winding up the partnership business is liable to the partnership for any damage caused to the partnership arising from the obligation.

**Source: L. 97:** Entire article added, p. 893, § 1, effective January 1, 1998.



**7-64-807. Settlement of accounts and contributions among partners.** (1) In winding up a partnership's business, the assets of the partnership, including the contributions of the partners required by this section, shall be applied to discharge or provide for partnership obligations to creditors, including, to the extent permitted by law, partners who are creditors. Any surplus shall be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions under subsection (2) of this section.

(2) Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, the profits and losses that result from the liquidation of the partnership assets shall be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account.

(3) If a partner fails to contribute, all of the other partners shall contribute, in the proportions in which those partners share partnership losses, the additional amount necessary to discharge or provide for the partnership obligations.

(4) A partner or partner's legal representative may recover from the other partners any contributions the partner makes to the extent the amount contributed exceeds that partner's share of the partnership obligations.

(5) After the settlement of accounts, each partner shall contribute, in the proportion in which the partner shares partnership losses, the amount necessary to discharge or provide for partnership obligations that were not known at the time of the settlement.

(6) The estate of a deceased partner is liable for the partner's obligation to contribute to the partnership.

(7) An assignee for the benefit of creditors of a partnership or a partner, or a person appointed by a court to represent creditors of a partnership or a partner, may enforce a partner's obligation to contribute to the partnership.

(8) Notwithstanding any other subsection of this section, no partner shall be obligated to contribute under this section with respect to any amounts that are attributable to a partnership obligation incurred while the partnership is a limited liability partnership.

**Source: L. 97:** Entire article added, p. 894, § 1, effective January 1, 1998.

## PART 9

### CONVERSIONS AND MERGERS

#### **7-64-901 to 7-64-909. (Repealed)**

**Editor's note:** (1) This article was added in 1997, and this part 9 was subsequently repealed in 2003, effective July 1, 2004. For amendments to this part 9 prior to its repeal in 2004, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

(2) Section 7-64-909 provided for the repeal of this part 9, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

## PART 10

### LIMITED LIABILITY PARTNERSHIPS; LIMITED LIABILITY LIMITED PARTNERSHIPS; FOREIGN LIMITED LIABILITY PARTNERSHIPS; FOREIGN LIMITED LIABILITY LIMITED PARTNERSHIPS

#### **7-64-1001. Definitions.** As used in this part 10:

- (1) "Partner" includes both a general partner and a limited partner.
- (2) "Partnership agreement" means the partnership agreement in a partnership or a limited partnership.

**Source:** L. 97: Entire article added, p. 900, § 1, effective January 1, 1998.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

**7-64-1002. Registration.** (1) A domestic partnership governed by this article may register as a limited liability partnership, and a domestic limited partnership that has made the election provided for in section 7-61-129 or section 7-62-1104 may register as a limited liability limited partnership, by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of registration. If a certificate of limited partnership is being filed, the statement of registration may be included in the certificate of limited partnership.

(2) The statement of registration shall be approved in the manner provided in the partnership agreement or, if not so provided, shall be approved by all of the general partners.

(3) The statement of registration shall state:

(a) The name that has been the true name of the domestic partnership or of the domestic limited partnership and the name that will be the domestic entity name of the domestic limited liability partnership or domestic limited liability limited partnership, which domestic entity name shall comply with part 6 of article 90 of this title;

(b) The principal office address of its principal office; and

(c) The registered agent name and registered agent address of its registered agent.

(d) (Deleted by amendment, L. 2004, p. 1452, § 162, effective July 1, 2004.)

(4) Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign limited liability partnerships and foreign limited liability limited partnerships.

(5) A domestic limited liability partnership or a domestic limited liability limited partnership may cease to be a domestic limited liability partnership or a domestic limited liability limited partnership by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of withdrawal of registration. The statement of withdrawal of registration shall be approved in the manner provided in the partnership agreement or, if not so provided, shall be approved by all of the general partners. The withdrawal of registration shall be effective upon the effective date of the statement of withdrawal of registration.

(6) A domestic partnership or a domestic limited partnership that has been registered under this part 10 is for all purposes the same entity that existed before it registered. A domestic partnership or a domestic limited partnership that withdraws its registration as a domestic limited liability partnership or a domestic limited liability limited partnership is for all purposes the same entity that existed before it withdrew its registration.

(7) Except as to persons who were partners at the time of filing, the filing of a statement of registration shall be conclusive that all conditions precedent to registration under this section have been met.

**Source:** L. 97: Entire article added, p. 900, § 1, effective January 1, 1998. L. 2000: (1)(a) and (2)(a) amended, p. 957, § 37, effective July 1. L. 2002: IP(1), IP(2), and (4) amended, p. 1827, § 60, effective July 1; IP(1), IP(2), and (4) amended, p. 1691, § 58, effective October 1. L. 2003: Entire section amended, p. 2255, § 162, effective July 1, 2004. L. 2004: (1) and (3) amended, p. 1452, § 162, effective July 1.

#### **7-64-1003. Name. (Repealed)**

**Source:** L. 97: Entire article added, p. 902, § 1, effective January 1, 1998. L. 2000: Entire section repealed, p. 990, § 109, effective July 1.

**7-64-1004. Limitations on distributions to general partner.** (1) A limited liability partnership or limited liability limited partnership shall not make a distribution to a general partner to the extent that at the time of the distribution, after giving effect to the distribution,



all liabilities of the limited liability partnership or limited liability limited partnership, other than liabilities to general partners on account of their partnership interests and liabilities for which the recourse of creditors is limited to specified property of the partnership, exceed the fair value of the assets of the partnership; except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the partnership only to the extent that the fair value of that property exceeds that liability. For purposes of this section and sections 7-62-607 and 7-62-608, the term "distribution" shall not include payments to the extent that the payments do not exceed amounts equal to or constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

(2) A general partner in a limited liability partnership or limited liability limited partnership who receives a distribution in violation of subsection (1) of this section, and who knew at the time of the distribution that the distribution violated subsection (1) of this section, shall be liable to the partnership for the amount of the distribution. A general partner in a limited liability partnership or limited liability limited partnership who receives a distribution in violation of subsection (1) of this section, and who did not know at the time of the distribution that the distribution violated subsection (1) of this section, shall not be liable for the amount of the distribution. Subject to subsection (3) of this section, this subsection (2) shall not affect any obligation or liability of a general partner under an agreement or other applicable law for the amount of a distribution.

(3) Unless otherwise agreed, a general partner in a limited liability partnership or limited liability limited partnership who receives a distribution from the partnership shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution unless an action to recover the distribution from such partner is commenced prior to the expiration of the said three-year period and an adjudication of liability against such partner is made in the said action.

**Source:** L. 97: Entire article added, p. 904, § 1, effective January 1, 1998. L. 2006: Entire section amended, p. 851, § 13, effective July 1.

#### **7-64-1005. Liability of general partner upon return of contribution. (Repealed)**

**Source:** L. 97: Entire article added, p. 904, § 1, effective January 1, 1998. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

#### **7-64-1006. Governing law - repeal. (Repealed)**

**Source:** L. 97: Entire article added, p. 904, § 1, effective January 1, 1998. L. 2003: (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-64-1007. Periodic reports.** Part 5 of article 90 of this title, providing for periodic reports from reporting entities, applies to domestic limited liability partnerships and domestic limited liability limited partnerships and applies to foreign limited liability partnerships and foreign limited liability limited partnerships that are authorized to transact business or conduct activities in this state pursuant to part 8 of article 90 of this title.

**Source:** L. 97: Entire article added, p. 905, § 1, effective January 1, 1998. L. 2000: Entire section repealed, p. 990, § 109, effective July 1. L. 2003: Entire section RC&RE, p. 2257, § 163, effective July 1, 2004. L. 2004: Entire section amended, p. 1453, § 163, effective July 1. L. 2010: Entire section amended, (HB 10-1403), ch. 404, p. 1994, § 7, effective August 11.

**7-64-1008. Failure to comply with part 5 of article 90 of this title. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 905, § 1, effective January 1, 1998. **L. 2000:** (1), (3)(b), and (3)(d) amended, p. 957, § 38, effective July 1. **L. 2003:** Entire section amended, p. 2257, § 164, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1453, § 164, effective July 1. **L. 2005:** Entire section repealed, p. 1218, § 26, effective October 1.

**7-64-1008.5. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, shall apply to domestic limited liability partnerships and domestic limited liability limited partnerships and to foreign limited liability partnerships and foreign limited liability limited partnerships that are authorized to transact business or conduct activities in this state pursuant to part 8 of article 90 of this title.

**Source:** **L. 2004:** Entire section added, p. 1454, § 165, effective July 1.

**7-64-1009. Application of corporation case law to set aside limited liability.** (1) In a case in which a party seeks to hold the general partners of a limited liability partnership or limited liability limited partnership personally responsible for the alleged improper actions of the limited liability partnership or limited liability limited partnership, the court shall apply the case law that interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

(2) For purposes of this section, the failure of a limited liability partnership or limited liability limited partnership to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the partners for debts, obligations, or liabilities of the limited liability partnership or limited liability limited partnership.

**Source:** **L. 97:** Entire article added, p. 906, § 1, effective January 1, 1998. **L. 2003:** (1) amended, p. 2258, § 165, effective July 1, 2004.

**7-64-1010. Scope of part - choice of law - application to professions and occupations.** (1) A limited liability partnership or limited liability limited partnership may conduct its business, carry on its operations, and exercise the powers granted by this part 10 within and without the state.

(2) (a) It is the intent of the general assembly that the legal existence of limited liability partnerships and limited liability limited partnerships be recognized outside the boundaries of this state and that the law of this state governing the limited liability partnership or limited liability limited partnership transacting business outside this state be granted the protection of full faith and credit under section 1 of article IV of the constitution of the United States.

(b) It is the intent of the general assembly that the internal affairs of a limited liability partnership or limited liability limited partnership formed in this state be subject to and governed by the law of this state including the provisions governing liability of general partners for debts, obligations, and liabilities chargeable to partnerships, limited liability partnerships, and limited liability limited partnerships.

(3) Nothing in this part 10 shall be construed to permit a limited liability partnership, foreign limited liability partnership, limited liability limited partnership, or foreign limited liability limited partnership to engage in a profession or occupation as described in title 12, C.R.S., for which there is a specific statutory provision applicable to the practice of such profession or occupation by a corporation or professional corporation in this state unless authorized under applicable provisions of title 12, C.R.S.

**Source:** **L. 97:** Entire article added, p. 906, § 1, effective January 1, 1998. **L. 2003:** (2) amended, p. 2258, § 166, effective July 1, 2004.



## PART 11

## FILING DOCUMENTS

**Editor's note:** This article was added in 1997, and this part 11 was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 11 prior to 2004, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**7-64-1101. Filing requirements.** Part 3 of article 90 of this title, providing for the filing of documents, applies to any document filed or to be filed by the secretary of state pursuant to this article.

**Source: L. 2003:** Entire part R&RE, p. 2258, § 167, effective July 1, 2004.

**7-64-1102. Registered agent - service of process. (Repealed)**

**Source: L. 2003:** Entire part R&RE, p. 2259, § 167, effective July 1, 2004. **L. 2004:** Entire section repealed, p. 1454, § 166, effective July 1.

## PART 12

## MISCELLANEOUS PROVISIONS

**7-64-1201. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source: L. 97:** Entire article added, p. 914, § 1, effective January 1, 1998.

**7-64-1202. Title.** This article may be cited as the "Colorado Uniform Partnership Act (1997)".

**Source: L. 97:** Entire article added, p. 914, § 1, effective January 1, 1998.

**7-64-1203. Severability clause.** If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

**Source: L. 97:** Entire article added, p. 914, § 1, effective January 1, 1998.

**7-64-1204. Effective date.** This article takes effect January 1, 1998.

**Source: L. 97:** Entire article added, p. 915, § 1, effective January 1, 1998.

**7-64-1205. Applicability.** (1) This article governs only a partnership formed:

(a) After January 1, 1998, unless that partnership is continuing the business of a partnership that has dissolved under section 7-60-141; and

(b) Before January 1, 1998, that elects, as provided by subsection (2) of this section, to be governed by this article.

(2) A partnership voluntarily may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be governed by this article. The provisions of this article relating to the liability of the partnership's partners to third parties apply to limit those partners' liability to a third party who had done business with

the partnership within one year preceding the partnership's election to be governed by this article, only if the third party has notice of the partnership's election to be governed by this article.

**Source: L. 97:** Entire article added, p. 915, § 1, effective January 1, 1998.

ANNOTATION

**A dispute involving a partnership formed before 1998** is governed by the Uniform Partnership Law, article 60 of title 7. *Adams v. Land Servs., Inc.*, 194 P.3d 429 (Colo. App. 2008).

**7-64-1206. Savings clause.** This article does not affect an action or proceeding commenced or right accrued before this article takes effect.

**Source: L. 97:** Entire article added, p. 915, § 1, effective January 1, 1998.

TRADEMARKS, BUSINESS AND FARM NAMES

ARTICLE 70

Trademarks

**Editor's note:** This article was numbered as article 1 of chapter 141, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 2006, effective May 29, 2007, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2007, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

**Law reviews:** For article, "Trademark Basics for the Young Lawyer", see 18 Colo. Law. 459 (1989); for article, "Representing the Franchise", see 18 Colo. Law. 2105 (1989); for a discussion of recent Tenth Circuit decisions dealing with trademarks, see 66 Den. U. L. Rev. 709 (1989); for article, "Distinguishing Between an Employee's General Knowledge and Trade Secrets", see 23 Colo. Law. 2123 (1994); for article, "The Revision of the Colorado Trademark Registration Statute", see 36 Colo. Law. 39 (January 2007).

7-70-101.	Definitions.	7-70-106.	Statement of transfer of trademark registration.
7-70-102.	Statement of trademark registration.	7-70-107.	Judicial cancellation of statement of trademark registration.
7-70-103.	Effect of filing statement of trademark registration.	7-70-108.	Service of process on a registrant.
7-70-104.	Duration and renewal.	7-70-109.	Statements of trademark registration filed prior to May 29, 2007.
7-70-105.	Statement of withdrawal of trademark registration.		

**7-70-101. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Class" means one of the classes listed in the "International Classification of Goods and Services for the Purposes of the Registration of Marks", published by the world intellectual property organization, as adopted and codified by the United States patent and trademark office of the United States department of commerce at 37 CFR 6.1, as amended from time to time, or in any successor classification list as determined by the secretary of state.
- (2) "Drawing" means a pictorial representation of a special form trademark.
- (3) "Registrant" means:
  - (a) A person who is identified as the registrant in the statement of trademark registration filed under this article; or



(b) Following the filing of a statement of transfer of trademark registration, a person who is identified as the transferee in the statement of transfer of trademark registration.

(4) "Special form trademark" means any trademark that is not a standard character trademark, such as a trademark made up of, or containing, in whole or in part, one or more special characteristics such as a logo, picture, design element, color, or style of lettering.

(5) "Specimen" means a sample of use of the trademark, on or in a medium acceptable to the secretary of state. A specimen for a trademark for goods must show the trademark as used on or in connection with the goods in commerce in this state, such as a label, tag, or container for the goods; a display associated with the goods; or an imprint on the goods, such as a stamping. A specimen for a trademark for services must show the trademark as used in connection with the sale or advertising of the services in commerce in this state.

(6) "Standard character trademark" means a trademark:

(a) In which the trademark is expressed only in English letters, roman or arabic numerals, or punctuation marks as may be acceptable to the secretary of state; and

(b) In which no stylization of lettering or numbers is claimed.

(7) "Trademark" means a word, name, symbol, device, or any combination thereof, including packaging, configuration of goods, or other trade dress, used by a person to identify and distinguish the person's goods or services from those manufactured, sold, or rendered by others and to indicate the source of the goods or services, even if that source is unknown.

(8) "Transfer" includes an assignment and a transfer by operation of law, but does not include a security interest or a license.

(9) "Use in commerce" means a bona fide use of a trademark in the ordinary course of trade, and not made merely to reserve a right in a trademark.

**Source:** L. 2006: Entire article R&RE, p. 109, § 1, effective May 29, 2007.

**Editor's note:** This section is similar to former § 7-70-101 as it existed prior to 2006.

**Cross references:** (1) For definitions applicable to this article, see § 7-90-102.

(2) For the unlawful use of trademarks or trade names on fuel products, see § 8-20-220.

## ANNOTATION

**Law reviews.** For article, "The New Colorado Trade-Mark Law — Its Practical Effect", see 28 Dicta 183 (1951).

**7-70-102. Statement of trademark registration.** (1) A person who adopts and makes use in commerce of a trademark in this state may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of trademark registration to which a specimen and, if the trademark is a special form trademark, a drawing is attached.

(2) A statement of trademark registration shall state:

(a) The true name of the registrant or, in the case of a general partnership that is not a limited liability partnership, the true name of at least one general partner of the general partnership;

(b) If the registrant is an entity, the form of entity and the jurisdiction under the law of which the entity is formed;

(c) If the registrant is an individual, the individual's principal address;

(d) If the registrant is an entity other than a reporting entity, the entity's principal address;

(e) If the registrant is neither an individual resident of this state nor an entity that is required to maintain a registered agent pursuant to part 7 of article 90 of this title, either of the following:

(I) If the registrant desires to appoint a registered agent pursuant to section 7-70-108, the registered agent name, the registered agent address, and a statement that the person appointed as the registered agent for the registrant has consented to being so appointed; or

(II) The mailing address to which service of process in any proceeding based on a cause of action with respect to the statement of trademark registration may be mailed pursuant to section 7-70-108;

(f) If the trademark is a standard character trademark, the characters constituting the trademark;

(g) If the trademark is a special form trademark, a description of the attached drawing;

(h) A detailed description of the goods or services in connection with which the trademark is used and the class into which such goods or services fall;

(i) A description of the attached specimen sufficient to identify the nature of the specimen;

(j) The date of first use in commerce of the trademark in this state by the registrant or the registrant's predecessor in interest; and

(k) That the registrant is currently using the trademark in commerce in this state and that the registrant believes, in good faith, that:

(I) The registrant has the right to use the trademark in connection with the goods or services listed pursuant to paragraph (h) of this subsection (2); and

(II) The registrant's use of the trademark does not infringe the rights of any other person in that trademark.

(3) A statement of trademark registration shall not state a delayed effective date.

**Source:** L. 2006: Entire article R&RE, p. 110, § 1, effective May 29, 2007. L. 2007: (2)(c) and (2)(d) amended, p. 225, § 12, effective May 29. L. 2009: (2)(a) amended, (HB 09-1248), ch. 252, p. 1131, § 9, effective May 14.

**Editor's note:** This section is similar to former § 7-70-102 as it existed prior to 2006.

**7-70-103. Effect of filing statement of trademark registration.** (1) A statement of trademark registration filed by the secretary of state shall be notice of the claims made in the statement of trademark registration from and after the date and time the statement of trademark registration is filed.

(2) Except as provided in subsection (1) of this section, filing of a statement of trademark registration does not confer upon the registrant any substantive right or create any remedy not otherwise available. All substantive rights and remedies created by the laws of this state with respect to trademarks are created exclusively by common law.

(3) Except as provided in subsection (1) of this section, filing of a statement of trademark registration does not enlarge or otherwise affect rights with respect to the trademark that are created by the common law of this state or any other laws. The lack of filing of a statement of trademark registration does not impair or otherwise affect such rights.

(4) This article does not confer the right to use the phrase "registered in the United States patent and trademark office", the abbreviation "reg. U.S. pat. & tm. off.", or any other abbreviation of such phrase or variant thereof, or the letter R enclosed within a circle, or ® in connection with a trademark with respect to which a statement of trademark registration has been filed by the secretary of state.

**Source:** L. 2006: Entire article R&RE, p. 112, § 1, effective May 29, 2007.

**7-70-104. Duration and renewal.** (1) Unless withdrawn in accordance with section 7-70-105, a statement of trademark registration shall be effective for a term of five years from the date on which the statement of trademark registration is filed by the secretary of state. A statement of trademark registration, with respect to which a statement of withdrawal of trademark registration has been filed by the secretary of state or with respect to which a statement of renewal of trademark registration has not been filed by the secretary of state within the time provided in this section, does not provide notice under section 7-70-103 (1).



(2) The effectiveness of a statement of trademark registration may be renewed by the registrant for successive terms of five years by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of renewal of trademark registration:

(a) No earlier than one hundred eighty days before the expiration of the current term of effectiveness of the statement of trademark registration; and

(b) No later than the date of expiration of the current term of effectiveness of the statement of trademark registration.

(3) The statement of renewal of trademark registration shall:

(a) State the true name of the registrant or, in the case of a general partnership that is not a limited liability partnership, the true name of at least one general partner of the general partnership;

(b) Identify the statement of trademark registration in a manner satisfactory to the secretary of state;

(c) If the registrant is an individual, state the individual's principal address;

(c.5) If the registrant is an entity other than a reporting entity, state the entity's principal address;

(c.7) If the registrant is neither an individual resident of this state nor an entity that is required to maintain a registered agent pursuant to part 7 of article 90 of this title, state either of the following:

(I) If the registrant desires to appoint a registered agent pursuant to section 7-70-108, the registered agent name, the registered agent address, and that the person appointed as the registered agent for the registrant has consented to being so appointed; or

(II) The mailing address to which service of process in any proceeding based on a cause of action with respect to the statement of trademark registration may be mailed pursuant to section 7-70-108;

(d) Identify any goods or services described in the statement of trademark registration, or in any previously filed statement related to the statement of trademark registration, with respect to which the trademark is no longer used;

(e) State that the registrant is currently using the trademark in commerce in this state in connection with the goods or services described in the statement of trademark registration, excluding any goods or services identified pursuant to paragraph (d) of this subsection (3);

(f) State that the registrant believes, in good faith, that:

(I) The registrant has the right to use the trademark in commerce in this state in connection with the goods or services, excluding any goods or services identified in paragraph (d) of this subsection (3); and

(II) The registrant's use of the trademark does not infringe the rights of any other person in that trademark;

(g) Have a current specimen attached; and

(h) Contain such other information as the secretary of state may require.

(4) Repealed.

(5) A statement of renewal of trademark registration shall not state a delayed effective date.

**Source:** L. 2006: Entire article R&RE, p. 112, § 1, effective May 29, 2007. L. 2009: (3)(a) and (3)(c) amended and (3)(c.5) and (3)(c.7) added, (HB 09-1248), ch. 252, p. 1131, § 10, effective May 14. L. 2010: (4) repealed, (HB 10-1403), ch. 404, p. 1995, § 10, effective August 11.

**Editor's note:** This section is similar to former § 7-70-104 as it existed prior to 2007.

**7-70-105. Statement of withdrawal of trademark registration.** (1) A statement of trademark registration may be withdrawn by the registrant by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of withdrawal of trademark registration.

(2) A statement of withdrawal of trademark registration shall:

(a) State the true name of the registrant;

- (b) Identify the statement of trademark registration in a manner satisfactory to the secretary of state;
- (c) State that the statement of trademark registration is withdrawn; and
- (d) Include such other information as the secretary of state may require.

**Source: L. 2006:** Entire article R&RE, p. 114, § 1, effective May 29, 2007.

**7-70-106. Statement of transfer of trademark registration.** (1) Following the transfer of a trademark to another person by the registrant or by operation of law, the registrant or the transferee may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of transfer of trademark registration.

- (2) A statement of transfer of trademark registration shall:
  - (a) State the true name of the registrant prior to the transfer;
  - (b) State the true name of the transferee;
  - (c) If the transferee is an entity, state the form of entity and the jurisdiction under the law of which it is formed;
  - (d) If the transferee is an individual, state the individual's principal address;
  - (e) If the transferee is an entity other than a reporting entity, state the entity's principal address;
  - (f) If the transferee is neither an individual resident of this state nor an entity that is required to maintain a registered agent pursuant to part 7 of article 90 of this title, state either:

- (I) If the transferee desires to appoint a registered agent pursuant to section 7-70-108, the registered agent name, the registered agent address, and a statement that the person appointed as the registered agent for the registrant has consented to being so appointed; or

- (II) The mailing address to which service of process in any action relating to the statement of trademark registration may be mailed pursuant to section 7-70-108;

- (g) Identify the statement of trademark registration in a manner satisfactory to the secretary of state;
  - (h) State that the registrant has transferred to the transferee, or that the transferee has by operation of law succeeded to, the rights to the trademark, including all associated goodwill, to which the statement of trademark registration pertains; and
  - (i) Include such other information as the secretary of state may require.
- (3) The filing of, or the failure to file, a statement of transfer of trademark registration shall not affect the validity or effectiveness of the underlying transfer of the trademark.

**Source: L. 2006:** Entire article R&RE, p. 114, § 1, effective May 29, 2007. **L. 2007:** (2)(d) and (2)(e) amended, p. 225, § 13, effective May 29.

**7-70-107. Judicial cancellation of statement of trademark registration.** (1) A statement of trademark registration or any document affecting a statement of trademark registration filed by the secretary of state may be cancelled in a proceeding in a court of competent jurisdiction if it is established:

- (a) By a person that a statement of trademark registration, or any document affecting a statement of trademark registration, filed by the secretary of state in the name of the person, was not duly authorized by the person or was filed without the person's knowledge or consent; or

- (b) By a person who is harmed by a statement of trademark registration, or any document affecting a statement of trademark registration, that it was delivered for filing by a person other than the person who is harmed and contains a material misstatement, was delivered for filing in bad faith, or is fraudulent.

- (2) (a) If it is determined in the proceeding that one or more grounds for cancellation described in subsection (1) of this section exist, an order shall be issued cancelling the statement of trademark registration or any other document filed by the secretary of state affecting the statement of trademark registration. Upon issuance of such order, the person



requesting cancellation may deliver a certified copy of the order to the secretary of state for filing pursuant to part 3 of article 90 of this title.

(b) Upon good cause shown, it may also be ordered that after cancellation, the filed statement of trademark registration or the filed document affecting the statement of trademark registration be removed from the publicly accessible records of the secretary of state. In such a case the secretary of state may retain the original or a copy of the filed statement of trademark registration or the filed document affecting the statement of trademark registration, but such original or copy shall not be opened for inspection, and copies or printouts of the filed statement of trademark registration or the filed document affecting the statement of trademark registration shall not be furnished, except upon application to the secretary of state and only for good cause shown, notwithstanding any provision of part 2 of article 72 of title 24, C.R.S., or any other provision of law.

(3) This section does not provide the only grounds for cancellation of a statement of trademark registration or any document affecting a statement of trademark registration filed by the secretary of state, and any court of competent jurisdiction may order the cancellation of a statement of trademark registration or any document affecting a statement of trademark registration filed by the secretary of state when the court determines that such cancellation is appropriate relief in any action.

(4) In any proceeding under this section, the court, in exceptional cases, may award reasonable attorney fees to the prevailing party.

**Source:** L. 2006: Entire article R&RE, p. 115, § 1, effective May 29, 2007.

**7-70-108. Service of process on a registrant.** (1) A registrant who is neither an individual resident of this state nor an entity that is required to maintain a registered agent pursuant to part 7 of article 90 of this title shall either:

(a) Continuously maintain a registered agent in this state to accept service on its behalf in any proceeding based on a cause of action with respect to the statement of trademark registration; or

(b) Be deemed to have authorized service of process on it in connection with any such cause of action by registered mail or by certified mail, return receipt requested, addressed to the registrant at the mailing address, if any, furnished pursuant to section 7-70-102 (2) (e) (II), 7-70-104 (3) (c.7) (II), or 7-70-106 (2) (f) (II), as it may have been corrected by a statement of correction filed pursuant to section 7-90-305 or changed in a statement of change filed pursuant to section 7-90-305.5, and, if no such address has been furnished, to the registrant at the registrant's principal address.

(2) Service is perfected under paragraph (b) of subsection (1) of this section at the earliest of:

(a) The date the registrant received the process;

(b) The date shown on the return receipt, if signed by or on behalf of the registrant; or

(c) Five days after mailing.

(3) A registrant who is neither an individual resident of this state nor an entity that is required to maintain a registered agent pursuant to part 7 of article 90 of this title may appoint a registered agent to accept service on its behalf in any proceeding based on a cause of action with respect to the statement of trademark registration by making the statements set forth in section 7-70-102 (2) (e) (I) in a statement of trademark registration, in a statement of renewal of trademark registration or the statements set forth in section 7-70-106 (2) (f) (I), in a statement of transfer of trademark registration, or in a statement of change filed pursuant to section 7-90-305.5, adding such statements to a filed statement of trademark registration or a filed statement of transfer of trademark registration. The registered agent shall be:

(a) An individual who is eighteen years of age or older and whose primary residence or usual place of business is in this state;

(b) A domestic entity having a usual place of business in this state; or

(c) A foreign entity authorized to transact business or conduct activities in this state that has a usual place of business in this state.

(4) A registrant having a usual place of business in this state may serve as its own registered agent.

(5) The provisions of sections 7-90-702 and 7-90-703 shall apply to a registered agent appointed by a registrant pursuant to subsection (3) of this section, notwithstanding that the registrant is not an entity otherwise covered by section 7-90-702 or 7-90-703, and to the registrant who appoints such a registered agent.

(6) This section does not prescribe the only means, or necessarily the required means, of serving a registrant in any proceeding based on a cause of action with respect to the statement of trademark registration. Nothing in this section shall authorize service of process on a registrant who maintains a registered agent pursuant to paragraph (a) of subsection (1) of this section in any proceeding other than a proceeding based on a cause of action with respect to the statement of trademark registration.

**Source: L. 2006:** Entire article R&RE, p. 116, § 1, effective May 29, 2007. **L. 2007:** (1)(b) amended, p. 225, § 14, effective May 29. **L. 2009:** (1)(b) amended, (HB 09-1248), ch. 252, p. 1132, § 11, effective May 14.

**7-70-109. Statements of trademark registration filed prior to May 29, 2007.** (1) A statement of trademark registration that was filed in accordance with this article prior to May 29, 2007, and that is on file in the records of the secretary of state as of May 28, 2007, shall be deemed to have been filed pursuant to and in accordance with this article as repealed and reenacted and shall have the same effect as if filed pursuant to this article as repealed and reenacted. Each such statement of trademark registration shall remain effective until the expiration date for the statement of trademark registration under this article prior to its repeal and reenactment.

(2) Repeal and reenactment of this article shall not affect any actions or causes of action that have accrued under this article before its repeal and reenactment.

**Source: L. 2006:** Entire article R&RE, p. 118, § 1, effective May 29, 2007.

## ARTICLE 71

### Trade Names

**Editor's note:** This article was numbered as article 2 of chapter 141, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 2004, effective May 30, 2006, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2006, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

**Cross references:** (1) For definitions applicable to this article, see § 7-90-102.

(2) For the unlawful use of trademarks or trade names on fuel products, see § 8-20-220.

7-71-101.	Statement of trade name required.	7-71-108.	Recording of trade name affidavit.
7-71-102.	Consequences for failure to have effective statement of trade name filed.	7-71-109.	Trade names registered with the department of revenue.
7-71-103.	Statement of trade name.	7-71-110.	Existing trade names on file in the records of the secretary of state.
7-71-104.	Effect of filing a statement of trade name.	7-71-111.	Affidavit or certification recorded before July 1, 1985.
7-71-105.	Renewal of statement of trade name.	7-71-112.	Affidavit or certification recorded pursuant to 24-35-301 (1.5), C.R.S.
7-71-106.	Withdrawal of statement of trade name.		
7-71-107.	Nonprofit entities.		



**7-71-101. Statement of trade name required.** Except as otherwise provided in section 7-71-107, a person shall not transact business in this state under a name other than the true name of the person or, in the case of a general partnership that is not a limited liability partnership, under a name other than the true name of each general partner of the general partnership, except in compliance with this article and not unless an effective statement of trade name is on file in the records of the secretary of state.

**Source:** L. 2004: Entire article R&RE, p. 1538, § 1, effective May 30, 2006.

**Editor's note:** This section is similar to former § 7-71-101 (1) as it existed in prior to 2006.

## ANNOTATION

- I. General Consideration.
- II. Trade Names.
- III. Assumed Names.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The New Colorado Trade-Mark Law — Its Practical Effect", see 28 Dicta 183 (1951). For article, "One Year Review of Corporations, Partnership, and Agency", see 36 Dicta 27 (1959). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part I", see 12 Colo. Law. 61 (1983). For article, "Trade Name Registration Requirements and Customs in Colorado — Parts I and II", see 16 Colo. Law. 238 and 454 (1987). For article "Entity and Trade Name Registration: 2004 Update", see 34 Colo. Law. 11 (January 2005).

**Annotator's note.** Since § 7-71-101 is similar to § 7-71-101 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**The purpose of this section** is to afford the public the means of ascertaining the individual names of persons doing business under a common name where such names could not be found in the common name itself. *Smith v. Stubbs*, 16 Colo. App. 130, 63 P. 955 (1901).

Registration of a certificate of assumed or trade name pursuant to this section is intended only to afford the public a means of ascertaining the identities of persons or entities doing business under an assumed name and adds nothing to the common law relating to trademarks or unfair competition. *MacPhail v. Stevens*, 41 Colo. App. 99, 586 P.2d 1339 (1978).

**However, this section makes no requirement of recordation;** it is enough if the instrument is filed and thereafter kept in the office of the county clerk and recorder. *Wallace Plumbing Co. v. Dillon*, 71 Colo. 224, 205 P. 950 (1922).

**Applied** in *Rosebud Corp. v. Boggio*, 39 Colo. App. 84, 561 P.2d 367 (1977); *Masinton v. Dean*, 659 P.2d 50 (Colo. App. 1982); *Beneficial Fin. Co. v. Bach*, 665 P.2d 1034 (Colo. App. 1983).

### II. TRADE NAMES.

**A partnership using a company name must file** with the county clerk and recorder an affidavit setting forth the names and addresses of its members. *Fisher v. Colorado Cent. Power Co.*, 94 Colo. 218, 29 P.2d 641 (1934).

**But not when surnames used.** This section does not apply to a partnership of two members doing business under a name composed of the surnames of the partners. *Smith v. Stubbs*, 16 Colo. App. 130, 63 P. 955 (1901).

**Nor in case of nonresident partnership.** A nonresident partnership having its principal place of business outside of the state from which it transacts business through salesmen coming into the state is not "doing business in this state" within the meaning of that phrase as used in this section, and consequently, it has no application to such partnerships. *Doll v. Rodgers*, 98 Colo. 36, 52 P.2d 1147 (1935).

**An affidavit is insufficient under this section** where it does not contain the full name or the address of the person represented by the company. *Wallace Plumbing Co. v. Dillon*, 71 Colo. 224, 205 P. 950 (1922).

**Failure to comply with the provisions of this section is a matter of abatement** to be pleaded in the answer, and if not pleaded, one cannot raise the objection upon the trial of the case. *Smith v. Stubbs*, 16 Colo. App. 130, 63 P. 955 (1901); *Rocky Mt. Seed Co. v. McArthur*, 85 Colo. 1, 272 P. 1117 (1928).

Defense of plaintiff's failure to comply with this statute must be affirmatively pleaded, and where the defendants failed to so plead they are estopped from raising the objection at a later time. *Zambruk v. Perlmutter 3rd Generation Bldrs., Inc.*, 32 Colo. App. 276, 510 P.2d 472 (1973).

**But an allegation in an answer that plaintiff has failed to file an affidavit** as required by this section and should not bring the action is a good defense, and a motion to strike it out may be properly denied. *Elgin Jewelry Co. v. Wilson*, 42 Colo. 270, 93 P. 1107 (1908).

**Moreover, dismissal proper where variance between affidavit and caption in complaint.** In

an action by a party doing business under the trade name, a dismissal is proper where a variance is shown between the statutory affidavit on record and the caption in the complaint. *Michard v. Myron Stratton Home*, 144 Colo. 251, 355 P.2d 1078 (1960).

**However, upon correction of the caption**, or the filing of a new trade name affidavit to conform to the complaint, the action may be reinstated. *Michard v. Myron Stratton Home*, 144 Colo. 251, 355 P.2d 1078 (1960).

**And only issue at new trial is compliance with this section.** Where a cause of action is reversed on the ground that the plaintiff, an individual doing business under a trade name, has failed to file the affidavit required by this section, the only issue on a new trial is that of compliance with the statute. *Wallace Plumbing Co. v. Dillon*, 71 Colo. 224, 205 P. 950 (1922).

**For it is not necessary that there be a new trial as to any issue except** the one as to the filing of a proper trade name affidavit, since plaintiff's failure to file the proper affidavit is merely a matter in abatement. *Admiral Corp. v. Trio Television Sales & Serv. Corp.*, 138 Colo. 157, 330 P.2d 1106 (1958); *Michard v. Myron Stratton Home*, 144 Colo. 251, 355 P.2d 1078 (1960); *Campbell v. Graham*, 144 Colo. 532, 357 P.2d 366 (1960).

**And the affidavit may be filed at any time prior to the new trial.** *Wallace Plumbing Co. v. Dillon*, 71 Colo. 224, 205 P. 950 (1922).

### III. ASSUMED NAMES.

**Foreign corporation not excluded from transacting business under assumed name.** The phrase, "any corporation existing under the laws of this state", in this section is not intended to exclude foreign corporations from the right to transact all or a part of its business under an assumed name. *Admiral Corp. v. Trio Television Sales & Serv., Inc.*, 138 Colo. 157, 330 P.2d 1106 (1958).

**Hence, a foreign corporation can resort to court action** to enforce its rights if it carries on its business in any name other than that adopted in the state where it is incorporated. *Admiral Corp. v. Trio Television Sales & Serv., Inc.*, 138 Colo. 157, 330 P.2d 1106 (1958).

**And where a foreign corporation doing business in Colorado under an assumed name fails to comply** with this section requiring the filing of a certificate with respect to such assumed name, such failure serves only to abate an action during the time the required certificate remains unrecorded. *Admiral Corp. v. Trio Television Sales & Serv., Inc.*, 138 Colo. 157, 330 P.2d 1106 (1958).

#### **7-71-102. Consequences for failure to have effective statement of trade name filed.**

(1) No person transacting business in this state under a name in violation of section 7-71-101, nor anyone on its behalf, shall be permitted to maintain a proceeding in any court in this state for the collection of a debt from another with whom or with which the person transacted business in violation of section 7-71-101 until an effective statement of trade name for such name is on file in the records of the secretary of state in accordance with this article.

(2) A person that transacts business in this state under a name in violation of section 7-71-101 shall be subject to a civil penalty not to exceed five hundred dollars. The civil penalty may be recovered in an action brought by the attorney general in the district court in and for the city and county of Denver and shall be transmitted to the state treasurer, who shall credit it to the general fund. Upon a finding by the court that a person, or any of its members, managers, or agents on its behalf, has transacted business in this state under a name in violation of section 7-71-101, the court may issue, in addition to or in lieu of the imposition of a civil penalty, an injunction restraining the further transaction of business in this state by the person and such members, managers, and agents under such name until the person has complied with the provisions of this article.

(3) Notwithstanding subsection (1) of this section, transacting business in this state by a person under a name in violation of section 7-71-101 does not impair the validity of the acts of the person at any time taken, affect title to any property or interest in property owned by the person, or prevent the person from defending any proceeding in this state at any time.

**Source: L. 2004:** Entire article R&RE, p. 1538, § 1, effective May 30, 2006.

**Editor's note:** This section is similar to former § 7-71-102 as it existed prior to 2006.



## ANNOTATION

**Law reviews.** For article, "One Year Review of Corporations, Partnerships, and Agency", see 36 Dicta 27 (1959).

**Annotator's note.** Since § 7-71-102 is similar to § 7-71-102 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

**Former section was penal.** Wallbrecht v. Blush, 43 Colo. 329, 95 P. 927 (1908); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

**And so this section had to be strictly construed.** Wallbrecht v. Blush, 43 Colo. 329, 95 P. 927 (1908); Savage v. United States, 270 F. 14 (8th Cir 1920).

**Rather, the penalty provided by this section for failure to file the certificate is that such persons, associations, and corporations so trading and doing business shall not be permitted to prosecute any suits for the collection of their debts until such affidavit shall be filed.** Admiral Corp. v. Trio Television Sales & Serv., Inc., 138 Colo. 157, 330 P.2d 1106 (1958); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

**So when failure to comply with this section appears, an abatement of an action occurs.** Admiral Corp. v. Trio Television Sales & Serv., Inc., 138 Colo. 157, 330 P.2d 1106 (1958); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

**Subsequently, when an affidavit is filed, this disability is removed, and plaintiff is free to**

**prosecute the action as originally filed.** Admiral Corp. v. Trio Television Sales & Serv., Inc., 138 Colo. 157, 330 P.2d 1106 (1958); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

**In any event this section only applies to suits for the collection of debts due a firm.** Pedroni v. Eppstein, 17 Colo. App. 424, 68 P. 794 (1902); Melcher v. Beeler, 48 Colo. 233, 110 P. 181 (1910).

**Thus it does not apply to suits for torts.** Pedroni v. Eppstein, 17 Colo. App. 424, 68 P. 794 (1902); Melcher v. Beeler, 48 Colo. 233, 110 P. 181 (1910).

**Or to recover possession of real property.** The filing of the prescribed affidavit required by this section is not a condition precedent to the prosecution of an action to recover possession of real property. Wallbrecht v. Blush, 43 Colo. 329, 95 P. 927 (1908); Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

**Moreover, since this section is procedural, it has no proper place in a bankruptcy proceeding.** In re Thomas, 211 F. Supp. 187 (D. Colo. 1962), aff'd, 327 F.2d 667 (10th Cir.), cert. denied, 379 U.S. 827, 85 S. Ct. 55, 13 L. Ed.2d 36 (1964).

**This section does not expressly deprive the associations of the right to transact business.** Wallbrecht v. Blush, 43 Colo. 329, 95 P. 927 (1908); Savage v. United States, 270 F. 14 (8th Cir. 1920).

**Applied in B.C. Inv. Co. v. Thom, 650 P.2d 1333 (Colo. App. 1982).**

**7-71-103. Statement of trade name.** (1) A person may deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of trade name for any name other than the true name of the person or, in the case of a general partnership that is not a limited liability partnership, other than the true name of each general partner of the general partnership, under which the person transacts business, or contemplates transacting business, in this state. A statement of trade name shall state:

(a) The true name of the person or, in the case of a general partnership that is not a limited liability partnership, the true name of at least one general partner of the general partnership;

(b) If the person is an entity, the form of entity and the jurisdiction under the law of which it is formed;

(c) If the person is not a reporting entity, the person's principal address;

(d) The name, other than the true name of the person, or, in the case of a general partnership that is not a limited liability partnership, other than the true name of each general partner of the general partnership, under which the person transacts business, or contemplates transacting business, in this state;

(e) A brief description of the kind of business transacted, or contemplated to be transacted, in this state under the name; and

(f) Such other information as the secretary of state may require.

**Source: L. 2004:** Entire article R&RE, p. 1539, § 1, effective May 30, 2006. **L. 2007:** (1)(c) amended, p. 226, § 15, effective May 29.

**Editor's note:** This section is similar to former § 7-71-101 (2) as it existed prior to 2006.

**7-71-104. Effect of filing a statement of trade name.** (1) (a) A filed statement of trade name shall become effective as provided in section 7-90-304, and, unless the statement of trade name is withdrawn in accordance with section 7-71-106, for reporting entities shall remain effective in perpetuity, subject to the provisions of paragraphs (b) and (c) of this subsection (1), and for persons other than reporting entities shall remain effective only through the last day of the twelfth calendar month following the calendar month in which the statement of trade name becomes effective, unless it is renewed in accordance with section 7-71-105.

(b) A filed statement of trade name of a delinquent entity shall remain effective only through the last day of the twelfth calendar month following the calendar month of the effective date of delinquency under section 7-90-902 (1), unless it is renewed in accordance with section 7-71-105; except that this paragraph (b) shall not apply to a filed statement of trade name of a delinquent entity that cures its delinquency pursuant to section 7-90-904 (1) while such filed statement of trade name is effective.

(c) A filed statement of trade name of a dissolved reporting entity shall remain effective only through the last day of the twelfth calendar month following the calendar month of the effective date of dissolution of the entity, unless it is renewed in accordance with section 7-71-105; except that this paragraph (c) shall not apply to a filed statement of trade name of a dissolved entity that is reinstated while such filed statement of trade name is effective.

(2) A person having an effective statement of trade name on file in the records of the secretary of state shall be liable in connection with the business transacted in this state by the person under the trade name stated in the statement of trade name to the same extent and in the same manner as if the business were transacted under its true name.

(3) A person having an effective statement of trade name on file in the records of the secretary of state at the time an action is brought by another person may be sued under the trade name stated in the statement of trade name in connection with any business transacted by the person in this state under the trade name with the person bringing the action.

**Source:** L. 2004: Entire article R&RE, p. 1540, § 1, effective May 30, 2006. L. 2006: (1) amended, p. 852, § 14, effective May 30. L. 2010: (1)(b) amended, (HB 10-1403), ch. 404, p. 1994, § 8, effective August 11.

**Editor's note:** This section is similar to former § 7-71-101 (4) as it existed prior to 2006.

**7-71-105. Renewal of statement of trade name.** (1) A person other than a reporting entity having an effective statement of trade name on file in the records of the secretary of state may renew the statement of trade name by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of trade name renewal at any time during the last three calendar months the statement of trade name is effective. A filed statement of trade name renewal extends, by one calendar year, the period during which the statement of trade name to which it relates is effective. A statement of trade name renewal shall state, with respect to the statement of trade name to be renewed:

(a) The true name of the person, or, in the case of a general partnership that is not a limited liability partnership, the true name of at least one general partner of the partnership;

(b) The name under which the person transacts business in this state, as stated in the statement of trade name;

(c) The person's principal address;

(c.5) A brief description of the kind of business transacted, or contemplated to be transacted, in this state under the name; and

(d) Such other information as the secretary of state may require.

(1.5) No statement of trade name renewal shall state a delayed effective date.

(2) Repealed.

**Source:** L. 2004: Entire article R&RE, p. 1540, § 1, effective May 30, 2006. L. 2006: (1)(a) and (1)(c) amended and (1.5) added, p. 853, § 15, effective May 30. L. 2009: IP(1)



and (1)(c) amended and (1)(c.5) added, (HB 09-1248), ch. 252, p. 1132, § 12, effective May 14. **L. 2010:** (2) repealed, (HB 10-1403), ch. 404, p. 1995, § 11, effective August 11.

**7-71-106. Withdrawal of statement of trade name.** (1) A person having a statement of trade name on file in the records of the secretary of state may withdraw the statement of trade name by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of trade name withdrawal stating:

- (a) The true name of the person;
- (b) The trade name with respect to which the statement of trade name withdrawal relates;
- (c) That the person will no longer transact business in this state under the trade name; and
- (d) That the statement of trade name is withdrawn upon the filing of the statement of trade name withdrawal.

(2) Upon the filing of the statement of trade name withdrawal, the statement of trade name to which it relates shall no longer be effective.

**Source: L. 2004:** Entire article R&RE, p. 1541, § 1, effective May 30, 2006.

**Editor's note:** This section is similar to former § 7-71-101 (8) as it existed prior to 2006.

**7-71-107. Nonprofit entities.** (1) A nonprofit entity for which a constituent filed document is in the records of the secretary of state may, but shall not be required to, deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of trade name for any name other than its true name under which the nonprofit entity transacts business or conducts activities, or contemplates transacting business or conducting activities, in this state. This article, other than section 7-71-102, shall apply to the statement of trade name and any other statement filed in connection therewith and to the trade name.

(2) Any member of a nonprofit entity for which a constituent filed document is not in the records of the secretary of state may, but shall not be required to, deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of trade name for any name other than the true name of all of its members under which the nonprofit entity transacts business or conducts activities, or contemplates transacting business or conducting activities, in this state. This article, other than section 7-71-102, shall apply to any such statement of trade name and any other statement filed in connection therewith and to any trade name stated in any such statement of trade name.

(3) As to any statement of trade name filed pursuant to this section and any other statement filed in connection with the filing, any reference in this article or in such statement to the phrase "transact business", or its derivatives or variants, shall include "conduct activities".

**Source: L. 2004:** Entire article R&RE, p. 1541, § 1, effective May 30, 2006. **L. 2006:** (1) and (2) amended, p. 853, § 16, effective May 30.

**7-71-108. Recording of trade name affidavit.** (1) An affidavit stating that a person may hold title to real property in this state under one or more trade names may be recorded in the office of the clerk and recorder of any county in this state in which the person owns, or contemplates owning, any real property or interest in real property and, upon such recording, shall constitute prima facie evidence of the facts recited in the affidavit insofar as such facts affect title to real property located in such county. The affidavit shall include the following:

- (a) The true name of the person to which the affidavit relates;
- (b) If the person is an entity, the form of entity and the jurisdiction under the law of which it is formed;
- (c) If the person is an individual, the street address of the individual's primary residence or usual place of business in this state if the individual has one, or outside this state if the

individual has no primary residence or usual place of business in this state, and, if different, the mailing address of the individual or, if the person is an entity, the street address of the entity's usual place of business in this state if it has one, or outside this state if it has no usual place of business in this state and, if different, the mailing address of the entity; and

(d) The trade name or trade names under which the person may hold title to real property in this state.

(2) If the person to which the affidavit relates is not an individual and is capable of holding title to real property under the law of this state, the affidavit also shall be a statement of authority under section 38-30-172, C.R.S., with the effect of a statement of authority as provided in such section, if the affidavit also contains the following:

(a) The true name or position of the person authorized to execute instruments conveying, encumbering, or otherwise affecting title to real property on behalf of the person to which the affidavit relates; and

(b) Any limitation that may exist upon the authority of the person named in the affidavit or holding the position described in the affidavit to bind the person to which the affidavit relates or a statement that no such limitation exists.

**Source: L. 2004:** Entire article R&RE, p. 1542, § 1, effective May 30, 2006.

**7-71-109. Trade names registered with the department of revenue.** (1) Public records of the registration of trade names with the department of revenue pursuant to section 24-35-301, C.R.S., prior to its repeal, as to which the registration is in effect on May 29, 2006, shall be transferred to the secretary of state. On and after May 30, 2006, each such trade name shall be deemed a trade name for which a statement of trade name is on file in the records of the secretary of state. The statement of trade name deemed filed for each such trade name shall be effective until the date determined by the secretary of state, which date shall not be earlier than December 31, 2007. Applications to register, modify, delete, or renew trade names that are filed with the department of revenue on or before May 29, 2006, but not part of the public records transferred to the secretary of state pursuant to this subsection (1), shall be transmitted by the department of revenue to the secretary of state, together with any fee paid for the applications. Each such application shall be deemed delivered to the secretary of state, for filing pursuant to part 3 of article 90 of this title, by the person on whose behalf the application was made and shall in all respects be subject to part 3 of article 90 of this title. After filing by the secretary of state, each such application shall be deemed effective for purposes of this article and section 7-90-304, as of May 30, 2006.

(2) Fees that have been collected by the department of revenue for registration, modification, deletion, and renewal of registration of trade names that are part of the public records transferred to the secretary of state pursuant to subsection (1) of this section shall be remitted to the state treasury pursuant to section 24-35-301 (3), C.R.S., as such section existed prior to its repeal.

**Source: L. 2004:** Entire article R&RE, p. 1542, § 1, effective May 30, 2006.

**Cross references:** For registration of trade names as it existed prior to its repeal in 2006, see part 3 of article 35 of title 24, C.R.S., in the 2005 Colorado Revised Statutes.

**7-71-110. Existing trade names on file in the records of the secretary of state.** Certificates or statements of trade name filed in accordance with this article as in effect before May 30, 2006, that are on file in the records of the secretary of state as of May 29, 2006, shall be effective statements of trade name and shall be deemed to have been filed pursuant to and in accordance with this article. Each of such statements of trade name shall remain effective as provided in section 7-71-104 (1); except that any such statement of trade name for a trade name of a person other than a reporting entity shall remain effective until the date determined by the secretary of state, which date shall not be earlier than December 31, 2007.

**Source: L. 2004:** Entire article R&RE, p. 1543, § 1, effective May 30, 2006.



**7-71-111. Affidavit or certification recorded before July 1, 1985.** Any affidavit or certification recorded pursuant to section 7-71-101 (1) (a) or (7) prior to July 1, 1985, shall continue to constitute prima facie evidence of the facts recited therein insofar as the same affect title to real property.

**Source: L. 2006:** Entire section added, p. 854, § 17, effective July 1.

**7-71-112. Affidavit or certification recorded pursuant to 24-35-301 (1.5), C.R.S.** Any affidavit recorded pursuant to section 24-35-301 (1.5), C.R.S., prior to its repeal, shall continue to constitute prima facie evidence of the facts recited therein insofar as the same affect title to real property.

**Source: L. 2006:** Entire section added, p. 854, § 17, effective July 1.

## ARTICLE 72

### Registration of Farm Names

#### 7-72-101 and 7-72-102. (Repealed)

**Source: L. 95:** Entire article repealed, p. 194, § 5, effective April 13.

**Editor's note:** This article was numbered as article 4 of chapter 141, C.R.S. 1963. For amendments to this article prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## ARTICLE 73

### Trademarks on Articles or Supplies - Registration

#### 7-73-101 to 7-73-109. (Repealed)

**Source: L. 2008:** Entire article repealed, p. 24, § 22, effective August 5.

**Editor's note:** This article was numbered as article 4 of chapter 141, C.R.S. 1963. For amendments to this article prior to its repeal in 2008, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## TRADE SECRETS

## ARTICLE 74

### Uniform Trade Secrets Act

**Cross references:** For provisions concerning agreements not to compete, see § 8-2-113; for theft of a trade secret, see § 18-4-408.

**Law reviews:** For article, "Help for Colorado Trade Secret Owners", see 15 Colo. Law. 1993 (1986); for article, "An Introduction to the Law of Trade Secrets", see 23 Colo. Law. 2125 (1994); for article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado-Part I", see 30 Colo. Law. 7 (April 2001); for article, "The Inevitable Disclosure Doctrine: Safeguarding the Privacy of Trade Secrets", see 33 Colo. Law. 17 (October 2004); for article, "Four Strategies for Controlling Employee-Created IP", see 36 Colo. Law. 31 (April 2007); for article, "Trade Secrets, Duties of Confidentiality, and Misappropriation Claims Under the Colorado Trade Secrets Act", see 37 Colo. Law. 81 (August 2008); for article, "Keeping It Secret in Colorado", see 39 Colo. Law. 39 (November 2010).

7-74-101.	Short title.	7-74-107.	Statute of limitations.
7-74-102.	Definitions.	7-74-108.	Effect on other law.
7-74-103.	Injunctive relief.	7-74-109.	Uniformity of application and construction.
7-74-104.	Damages.	7-74-110.	Severability.
7-74-105.	Attorney fees.		
7-74-106.	Preservation of secrecy.		

**7-74-101. Short title.** This article shall be known and may be cited as the “Uniform Trade Secrets Act”.

**Source:** L. 86: Entire article added, p. 460, § 1, effective July 1.

**7-74-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(2) “Misappropriation” means:

(a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(I) Used improper means to acquire knowledge of the trade secret; or

(II) At the time of disclosure or use, knew or had reason to know that such person’s knowledge of the trade secret was:

(A) Derived from or through a person who had utilized improper means to acquire it;

(B) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(III) Before a material change of such person’s position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) Repealed.

(4) “Trade secret” means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a “trade secret” the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

**Source:** L. 86: Entire article added, p. 460, § 1, effective July 1. L. 2003: (3)(b) added by revision, pp. 2356, 2357, §§ 347, 348. L. 2004: IP(2)(b)(II) and (2)(b)(III) amended, p. 1459, § 180, effective July 1.

**Editor’s note:** Subsection (3)(b) provided for the repeal of subsection (3), effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

## ANNOTATION

**The following factors are considered in determining whether certain information is a trade secret:** (1) The extent to which the information is known outside the business; (2) the extent to which the information is known to those inside the business; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings

effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp.2d 1247 (D. Colo. 2001).



**Indispensable to an effective allegation of a trade secret is proof that the matter is, more or less, secret.** *Hertz v. Luzenac Group*, 576 F.3d 1103 (10th Cir. 2009).

**A trade secret can exist in a combination of characteristics and components each of which, by itself, is in the public domain, but the unified process, design, and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.** *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125 (10th Cir. 2003); *Hertz v. Luzenac Group*, 576 F.3d 1103 (10th Cir. 2009).

**A trade secret can include a system where the elements are in the public domain, but there has been accomplished an effective, successful, and valuable integration of the public domain elements and the trade secret gave the claimant a competitive advantage that is protected from misappropriation.** *Rivendell Forest Prods., Ltd. v. Georgia-Pacific Corp.*, 28 F.3d 1042 (10th Cir. 1994).

**Information can be a trade secret notwithstanding the fact that some of its components are well-known.** *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125 (10th Cir. 2003); *Hertz v. Luzenac Group*, 576 F.3d 1103 (10th Cir. 2009).

**Both actual and prospective customer lists can be a trade secret since both can be of value to the owner.** *Hertz v. Luzenac Group*, 576 F.3d 1103 (10th Cir. 2009).

**It is error for the court to rule as a matter of law that customer lists are not trade secrets particularly when presentation of evidence and offers of proof were not permitted.** *Network Telecomm. v. Boor-Crepeau*, 790 P.2d 901 (Colo. App. 1990).

**Adoption of a per se rule that a bid on a contract cannot be a trade secret as a matter of law is also declined. The statutory definition of "trade secret", together with evidence of value and of measures to protect disclosure, is broad**

**enough to include a bid on a contract.** *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221 (Colo. App. 2001).

**Precautions taken pursuant to subsection (4) must be more than normal business procedures.** Such efforts may include advising employees of the existence of a trade secret, limiting access to a need-to-know basis, and controlling access to locations where the information may be learned. *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp.2d 1247 (D. Colo. 2001).

**Subsection (4) applied in Colo. Supply Co., Inc. v. Stewart**, 797 P.2d 1303 (Colo. App. 1990); *In re S & D Foods, Inc.*, 144 Bankr. 121 (Bankr. D. Colo. 1992).

**No claim for misappropriation of trade secret.** Nothing protectable was used by former employee when he took general business knowledge from one job to the next. Although misappropriation can be established without any copying or physical appropriation, business practices at best hold a tenuous claim to being trade secrets. *Rivendell Forest Prods. v. Georgia-Pacific*, 824 F. Supp. 961 (D. Colo. 1993).

**State claims not preempted by federal copyright law.** Plaintiff's claims of trade secret misappropriation under Colorado law require proof of a breach of trust or confidence - proof which is not required under the Copyright Act, therefore state claims are not preempted by the federal law. *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823 (10th Cir. 1993).

**The Uniform Trade Secrets Act contains no requirement that there be actual use or commercial implementation of a misappropriated trade secret for damages to accrue.** Misappropriation consists only of the improper disclosure or acquisition of a trade secret. *Sonoco Prod. Co. v. Johnson*, 23 P.3d 1287 (Colo. App. 2001).

**Applied in Gold Messenger, Inc. v. McGuay**, 937 P.2d 907 (Colo. App. 1997); *Saturn Sys., Inc. v. Militare*, 252 P.3d 516 (Colo. App. 2011).

**7-74-103. Injunctive relief.** Temporary and final injunctions including affirmative acts may be granted on such equitable terms as the court deems reasonable to prevent or restrain actual or threatened misappropriation of a trade secret.

**Source: L. 86:** Entire article added, p. 461, § 1, effective July 1.

## ANNOTATION

**No claim for misappropriation of trade secret.** Nothing protectable was used by former employee when he took general business knowledge from one job to the next. Although misappropriation can be established without any copying or physical appropriation, business practices at best hold a tenuous claim to being trade secrets. *Rivendell Forest Prods. v. Georgia-Pacific*, 824 F. Supp. 961 (D. Colo. 1993).

**Awards of both damages and injunctive relief are authorized under the Uniform Trade Secrets Act, but the trial court is not required to award both.** The grant or denial of an injunction lies within the trial court's sound discretion and will be reversed on appeal only upon a showing of abuse of that discretion. *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221 (Colo. App. 2001).

**7-74-104. Damages.** (1) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(2) If the misappropriation is attended by circumstances of fraud, malice, or a willful and wanton disregard of the injured party's right and feelings, the court or the jury may award exemplary damages in an amount not exceeding the award made under subsection (1) of this section.

**Source: L. 86:** Entire article added, p. 461, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Assessing Damages for Misappropriation of Trade Secrets", see 27 Colo. Law. 71 (August 1998).

**Revelations regarding trade secrets were so malicious and wanton** that defendant was en-

titled to recover attorney's fees, costs, and exemplary damages under this section. In *Re S & D Foods, Inc.*, 144 Bankr. 121 (Bankr. D. Colo. 1992).

**7-74-105. Attorney fees.** If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney fees to the prevailing party.

**Source: L. 86:** Entire article added, p. 461, § 1, effective July 1.

**7-74-106. Preservation of secrecy.** In an action under this article, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

**Source: L. 86:** Entire article added, p. 461, § 1, effective July 1.

**7-74-107. Statute of limitations.** An action for misappropriation of a trade secret shall be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

**Source: L. 86:** Entire article added, p. 462, § 1, effective July 1.

**Cross references:** For other provisions relating to limitations on personal actions, see article 80 of title 13.

#### ANNOTATION

The statute of limitations begins to run once a plaintiff learns a defendant improperly disclosed trade secrets, even though the defendant subsequently may also have unlawfully used those same trade secrets. *Chasteen v. UNISIA JECS Corp.*, 216 F.3d 1212 (10th Cir. 2000).

The statute of limitations on trade secret misappropriation claims begins to run not when a plaintiff can positively and directly prove misappropriation rather than independent development, but simply when the plaintiff has knowledge of sufficient facts from which a reasonable jury could infer misappro-



priation. *Chasteen v. UNISIA JECS Corp.*, 216 F.3d 1212 (10th Cir. 2000); *Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009), *aff'd*, 259 P.3d 497 (Colo. 2011).

To bring a claim of trade secret misappropriation, one does not need to know the specific damage inflicted. *Phillips v. AWH Corp.*, 363 F.3d 1207 (Fed. Cir. 2004).

**Statute provides for a single accrual date for multiple misappropriations** of a single trade secret or of multiple, related trade secrets, coinciding with the first date plaintiff has knowl-

edge of sufficient facts from which a jury could reasonably infer misappropriation. *Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009), *aff'd*, 259 P.3d 497 (Colo. 2011).

By specifying that "a continuing misappropriation constitutes a single claim," statute evinces a clear legislative intent that multiple misappropriations by the same party be treated as a single claim for accrual purposes. *Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009), *aff'd*, 259 P.3d 497 (Colo. 2011).

**7-74-108. Effect on other law.** (1) Except as provided in subsection (2) of this section, this article displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.

(2) This article does not affect:

- (a) Contractual remedies, whether or not based upon misappropriation of a trade secret;
- (b) Other civil remedies that are not based upon misappropriation of a trade secret; or
- (c) Criminal remedies, whether or not based upon misappropriation of a trade secret.

**Source:** L. 86: Entire article added, p. 462, § 1, effective July 1.

**Cross references:** For theft of trade secrets, see § 18-4-408.

#### ANNOTATION

**Claims for interference with business relations do not conflict with the Uniform Trade Secrets Act (UTSA) and, therefore, are not preempted.** *Powell Prods., Inc. v. Marks*, 948 F. Supp. 1469 (D. Colo. 1996).

**Claims that, although involving a trade secret misappropriation issue, include additional elements not necessary to a misappropriation claim under the UTSA do not con-**

**flict with the USTA and are not preempted.** *Powell Prods., Inc. v. Marks*, 948 F. Supp. 1469 (D. Colo. 1996).

**Preemption is only appropriate where other claims are no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation.** *Powell Prods., Inc. v. Marks*, 948 F. Supp. 1469 (D. Colo. 1996).

**7-74-109. Uniformity of application and construction.** This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

**Source:** L. 86: Entire article added, p. 462, § 1, effective July 1.

**7-74-110. Severability.** If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

**Source:** L. 86: Entire article added, p. 462, § 1, effective July 1.

### LIMITED LIABILITY COMPANIES

#### ARTICLE 80

#### Limited Liability Companies

**Cross references:** For the "Uniform Records Retention Act", see article 17 of title 6.

**Law reviews:** For article, "Colorado Enacts Limited Liability Company Legislation", see 19 Colo. Law. 1029 (1990); for article, "Choice of Entities in Colorado", see 23 Colo. Law. 293 (1994); for article, "Colorado LLCs: New and Improved", see 24 Colo. Law. 1473 (1994); for article, "Classifying LLCs Under New IRS Ruling Guidelines", see 24 Colo. Law. 741 (1995); for article, "Choice of Entity in Colorado: An Update", see 25 Colo. Law. 3 (October 1996); for article, "Colorado Choice of Entity 1998", see 27 Colo. Law. 5 (June 1998); for article, "Colorado LLCs as Nonprofit Organizations", see 27 Colo. Law. 57 (August 1998); for article, "Contractually Binding Colorado Entities", see 28 Colo. Law. 33 (December 1999); for article, "Colorado Choice of Form of Organization and Structure 2001", see 30 Colo. Law. 11 (October 2001); for article, "Entity and Trade Name Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001); for article, "LLCs in Acquisitions: Increased Utility Under Recent Regulation", see 31 Colo. Law. 73 (August 2002); for article, "No Paper Required: Business Entity Legislation Makes Life Easier for Business Lawyers", see 33 Colo. Law. 6 (June 2004); for article, "Entity and Trade Name Registration: 2004 Update", see 34 Colo. Law. 11 (January 2005); for article, "Satisfying Creditor Claims Against Colorado LLCs, Members, and Managers", see 36 Colo. Law. 23 (January 2007); for article, "Piercing the Veil of an LLC or a Corporation", see 39 Colo. Law. 71 (August 2010).

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## PART 1

## DEFINITION AND APPLICATION

**7-80-101. Short title.** This article shall be known and may be cited as the “Colorado Limited Liability Company Act”.

**Source: L. 90:** Entire article added, p. 414, § 1, effective April 18.

**7-80-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Articles of organization” means the articles of organization filed in the records of the secretary of state for the purpose of forming a limited liability company as specified in sections 7-80-203 and 7-80-204. “Articles of organization” includes amended articles of organization, restated articles of organization, statements of merger, and other instruments, however designated, on file in the records of the secretary of state that have the effect of amending or supplementing, in some respect, the original or amended articles of organization.

(2) “Bankrupt” means bankrupt or a debtor under the federal bankruptcy code of 1978, title 11 of the United States Code, as amended, or an insolvent under any state insolvency act.

(3) “Business” means any lawful activity, including ownership of real or personal property, whether or not engaged in for profit.

(4) “Contribution” means anything of value that a person contributes to a limited liability company as a prerequisite to becoming a member in the limited liability company or in the capacity of a member in the limited liability company, including cash, property, or services rendered or a promissory note or other binding obligation to contribute cash or property or to perform services.

(5) “Court” includes every court and judge having jurisdiction in a case.

(6) and (6.5) (Deleted by amendment, L. 2003, p. 2263, § 174, effective July 1, 2004.)

(7) “Limited liability company” or “company” means a limited liability company formed under this article.

(7.5) and (7.6) (Deleted by amendment, L. 2003, p. 2263, § 174, effective July 1, 2004.)

(8) “Manager” means a person designated as a manager of a limited liability company to manage the company pursuant to section 7-80-402.

(9) “Member” means a person with an ownership interest in a limited liability company with the rights and obligations specified under this article. In the case of a limited liability company with only one member, “members” and “all of the members” refers to such one member.

(10) “Membership interest” means a member’s share of the profits and losses of a limited liability company and the right to receive distributions of such company’s assets.

(11) (a) “Operating agreement” means any agreement of all of the members as to the affairs of a limited liability company and the conduct of its business. Except as otherwise provided in this article or as otherwise required by a written operating agreement, the operating agreement need not be in writing. An operating agreement may contain any provisions required or permitted by section 7-80-108 (1). An operating agreement includes any amendments to the operating agreement.

(b) In the case of a limited liability company with only one member, “operating agreement” includes:

(I) Any writing, without regard to whether such writing otherwise constitutes an agreement, as to such company’s affairs and the conduct of the limited liability company’s business signed by the sole member;

(II) Any written agreement between the member and the company as to the limited liability company’s affairs and the conduct of the limited liability company’s business; or

(III) Any agreement, whether or not the agreement is in writing, between the member and the limited liability company as to a limited liability company’s affairs and the conduct



of its business if the limited liability company is managed by a manager who is a person other than the member.

(12) to (16) (Deleted by amendment, L. 2003, p. 2263, § 174, effective July 1, 2004.)

**Source:** **L. 90:** Entire article added, p. 414, § 1, effective April 18. **L. 94:** (3), (7), and (11) amended and (6.5), (7.5), (7.6), (14), (15), and (16) added, p. 709, § 1, effective July 1. **L. 95:** (7.6), (11), and (13) amended, p. 805, § 21, effective May 24. **L. 97:** (8), (9), and (11) amended and (14.5) added, p. 1502, § 11, effective June 3; (13) amended, p. 917, § 8, effective January 1, 1998. **L. 2002:** (1) amended, p. 1832, § 70, effective July 1; (1) amended, p. 1697, § 68, effective October 1. **L. 2003:** (1), (6) to (7.6), and (12) to (16) amended, p. 2263, § 174, effective July 1, 2004. **L. 2004:** (11)(a) amended, p. 936, § 1, effective July 1. **L. 2006:** (1), (4), and (8) amended, p. 854, § 18, effective July 1.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

#### ANNOTATION

**Applied** in *Condo v. Connors*, \_\_\_ P.3d \_\_\_ (Colo. App. 2010), aff'd, 266 P.3d 1110 (Colo. 2011).

**7-80-103. Nature of business.** A limited liability company may be formed under this article for any lawful business, subject to any provisions of law governing or regulating such business within this state.

**Source:** **L. 90:** Entire article added, p. 415, § 1, effective April 18. **L. 94:** Entire section amended, p. 710, § 2, effective July 1. **L. 2003:** Entire section amended, p. 2264, § 175, effective July 1, 2004.

#### ANNOTATION

**Law reviews.** For article, "Partnership or Limited Liability Company or Trust?", see 25 Colo. Law. 43 (January 1996).

**7-80-104. Powers.** (1) Each limited liability company formed and existing under this article may:

- (a) Sue and be sued, complain and defend, and participate in administrative or other proceedings, in its name;
- (b) Purchase, take, receive, lease or otherwise acquire, own, hold, improve, use, and otherwise deal in and with real or personal property, or an interest in it, wherever situated;
- (c) Sell, convey, assign, encumber, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets;
- (d) Lend money to and otherwise assist its members and employees;
- (e) Purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in or obligations of any other person;
- (f) Make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the limited liability company may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any part of its property, franchises, and income;
- (g) Lend money for its proper purposes, invest and reinvest its funds, and take and hold real property and personal property for the payment of funds so loaned or invested;
- (h) Conduct its business, carry on its operations, and have and exercise the powers granted by this article in any jurisdiction;
- (i) Have managers and other agents;
- (j) Be a party to the operating agreement;

(k) Indemnify a member or manager or former member or manager of the limited liability company as provided in section 7-80-407;

(l) (Deleted by amendment, L. 2003, p. 2264, § 176, effective July 1, 2004.)

(m) Have and exercise all powers necessary or convenient to effect any or all of the purposes for which the limited liability company is formed;

(n) Be an agent, an associate, a fiduciary, a manager, a member, a partner, a promoter, or a trustee of, or hold any similar position with, any entity, trust, or estate.

**Source:** L. 90: Entire article added, p. 415, § 1, effective April 18. L. 94: (1)(d) amended, p. 710, § 3, effective July 1. L. 2003: IP(1), (1)(e), (1)(h), (1)(j), (1)(l), (1)(m), and (1)(n) amended, p. 2264, § 176, effective July 1, 2004. L. 2004: (1)(k) amended, p. 936, § 2, effective July 1. L. 2006: (1)(i), (1)(j), and (1)(n) amended, p. 854, § 19, effective July 1.

**7-80-105. Unauthorized assumption of powers.** All persons who assume to act as a limited liability company without authority to do so and without good faith belief that they have such authority shall be jointly and severally liable for all debts and liabilities incurred by such persons so acting.

**Source:** L. 90: Entire article added, p. 416, § 1, effective April 18.

**7-80-106. Transaction of business outside state.** It is the intention of the general assembly by the enactment of this article that the legal existence of limited liability companies formed under this article be recognized beyond the limits of this state and that, subject to any reasonable registration requirements, any such limited liability company transacting business outside this state be granted the protection of full faith and credit under section 1 of article IV of the constitution of the United States.

**Source:** L. 90: Entire article added, p. 416, § 1, effective April 18.

**7-80-107. Application of corporation case law to set aside limited liability.** (1) In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

(2) For purposes of this section, the failure of a limited liability company to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the members for liabilities of the limited liability company.

**Source:** L. 90: Entire article added, p. 416, § 1, effective April 18. L. 94: Entire section amended, p. 710, § 4, effective July 1.

#### ANNOTATION

This section is the only part of the Colorado Limited Liability Company Act that addresses applying the common law principle of piercing the corporate veil in the limited liability company (LLC) context. *Sheffield Servs. Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009).

The plain language of subsection (1) does not prohibit a court from applying the equitable common law doctrine of piercing the

corporate veil to hold a manager of an LLC personally liable for the LLC's alleged improper actions. *Sheffield Servs. Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009).

It is presumed that, in adopting subsection (1), the general assembly did not intend to create a safe harbor for LLC managers to perpetrate fraud and deceit. To construe subsection (1) as precluding application of the common law doctrine of piercing the corporate veil



to LLC managers would open the door to fraud. *Sheffield Servs. Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009).

**Absent a statutory restriction, the common law piercing doctrine applies to LLC managers.** Because allowing a manager of an LLC to hide behind the LLC's cloak of limited liability

would promote injustice, protect fraud, or defeat legitimate creditors' claims, the equitable common law doctrine of piercing the corporate veil may be applied to hold an LLC manager personally liable for the LLC's improper actions. *Sheffield Servs. Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009).

**7-80-108. Effect of operating agreement - nonwaivable provisions.** (1) (a) The operating agreement may contain any provisions for the affairs of the limited liability company and the conduct of its business to the extent such provisions are consistent with law. Except as otherwise provided in subsection (1.5), (2), or (3) of this section, an operating agreement governs the rights, duties, limitations, qualifications, and relations among the managers, the members, the members' assignees and transferees, and the limited liability company. Such provisions shall control over any provision of this article to the contrary except as set forth in subsection (1.5), (2), or (3) of this section. To the extent the operating agreement does not otherwise provide, this article shall control.

(b) A limited liability company is bound by any operating agreement of its members.

(c) An operating agreement may be entered into before, after, or at the time of filing of articles of organization and, whether entered into before, after, or at the time of such filing, may be made effective as of the formation of the limited liability company or as of the time or date provided in the operating agreement.

(1.5) To the extent that a member or manager or other person that is a party to, or is otherwise bound by, the operating agreement has duties, including, but not limited to, fiduciary duties, to a limited liability company or to another member, manager, or other person that is a party to or is otherwise bound by an operating agreement, the duties of such member, manager, or other person may be restricted or eliminated by provisions in the operating agreement, as long as any such provision is not manifestly unreasonable.

(2) An operating agreement may not:

(a) (Deleted by amendment, L. 2006, p. 855, § 20, effective July 1, 2006.)

(b) Unreasonably restrict the rights of members and managers under section 7-80-408;

(c) (Deleted by amendment, L. 2006, p. 855, § 20, effective July 1, 2006.)

(d) Eliminate the obligation of good faith and fair dealing under section 7-80-404 (3); except that the operating agreement may prescribe the standards by which the performance of the obligation is to be measured, if such standards are not unreasonable;

(d.5) Eliminate or modify the provisions of section 7-80-801 (1) (c) (I), except to extend the time set forth therein to a time not later than the first anniversary of the date of the termination of the membership of the last remaining member; or

(e) Restrict rights of, or impose duties on, persons other than the members, their assignees and transferees, and the limited liability company without the consent of such persons.

(2.5) (a) An operating agreement may contain one or more provisions concerning the enforcement, interpretation, construction, application, severability of provisions, integration, effect of parole evidence, and other matters with respect to the operating agreement or any of its provisions.

(b) Unless otherwise provided in the operating agreement, if any provision of an operating agreement or application thereof to any person or circumstance is unenforceable or otherwise invalid under subsection (1.5) or (2) of this section or otherwise, the provision shall be limited, construed, and applied in a manner that is valid and enforceable, and, in any event, the remaining provisions of the operating agreement shall be given effect without the invalid provision or application.

(c) Unless otherwise provided in the operating agreement with respect to the unenforceability, invalidity, or application of any provision of the operating agreement under subsection (1.5) or (2) of this section, when it is claimed or appears to the court that any provision of the operating agreement may violate subsection (1.5) or (2) of this section, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect, to aid the court in making the determination.

(3) Unless contained in a written operating agreement or other writing approved in accordance with a written operating agreement, no operating agreement may:

- (a) (Deleted by amendment, L. 2004, p. 936, § 3, effective July 1, 2004.)
- (b) (Deleted by amendment, L. 97, p. 1503, 12, effective June 3, 1997.)
- (c) (Deleted by amendment, L. 2004, p. 936, § 3, effective July 1, 2004.)
- (d) Vary any requirement under this article that a particular action or provision be reflected in a writing.

(4) It is the intent of this article to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements.

**Source:** L. 94: Entire section added, p. 711, § 5, effective July 1. L. 97: IP(3) and (3)(b) amended, p. 1503, § 12, effective June 3. L. 2003: (2)(d) amended, p. 2265, § 177, effective July 1, 2004. L. 2004: (2) and (3) amended and (4) added, p. 936, § 3, effective July 1. L. 2005: (2)(d) amended, p. 1203, § 2, effective October 1. L. 2006: (1) and (2) amended and (1.5) and (2.5) added, p. 855, § 20, effective July 1.

### ANNOTATION

**Agreement that required prior written approval of any assignment of a member's interest controlled over statute making inter-**

**ests assignable.** Condo v. Connors, \_\_\_ P.3d \_\_\_ (Colo. App. 2010), aff'd, 266 P.3d 1110 (Colo. 2011).

**7-80-109. Construction of article.** The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

**Source:** L. 2004: Entire section added, p. 938, § 4, effective July 1.

### PART 2

### FORMATION

#### 7-80-201. Limited liability company name. (Repealed)

**Source:** L. 90: Entire article added, p. 417, § 1, effective April 18. L. 93: (1) amended, p. 63, § 1, effective March 22; (4)(a) and (4)(c) amended, p. 859, § 20, effective July 1, 1994. L. 94: (4)(d) added, p. 88, § 15, effective July 1. L. 97: (4)(a) amended, p. 760, § 24, effective July 1, 1998. L. 2000: Entire section repealed, p. 990, § 109, effective July 1.

#### 7-80-202. Reservation of name - repeal. (Repealed)

**Source:** L. 90: Entire article added, p. 418, § 1, effective April 18. L. 2003: (3) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (3) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-80-203. Formation.** (1) One or more persons may form a limited liability company by delivering articles of organization to the secretary of state for filing pursuant to part 3 of article 90 of this title. Any such person who is an individual shall be of the age of eighteen years or older. Such person or persons need not be members of the limited liability company after formation has occurred.

(2) Repealed.

**Source:** L. 90: Entire article added, p. 418, § 1, effective April 18. L. 94: (2) repealed, p. 712, § 6, effective July 1. L. 97: (1) amended, p. 1503, § 13, effective June 3. L. 2002:



(1) amended, p. 1833, § 71, effective July 1; (1) amended, p. 1697, § 69, effective October 1. **L. 2003:** (1) amended, p. 2265, § 178, effective July 1, 2004. **L. 2004:** (1) amended, p. 1459, § 181, effective July 1.

**7-80-204. Articles of organization.** (1) The articles of organization shall state:

(a) The domestic entity name of the limited liability company, which domestic entity name shall comply with part 6 of article 90 of this title;

(b) (Deleted by amendment, L. 94, p. 712, § 7, effective July 1, 1994.)

(b.5) The principal office address of the limited liability company's initial principal office;

(c) The registered agent name and registered agent address of the limited liability company's initial registered agent;

(d) The true name and mailing address of each person forming the limited liability company pursuant to section 7-80-203;

(e) That management of the limited liability company is vested in one or more managers or is vested in the members, whichever be the case;

(f) (Deleted by amendment, L. 2003, p. 2265, § 179, effective July 1, 2004.)

(g) That there is at least one member of the limited liability company; and

(h) Any other matters relating to the limited liability company or the articles of organization the persons forming the limited liability company determine to include therein.

(2) (Deleted by amendment, L. 2003, p. 2265, § 179, effective July 1, 2004.)

**Source: L. 90:** Entire article added, p. 418, § 1, effective April 18. **L. 94:** (1)(b), (1)(d), and (1)(e) amended and (1)(f) added, p. 712, § 7, effective July 1. **L. 97:** (2) amended, p. 1503, § 14, effective June 3. **L. 2003:** Entire section amended, p. 2265, § 179, effective July 1, 2004. **L. 2004:** (1)(b.5) and (1)(d) amended and (1)(g) and (1)(h) added, p. 1460, § 182, effective July 1.

**7-80-205. Filing of articles of organization - repeal. (Repealed)**

**Source: L. 90:** Entire article added, p. 419, § 1, effective April 18. **L. 2003:** (3) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (3) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-80-206. Appeal from secretary of state. (Repealed)**

**Source: L. 90:** Entire article added, p. 419, § 1, effective April 18. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-80-207. Effect of filing of articles of organization.** A limited liability company is formed when its articles of organization become effective.

**Source: L. 90:** Entire article added, p. 419, § 1, effective April 18. **L. 2000:** (3) amended, p. 959, § 41, effective July 1. **L. 2002:** (2) amended, p. 1833, § 72, effective July 1; (2) amended, p. 1697, § 70, effective October 1. **L. 2003:** Entire section R&RE, p. 2266, § 180, effective July 1, 2004.

**7-80-208. Notice of existence of limited liability company.** The fact that the articles of organization are on file in the records of the secretary of state is notice that the limited liability company is a limited liability company and is notice of all other facts stated therein that are required to be stated in the articles of organization by section 7-80-204.

**Source:** L. 90: Entire article added, p. 420, § 1, effective April 18. L. 97: Entire section amended, p. 1503, § 15, effective June 3. L. 2003: Entire section amended, p. 2266, § 181, effective July 1, 2004. L. 2004: Entire section amended, p. 1460, § 183, effective July 1.

### ANNOTATION

This notice provision applies only where a third party seeks to impose liability on a limited liability company's (LLC) members or managers simply because of their status as members or managers of the LLC. When a third party sues a manager or member of an LLC under an agency theory, the principles of agency law apply notwithstanding the Colorado Limited Liability Company Act's statutory notice rules. *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998).

The general assembly did not intend this notice provision to alter the partially disclosed principal doctrine. The legislature did not intend the notice language to relieve the agent of an LLC of the duty to disclose its identity in order to avoid personal liability. *Wa-*

*ter, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998).

Where an agent fails to disclose either the fact that he is acting on behalf of a principal or the identity of the principal, this notice provision cannot relieve the agent of liability to a third party. *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998).

When a third party deals with an agent acting on behalf of an LLC, the existence and identity of which has been disclosed, the third party is conclusively presumed to know that the entity is an LLC and not a partnership or some other type of business organization. *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998).

**7-80-209. Amendment of articles of organization.** (1) The articles of organization may be amended at any time for any purpose and shall be amended when:

- (a) There is a change in the domestic entity name of the limited liability company;
- (b) There is a false or erroneous statement in the articles of organization.
- (c) and (d) (Deleted by amendment, L. 94, p. 713, § 8, effective July 1, 1994.)

(1.5) An amendment to the articles of organization is invalid unless approved by all of the members or in such other manner as may be provided in the operating agreement.

- (2) (Deleted by amendment, L. 2003, p. 2266, § 182, effective July 1, 2004.)

(3) and (4) (Deleted by amendment, L. 2002, p. 1833, § 73, effective July 1, 2002; p. 1697, § 71, effective October 1, 2002.)

(5) A limited liability company amends its articles of organization by delivering articles of amendment to its articles of organization to the secretary of state, for filing pursuant to part 3 of article 90 of this title, stating:

- (a) The domestic entity name of the limited liability company; and
- (b) The amendment to the articles of organization.

**Source:** L. 90: Entire article added, p. 420, § 1, effective April 18. L. 94: (1)(c), (1)(d), and (2) amended and (1.5) added, p. 713, § 8, effective July 1. L. 2002: (2) to (4) amended, p. 1833, § 73, effective July 1; (2) to (4) amended, p. 1697, § 71, effective October 1. L. 2003: IP(1), (1)(a), and (2) amended, p. 2266, § 182, effective July 1, 2004. L. 2004: (1.5) amended, p. 938, § 5, effective July 1; (5) added, p. 1460, § 184, effective July 1.

### PART 3

#### REGISTERED AGENTS, SERVICE OF PROCESS, AND ANNUAL REPORTS

**Editor's note:** This article was added in 1990, and this part 3 was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 3 prior to 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**7-80-301. Limited liability companies - registered agents - service of process - periodic reports.** Part 7 of article 90 of this title, providing for registered agents and service



of process, applies to limited liability companies formed under this article. Part 5 of article 90 of this title, providing for periodic reports, applies to limited liability companies formed under this article.

**Source:** **L. 2003:** Entire part R&RE, p. 2267, § 183, effective July 1, 2004. **L. 2010:** Entire section amended, (HB 10-1403), ch. 404, p. 1995, § 9, effective August 11.

## PART 4

### MANAGEMENT

**Editor's note:** This article was added in 1990, and this part 4 was subsequently repealed and reenacted in 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 4 prior to 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

**7-80-401. Management of limited liability company.** (1) Except as provided in subsection (2) of this section, decisions with respect to a limited liability company shall be made by a majority of the members or, if the limited liability company has one or more managers, by a majority of the managers.

(2) The consent of each member is necessary to:

(a) Amend the articles of organization;

(b) Amend the operating agreement; and

(c) Authorize an act of the limited liability company that is not in the ordinary course of the business of the limited liability company.

(3) A person or persons who will be admitted as a member or members pursuant to section 7-80-701 (2) may, by unanimous consent, amend the operating agreement to be effective immediately before the admission of the person or persons.

**Source:** **L. 2004:** Entire part R&RE, p. 938, § 6, effective July 1. **L. 2006:** (1) amended and (3) added, p. 857, § 21, effective July 1.

**Editor's note:** This section is similar to former § 7-80-401 as it existed prior to 2004.

**7-80-402. Designation of managers.** The members of a limited liability company, the articles of organization of which provide that management of the limited liability company is vested in one or more managers, may designate one or more persons to be managers. A manager who is an individual shall be eighteen years of age or older. Managers may be designated and removed by the consent of a majority of the members.

**Source:** **L. 2004:** Entire part R&RE, p. 939, § 6, effective July 1. **L. 2006:** Entire section amended, p. 857, § 22, effective July 1.

**Editor's note:** This section is similar to former § 7-80-402 as it existed prior to 2004.

**7-80-403. Officers and other agents.** (1) A limited liability company may have one or more officers or other agents with such titles, rights, duties, and authority as the limited liability company may determine. An officer or an agent who is an individual shall be eighteen years of age or older. Except as provided in subsection (2) of this section, officers and other agents may be designated or removed, and their titles, rights, duties, and authority may be established, by the consent of a majority of the members or, if the limited liability company has one or more managers, by a majority of the managers.

(2) Officers and other agents may be given authority to do any act that is not in the ordinary course of the business of the limited liability company only with the consent of all of the members.

**Source:** L. 2004: Entire part R&RE, p. 939, § 6, effective July 1. L. 2006: Entire section amended, p. 857, § 23, effective July 1.

**7-80-404. Duties of members and managers.** (1) In addition to the duties established elsewhere in this article, the duties that each member in a limited liability company in which management is vested in the members and that each manager owes to the limited liability company include the duties to:

(a) Account to the limited liability company and hold as trustee for it any property, profit, or benefit derived by the member or manager in the conduct or winding up of the limited liability company business or derived from a use by the member or manager of property of the limited liability company, including the appropriation of an opportunity of the limited liability company;

(b) Refrain from dealing with the limited liability company in the conduct or winding up of the limited liability company business as or on behalf of a party having an interest adverse to the limited liability company; and

(c) Refrain from competing with the limited liability company in the conduct of the limited liability company business before the dissolution of the limited liability company.

(d) (Deleted by amendment, L. 2006, p. 857, § 24, effective July 1, 2006.)

(2) Each member in a limited liability company, the articles of organization of which provide that management is vested in the members, and each manager owes to the limited liability company a duty of care in the conduct and winding up of the business of the limited liability company, which shall be limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(3) Each member and each manager shall discharge the member's or manager's duties to the limited liability company and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(4) A member in a limited liability company, the articles of organization of which provide that management is vested in the members, or a manager does not violate a duty or obligation to the limited liability company solely because the member's or manager's conduct furthers the member's or manager's own interest.

(5) A member or a manager may lend money to, and transact other business with, the limited liability company, and as to each loan or transaction the rights and obligations of the member or manager may be exercised or performed in the same manner as those of a person who is not a member or manager, subject to other applicable law.

**Source:** L. 2004: Entire part R&RE, p. 939, § 6, effective July 1. L. 2006: Entire section amended, p. 857, § 24, effective July 1.

**Editor's note:** This section is similar to former § 7-80-406 as it existed prior to 2004.

#### ANNOTATION

**Law reviews.** For article, "No Paper Required: Business Entity Legislation Makes Life

Easier for Business Lawyers", see 33 Colo. Law. 11 (June 2004).

**7-80-405. Members and managers as agents of the limited liability company.** (1) If the articles of organization provide that management of the limited liability company is vested in one or more managers:

(a) A member is not an agent of the limited liability company and has no authority to bind the limited liability company solely by virtue of being a member; and

(b) Each manager is an agent of the limited liability company for the purposes of its business and an act of a manager, including the execution of an instrument in the name of the limited liability company, for apparently carrying on in the ordinary course the business of the limited liability company or business of the kind carried on by the limited liability company binds the limited liability company, unless the manager had no authority to act for the limited liability company in the particular matter and the person with whom the manager was dealing had notice that the manager lacked authority.



(2) If the articles of organization provide that management of the limited liability company is vested in the members, each member is an agent of the limited liability company for the purposes of its business and an act of a member, including the execution of an instrument in the name of the limited liability company, for apparently carrying on in the ordinary course the business of the limited liability company or business of the kind carried on by the limited liability company binds the limited liability company, unless the member had no authority to act for the limited liability company in the particular matter and the person with whom the member was dealing had notice that the member lacked authority.

**Source:** L. 2004: Entire part R&RE, p. 940, § 6, effective July 1. L. 2006: Entire section amended, p. 858, § 25, effective July 1.

**7-80-406. Business transactions of member or manager with the limited liability company. (Repealed)**

**Source:** L. 2004: Entire part R&RE, p. 940, § 6, effective July 1. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**Editor's note:** This section was similar to former § 7-80-409 as it existed prior to 2004.

**7-80-407. Reimbursement and indemnification of members and managers.** A limited liability company shall reimburse a person who is or was a member or manager for payments made, and indemnify a person who is or was a member or manager for liabilities incurred by the person, in the ordinary course of the business of the limited liability company or for the preservation of its business or property, if such payments were made or liabilities incurred without violation of the person's duties to the limited liability company.

**Source:** L. 2004: Entire part R&RE, p. 940, § 6, effective July 1. L. 2006: Entire section amended, p. 859, § 26, effective July 1.

**Editor's note:** This section is similar to former § 7-80-410 as it existed prior to 2004.

**7-80-408. Access to and confidentiality of information - records - accounting.**

(1) Each member of a limited liability company has the right, subject to such reasonable standards as may be established by the members or managers pursuant to section 7-80-401 (1), to inspect and copy at the expense of the requesting member the following records of the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company:

(a) True and full information regarding the business and financial condition of the limited liability company, including written resolutions and minutes, if any, of the limited liability company;

(b) A copy of the limited liability company's federal, state, and local income tax returns for each year;

(c) A current list of the name and last-known business, residence, or mailing address of each member and manager;

(d) A copy of the limited liability company's articles of organization and a copy of any written operating agreement of the limited liability company;

(e) True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and that each member has agreed to contribute in the future, and the date on which each became a member; and

(f) Other information regarding the affairs of the limited liability company as is just and reasonable.

(2) Each manager shall have the right to examine all of the information described in paragraph (a) of subsection (1) of this section for a purpose reasonably related to the position of manager.

(3) Each member of a limited liability company and each manager shall have the right to keep confidential from the members, for such period of time as the members or managers deem reasonable, any information that the members or managers reasonably believe to be in the nature of trade secrets or that the limited liability company is required by law or by agreement with a third party to keep confidential.

(4) A limited liability company may maintain its records in other than a written form if such form is capable of conversion into written form within a reasonable time.

(5) Any demand by a member under this section shall be in writing and shall state the purpose of the demand.

(6) A member of a limited liability company shall have the right to have a formal accounting of limited liability company affairs whenever circumstances render it just and reasonable.

**Source:** L. 2004: Entire part R&RE, p. 941, § 6, effective July 1. L. 2006: (1)(d) and (3) amended, p. 859, § 27, effective July 1. L. 2007: (6) added, p. 226, § 16, effective May 29.

**Editor's note:** This section is similar to former § 7-80-411 as it existed prior to 2004.

## PART 5

### FINANCE

**7-80-501. Form of contribution.** The contribution of a member may be in cash, property, or services rendered or a promissory note or other obligation to contribute cash or property or to perform services. A person may be admitted to a limited liability company as a member of the limited liability company and may receive a membership interest in the limited liability company without making a contribution or being obligated to make a contribution to the limited liability company. Unless otherwise provided in the operating agreement, a person may be admitted to a limited liability company as a member of the limited liability company without acquiring a membership interest in the limited liability company. Unless otherwise provided in the operating agreement, a person may be admitted as the sole member of a limited liability company without making a contribution or being obligated to make a contribution to the limited liability company or without acquiring a membership interest in the limited liability company.

**Source:** L. 90: Entire article added, p. 431, § 1, effective April 18. L. 2004: Entire section amended, p. 942, § 7, effective July 1. L. 2005: Entire section amended, p. 1203, § 3, effective October 1.

**7-80-502. Liability for contributions.** (1) A member is obligated to the limited liability company to perform any enforceable promise to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability, or any other reason. If a member does not make the required contribution of property or services, the member is obligated at the option of the limited liability company to contribute cash equal to that portion of the value, as stated in the limited liability records required to be kept by section 7-80-408, of such contribution that has not been made.

(2) The obligation of a member to make a contribution or return money or other property paid or distributed in violation of this article may be compromised only by consent in writing of all the members. Notwithstanding the compromise, a creditor of a limited liability company who extends credit or otherwise acts in reliance on the original obligation may enforce the original obligation.

(3) No promise by a member to contribute to the limited liability company is enforceable unless set out in a writing signed by the member.

**Source:** L. 90: Entire article added, p. 431, § 1, effective April 18. L. 94: (1) and (2) amended, p. 716, § 18, effective July 1. L. 2004: (1) amended, p. 942, § 8, effective July 1.



**7-80-503. Sharing of profits and losses.** The profits and losses of a limited liability company shall be allocated among the members and among classes of members on the basis of the value, as stated in the limited liability company records required to be kept pursuant to section 7-80-408, of the contributions made by each member.

**Source:** L. 90: Entire article added, p. 431, § 1, effective April 18. L. 94: Entire section amended, p. 717, § 19, effective July 1. L. 2004: Entire section amended, p. 942, § 9, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Allocation of LLC Profits and Losses and the Basic Economic Effect Test", see 40 Colo. Law. 45 (April 2011).

**7-80-504. Sharing of distributions.** Distributions of cash or other assets of a limited liability company shall be allocated among the members and among classes of members on the basis of the value, as stated in the limited liability company records required to be kept pursuant to section 7-80-408, of the contributions made by each member.

**Source:** L. 90: Entire article added, p. 431, § 1, effective April 18. L. 94: Entire section amended, p. 717, § 20, effective July 1. L. 2004: Entire section amended, p. 942, § 10, effective July 1.

#### PART 6

#### DISTRIBUTIONS AND RESIGNATION

**Law reviews:** For article, "Limited Liability Companies: Structuring Members' Economic Rights", see 34 Colo. Law. 73 (August 2005).

**7-80-601. Interim distributions.** Except as provided in this part 6, a member is entitled to receive distributions from a limited liability company before the member's resignation from the limited liability company and before the dissolution and winding up thereof to the extent and at the times or upon the happening of the events stated in the operating agreement or as otherwise agreed by all of the members.

**Source:** L. 90: Entire article added, p. 432, § 1, effective April 18. L. 97: Entire section amended, p. 1505, § 18, effective June 3. L. 2003: Entire section amended, p. 2267, § 186, effective July 1, 2004.

**7-80-602. Resignation of member.** A member may resign from a limited liability company at any time by giving notice to the other members, but, if the resignation violates the operating agreement, the limited liability company may recover from the resigning member damages for breach of the operating agreement and offset the damages against the amount otherwise distributable to the resigning member.

**Source:** L. 90: Entire article added, p. 432, § 1, effective April 18. L. 94: Entire section amended, p. 717, § 21, effective July 1. L. 2004: Entire section amended, p. 943, § 11, effective July 1.

**7-80-603. Interest of member upon resignation.** A member who has resigned shall have no right to participate in the management of the business and affairs of the limited liability company and is entitled only to receive the share of the profits or other compensation by way of income and the return of contributions, to which such member would have been entitled if the member had not resigned.

**Source:** **L. 90:** Entire article added, p. 432, § 1, effective April 18. **L. 94:** Entire section amended, p. 717, § 22, effective July 1. **L. 2007:** Entire section amended, p. 227, § 17, effective May 29.

**7-80-604. Distribution in kind.** A member, regardless of the nature of the member's contribution, has no right to demand and receive any distribution from a limited liability company in any form other than cash. A member may not be compelled to accept a distribution of any asset in kind from a limited liability company to the extent that the percentage of the asset distributed to the member exceeds a percentage of that asset that is equal to the percentage in which the member shares in distributions from the limited liability company.

**Source:** **L. 90:** Entire article added, p. 432, § 1, effective April 18. **L. 94:** Entire section amended, p. 718, § 23, effective July 1. **L. 2004:** Entire section amended, p. 1460, § 185, effective July 1.

**7-80-605. Right to distribution.** At the time a member becomes entitled to receive a distribution, the member has the status of and is entitled to all remedies available to a creditor of the limited liability company with respect to the distribution.

**Source:** **L. 90:** Entire article added, p. 432, § 1, effective April 18. **L. 2004:** Entire section amended, p. 1461, § 186, effective July 1.

**7-80-606. Limitations on distribution.** (1) A limited liability company shall not make a distribution to a member to the extent that at the time of distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their membership interests and liabilities for which the recourse of creditors is limited to a specific property of the limited liability company, exceed the fair value of the assets of the limited liability company; except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability. For purposes of this subsection (1), the term "distribution" shall not include payments to the extent that the payments do not exceed amounts equal to or constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

(2) A member who receives a distribution in violation of subsection (1) of this section, and who knew at the time of the distribution that the distribution violated subsection (1) of this section, shall be liable to the limited liability company for the amount of the distribution. A member who receives a distribution in violation of subsection (1) of this section, and who did not know at the time of the distribution that the distribution violated subsection (1) of this section, shall not be liable for the amount of the distribution. Subject to subsection (3) of this section, this subsection (2) shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

(3) Unless otherwise agreed, a member who receives a distribution from a limited liability company shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said three-year period and an adjudication of liability against such member is made in the said action.

**Source:** **L. 90:** Entire article added, p. 432, § 1, effective April 18. **L. 2006:** Entire section amended, p. 860, § 28, effective July 1. **L. 2007:** (1) amended, p. 227, § 18, effective May 29.



## ANNOTATION

**Creditors of a limited liability company (LLC), as a group, have standing to sue an LLC member who knowingly receives an un-**

**lawful distribution.** Colborne Corp. v. Weinstein, \_\_ P.3d \_\_ (Colo. App. 2010).

**7-80-607. Liability upon return of contribution. (Repealed)**

**Source:** **L. 90:** Entire article added, p. 432, § 1, effective April 18. **L. 94:** (1) repealed, p. 718, § 24, effective July 1. **L. 2004:** (2) and (3) amended, p. 943, § 12, effective July 1. **L. 2006:** Entire section repealed, p. 884, § 87, effective July 1.

## PART 7

## MEMBERS

**7-80-701. Admission of members.** (1) After the filing of a limited liability company's original articles of organization, one or more persons may be admitted as an additional member or members upon the consent of all members.

(2) At any time that a limited liability company has no members, upon the unanimous consent of all the persons holding by assignment or transfer any of the membership interest of the last remaining member of the limited liability company, one or more persons, including an assignee or transferee of the last remaining member, may be admitted as a member or members.

**Source:** **L. 90:** Entire article added, p. 433, § 1, effective April 18. **L. 2004:** Entire section amended, p. 943, § 13, effective July 1. **L. 2006:** Entire section amended, p. 860, § 29, effective July 1.

## ANNOTATION

**Agreement that required prior written approval of any assignment of a member's interest prevented putative assignee from becoming a member,** therefore the putative

assignee had no enforceable membership interest. Condo v. Connors, \_\_ P.3d \_\_ (Colo. App. 2010), aff'd, 266 P.3d 1110 (Colo. 2011).

**7-80-702. Interest in limited liability company - transferability of interest.**

(1) The interest of each member in a limited liability company constitutes the personal property of the member and may be assigned or transferred. Unless the assignee or transferee is admitted as a member, the assignee or transferee shall only be entitled to receive the share of profits or other compensation by way of income and the return of contributions to which that member would otherwise be entitled and shall have no right to participate in the management of the business and activities of the limited liability company or to become a member.

(2) A member ceases to be a member upon assignment or transfer of all the member's membership interest. A person to whom all of a member's membership interest has been assigned or transferred and who has been admitted as a member has all the rights and powers and is subject to all the restrictions and liabilities of the assignor or transferor with respect to the portion of the membership interest assigned or transferred. The admission of the assignee or transferee releases the assignor or transferor from liability to the limited liability company other than for liabilities under section 7-80-502 or 7-80-606.

(3) A person to whom a portion of a member's membership interest has been assigned or transferred and who has been admitted as a member has all the rights and powers and is subject to all the restrictions and liabilities of the assignor or transferor with respect to the portion of the membership interest assigned or transferred. The admission of the assignee or transferee terminates the assignor's or transferor's rights and powers as a member with respect to the portion of the membership interest assigned or transferred and releases the

assignor or transferor from liability to the limited liability company with respect to the portion of the membership interest assigned or transferred other than for liabilities under section 7-80-502 or 7-80-606.

**Source:** **L. 90:** Entire article added, p. 433, § 1, effective April 18. **L. 94:** (1) amended, p. 718, § 25, effective July 1. **L. 2004:** Entire section amended, p. 943, § 14, effective July 1. **L. 2006:** Entire section amended, p. 861, § 30, effective July 1. **L. 2007:** (2) amended, p. 227, § 19, effective May 29.

#### ANNOTATION

Where there are no other members in the limited liability company (LLC), the debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the trustee obtained all of the debtor's rights, including the right to control the management of the LLC. In re Albright, 291 B.R. 538 (Bankr. D. Colo. 2003).

Because the trustee became the sole member of the LLC upon the debtor's bankruptcy filing, the trustee controls, directly or indirectly, all governance of that entity, including any decision regarding liquidation of the entity's assets. Therefore, the trustee may cause the LLC to sell its property and distribute net proceeds to the bankruptcy estate. Alternatively, the trustee

may elect to distribute the LLC's property to the bankruptcy estate, and, in turn, liquidate the property himself. In re Albright, 291 B.R. 538 (Bankr. D. Colo. 2003).

**Agreement that required prior written approval of any assignment of a member's interest prevailed in conflict with this section.** Condo v. Conners, \_\_ P.3d \_\_ (Colo. App. 2010), aff'd, 266 P.3d 1110 (Colo. 2011).

**Membership interest may be a "security".** The presumption that a general partnership interest is not a security is not applicable to a limited liability partnership interest in Colorado. Instead, the structure of the entity and the terms of the agreement will control. Toothman v. Freeborn & Peters, 80 P.3d 804 (Colo. App. 2002).

**7-80-703. Rights of creditor against a member.** On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest thereon and may then or later appoint a receiver of the member's share of the profits and of any other money due or to become due to the member in respect of the limited liability company and make all other orders, directions, accounts, and inquiries that the debtor member might have made, or that the circumstances of the case may require. To the extent so charged, except as provided in this section, the judgment creditor has only the rights of an assignee or transferee of the membership interest. The membership interest charged may be redeemed at any time before foreclosure. If the sale is directed by the court, the membership interest may be purchased without causing a dissolution with separate property by any one or more of the members. With the consent of all members whose membership interests are not being charged or sold, the membership interest may be purchased without causing a dissolution with property of the limited liability company. This article shall not deprive any member of the benefit of any exemption laws applicable to the member's membership interest.

**Source:** **L. 90:** Entire article added, p. 433, § 1, effective April 18. **L. 97:** Entire section amended, p. 1505, § 19, effective June 3. **L. 2006:** Entire section amended, p. 862, § 31, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Charging Partnership and LLC Interests To Satisfy Debts of Individuals", see 23 Colo. Law. 2743 (1994).

Where there are no other members in the limited liability company (LLC), the debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the

bankruptcy estate, and the trustee obtained all of the debtor's rights, including the right to control the management of the LLC. In re Albright, 291 B.R. 538 (Bankr. D. Colo. 2003).

Because the trustee became the sole member of the LLC upon the debtor's bankruptcy filing, the trustee controls, directly or indi-



rectly, all governance of that entity, including any decision regarding liquidation of the entity's assets. Therefore, the trustee may cause the LLC to sell its property and distribute net proceeds to the bankruptcy estate. Alternatively, the trustee

may elect to distribute the LLC's property to the bankruptcy estate, and, in turn, liquidate the property himself. In re Albright, 291 B.R. 538 (Bankr. D. Colo. 2003).

**7-80-704. Deceased or incompetent members who are individuals - dissolved or terminated members who are legal entities.** (1) If a member who is an individual dies or a court of competent jurisdiction appoints a guardian or general conservator for the member, the member's executor, administrator, guardian, conservator, or other legal representative may exercise all of the powers of an assignee or transferee of the member.

(2) If a member other than an individual is dissolved or terminated, the legal representative or successor of the member may exercise all of the powers of an assignee or transferee of the member.

(3) (Deleted by amendment, L. 2006, p. 862, § 32, effective July 1, 2006.)

**Source:** L. 90: Entire article added, p. 433, § 1, effective April 18. L. 94: Entire section amended, p. 718, § 26, effective July 1. L. 2004: (1) amended, p. 1461, § 187, effective July 1. L. 2006: (2) and (3) amended, p. 862, § 32, effective July 1.

**7-80-705. Liability of members and managers.** Members and managers of limited liability companies are not liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company.

**Source:** L. 90: Entire article added, p. 434, § 1, effective April 18.

**7-80-706. Voting.** (1) Subject to the provisions of this article that require majority or unanimous consent, vote, or agreement of the members, the operating agreement may grant to all or a stated group of the members the right to consent, vote, or agree, on a per capita or other basis, upon any matter.

(2) Any member may vote in person or by proxy.

**Source:** L. 90: Entire article added, p. 434, § 1, effective April 18. L. 94: (2) amended, p. 719, § 27, effective July 1. L. 2003: (1) amended, p. 2267, § 187, effective July 1, 2004.

**7-80-707. Meetings of members. (Repealed)**

**Source:** L. 90: Entire article added, p. 434, § 1, effective April 18. L. 94: (3) amended, p. 719, § 28, effective July 1. L. 2003: (1) and (4)(b) amended, p. 2268, § 188, effective July 1, 2004. L. 2004: Entire section repealed, p. 944, § 15, effective July 1; entire section repealed, p. 1461, § 188, effective July 1.

**7-80-708. Quorum of members - vote required. (Repealed)**

**Source:** L. 90: Entire article added, p. 435, § 1, effective April 18. L. 94: Entire section amended, p. 719, § 29, effective July 1. L. 2004: Entire section repealed, p. 944, § 16, effective July 1; entire section repealed, p. 1462, § 189, effective July 1.

**7-80-709. Notice of members' meetings. (Repealed)**

**Source:** L. 90: Entire article added, p. 435, § 1, effective April 18. L. 94: (3) amended, p. 719, § 30, effective July 1. L. 2004: Entire section repealed, p. 944, § 17, effective July 1; entire section repealed, p. 1462, § 190, effective July 1.

**7-80-710. Waiver of notice. (Repealed)**

**Source: L. 90:** Entire article added, p. 435, § 1, effective April 18. **L. 2004:** Entire section repealed, p. 945, § 18, effective July 1; entire section repealed, p. 1462, § 191, effective July 1.

**7-80-711. Action by members without a meeting. (Repealed)**

**Source: L. 90:** Entire article added, p. 435, § 1, effective April 18. **L. 94:** (1) amended, p. 719, § 31, effective July 1. **L. 2003:** (1) amended, p. 2268, § 189, effective July 1, 2004. **L. 2004:** Entire section repealed, p. 945, § 19, effective July 1; entire section repealed, p. 1463, § 192, effective July 1.

**7-80-712. Information and accounting. (Repealed)**

**Source: L. 90:** Entire article added, p. 436, § 1, effective April 18. **L. 2003:** IP(1)(b) amended, p. 2268, § 190, effective July 1, 2004. **L. 2004:** Entire section repealed, p. 946, § 20, effective July 1.

**7-80-713. Derivative proceeding - standing - definitions.** (1) A member may commence or maintain a derivative proceeding pursuant to this part 7 only where:

(a) The member was a member of the limited liability company at the time of the act or omission complained of or the membership interest in such company thereafter devolved by operation of law; and

(b) It appears that the member fairly and adequately represents the interests of the members similarly situated in enforcing the right of the limited liability company.

(2) For purposes of this part 7, “derivative proceeding” means a civil suit in the right of a domestic limited liability company or, to the extent provided in section 7-80-719, in the right of a foreign limited liability company.

**Source: L. 2002:** Entire section added, p. 1725, § 160, effective October 1.

**ANNOTATION**

**Law reviews.** For article, “Business Entity Changes”, see 31 Colo. Law. 55 (November Legislation 2002: Filing Procedures and LLC 2002).

**7-80-714. Derivative proceeding - demand.** (1) No member shall commence a derivative proceeding pursuant to this part 7 unless:

(a) A written demand has been made upon the limited liability company to take suitable action; and

(b) Thirty days have expired from the date the demand was made; except that the thirty-day limitation shall not be required where:

(I) The member has been notified prior to the expiration of the thirty-day period that the demand has been rejected by the limited liability company; or

(II) Irreparable injury to the limited liability company would result from waiting for the expiration of the thirty-day period.

**Source: L. 2002:** Entire section added, p. 1725, § 160, effective October 1.

**7-80-715. Stay of derivative proceeding.** For the purpose of allowing the limited liability company time to undertake an inquiry into the allegations made in a demand or complaint commenced pursuant to this part 7, the court may stay any derivative proceeding for such period as the court deems appropriate.

**Source: L. 2002:** Entire section added, p. 1725, § 160, effective October 1.



**7-80-716. Dismissal of derivative proceeding.** (1) A derivative proceeding commenced pursuant to this part 7 shall be dismissed by the court on motion by the limited liability company if any one of the groups specified in subsection (2) of this section has determined in good faith, after conducting an inquiry upon which the determination is based, that the maintenance of the derivative action is not in the best interests of the limited liability company.

(2) (a) Subject to the requirements of paragraph (b) of this subsection (2), the determination whether the maintenance of the derivative proceeding is in the best interests of the limited liability company shall be made by the independent manager of the limited liability company or, where there is more than one such manager, by a majority of said managers; except that, if there is no independent manager of the limited liability company or if the majority of such managers is unable to make the determination, the determination shall be made by a majority of the independent members of the limited liability company.

(b) If the determination is not made pursuant to paragraph (a) of this subsection (2), the determination shall be made by the person, or, in the case of more than one person, by a majority of such persons, sitting upon a panel of one or more persons appointed by a court upon motion filed with the court by the limited liability company for such purposes.

(3) The court shall appoint only independent persons to the panel described in paragraph (b) of subsection (2) of this section.

(4) None of the following shall by itself cause a person not to be considered independent for purposes of subsection (2) of this section:

(a) The naming of the person as a defendant in the derivative proceeding or as a person against whom action is demanded;

(b) The approval by such person of the act being challenged in the derivative proceeding or demand where the act did not result in personal benefit to such person;

(c) The making of the demand pursuant to section 7-80-714 or the commencement of the derivative proceeding pursuant to this section.

(5) Subject to section 7-80-717, a panel appointed by the court pursuant to paragraph (b) of subsection (2) of this section shall have such authority to continue, settle, or discontinue the derivative proceeding as the court may confer upon such panel.

(6) The plaintiff in the derivative proceeding shall have the burden of proving that any of the requirements of subsections (1) and (2) of this section have not been met.

**Source: L. 2002:** Entire section added, p. 1725, § 160, effective October 1.

**7-80-717. Discontinuance or settlement of derivative proceeding.** No derivative proceeding commenced pursuant to this part 7 shall be discontinued or settled without the approval of the court. Where the court determines that a proposed discontinuance or settlement will substantially affect the interests of the members of the limited liability company, the court shall direct that notice be given to the members affected.

**Source: L. 2002:** Entire section added, p. 1726, § 160, effective October 1.

**7-80-718. Payment of expenses - derivative proceeding.** On the termination of a derivative proceeding commenced pursuant to this part 7, where the court finds that the proceeding has resulted in a substantial benefit to the limited liability company, the court may order the limited liability company to pay the plaintiff's reasonable expenses, including attorney fees, incurred by the plaintiff in connection with the maintenance of such proceeding. On the termination of a derivative proceeding commenced pursuant to this part 7, where the court finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose, the court may order the plaintiff to pay any of the defendant's reasonable expenses, including attorney fees, incurred by the defendant in connection with the defense of such proceeding.

**Source: L. 2002:** Entire section added, p. 1726, § 160, effective October 1.

**7-80-719. Applicability of derivative proceeding to foreign limited liability companies.** In any derivative proceeding in the right of a foreign limited liability company, the right of a person to commence or maintain a derivative proceeding in the right of a foreign limited liability company and any matters raised in such proceeding covered by sections 7-80-713 to 7-80-718 shall be governed by the law of the jurisdiction under which the foreign limited liability company was formed; except that any matters raised in such proceeding covered by sections 7-80-715 and 7-80-717 shall be governed by the law of this state.

**Source:** **L. 2002:** Entire section added, p. 1727, § 160, effective October 1. **L. 2003:** Entire section amended, p. 2268, § 191, effective July 1, 2004.

## PART 8

### DISSOLUTION

**Editor's note:** This article was added in 1990, and this part 8 was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 8 prior to 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

## SUBPART 1

### VOLUNTARY DISSOLUTION

**7-80-801. Dissolution - time and notice of dissolution.** (1) A limited liability company formed under this article is dissolved:

- (a) Upon the agreement of all members;
- (b) At the time or upon the occurrence of the events stated in the operating agreement; or
- (c) After the limited liability company ceases to have members, on the earlier of:
  - (I) The ninety-first day after the limited liability company ceases to have members unless, prior to that date, a person has been admitted as a member; or
  - (II) The date on which a statement of dissolution of the limited liability company becomes effective pursuant to section 7-90-304.

**Source:** **L. 2003:** Entire part R&RE, p. 2269, § 192, effective July 1, 2004. **L. 2004:** Entire section amended, p. 946, § 21, effective July 1. **L. 2006:** Entire section amended, p. 862, § 33, effective July 1.

**Editor's note:** This section is similar to former § 7-80-801 as it existed prior to 2004.

**7-80-802. Statement of dissolution.** (1) Upon dissolution, the limited liability company shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of dissolution stating:

- (a) The domestic entity name of the limited liability company; and
- (b) The principal office address of the limited liability company's principal office.
- (c) and (d) (Deleted by amendment, L. 2004, p. 1463, § 193, effective July 1, 2004.)
- (2) A limited liability company is dissolved as provided in section 7-80-801.
- (3) For purposes of sections 7-80-405 and 7-80-803.5, a person who is not a manager or member has notice of the dissolution of a limited liability company on the earlier of:
  - (a) The ninetieth day after the limited liability company's statement of dissolution is on file with the secretary of state; or
  - (b) The date on which such person first has actual knowledge of the dissolution.



**Source:** L. 2003: Entire part R&RE, p. 2269, § 192, effective July 1, 2004. L. 2004: (1) amended, p. 1463, § 193, effective July 1. L. 2006: (2) amended and (3) added, p. 863, § 34, effective July 1.

**Editor's note:** This section is similar to former § 7-80-806 as it existed prior to 2004.

**7-80-803. Effect of dissolution.** (1) A dissolved limited liability company continues its existence as a limited liability company but shall not carry on any business except as is appropriate to wind up and liquidate its business and affairs, including:

- (a) Collecting its assets;
  - (b) Disposing of its properties that will not be distributed in kind to its members;
  - (c) Discharging or making provision for discharging its liabilities;
  - (d) Distributing its remaining property among its members; and
  - (e) Doing every other act necessary to wind up and liquidate its business and affairs.
- (2) A dissolved limited liability company may dispose of claims against it pursuant to sections 7-90-911 and 7-90-912.

**Source:** L. 2003: Entire part R&RE, p. 2269, § 192, effective July 1, 2004. L. 2006: (2) added, p. 863, § 35, effective July 1.

**Editor's note:** This section is similar to former § 8-80-807 as it existed prior to 2004.

**7-80-803.3. Right to wind up business.** (1) After dissolution, the manager or, if there is no manager, any member may wind up the limited liability company's business, but on application of any member, member's legal representative, or member's assignee or transferee, the district court, for good cause shown, may order judicial supervision of the winding up.

(2) The legal representative, assignee, or transferee of the last remaining member may wind up the limited liability company's business if the limited liability company dissolves.

(3) A person winding up a limited liability company's business may preserve the business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle disputes, settle and close the limited liability company's business, dispose of and transfer the limited liability company's property, discharge or provide for obligations of the limited liability company, distribute the assets of the limited liability company pursuant to section 7-80-803 (1) (d), and perform other necessary acts.

**Source:** L. 2006: Entire section added, p. 863, § 36, effective July 1.

**7-80-803.5. Manager's or member's power to bind limited liability company after dissolution.** (1) Subject to section 7-80-802 (3), a limited liability company is bound by a manager's act or, in the case of a limited liability company, the articles of organization of which provide that management is vested in members, a member's act after dissolution that:

- (a) Is appropriate for winding up the limited liability company's business; or
- (b) Would have bound the limited liability company under section 7-80-405 before dissolution, if the other party to the transaction did not have notice of the dissolution.

**Source:** L. 2006: Entire section added, p. 863, § 36, effective July 1.

**7-80-804. Disposition of known claims by notification. (Repealed)**

**Source:** L. 2003: Entire part R&RE, p. 2269, § 192, effective July 1, 2004. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**7-80-805. Disposition of claims by publication. (Repealed)**

**Source:** L. 2003: Entire part R&RE, p. 2270, § 192, effective July 1, 2004. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**7-80-806. Enforcement of claims against dissolved limited liability company. (Repealed)**

**Source:** L. 2003: Entire part R&RE, p. 2271, § 192, effective July 1, 2004. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

## SUBPART 2

## ADMINISTRATIVE DISSOLUTION

**7-80-807. Grounds for administrative dissolution. (Repealed)**

**Source:** L. 2003: Entire part R&RE, p. 2271, § 192, effective July 1, 2004. L. 2004: IP(1) amended, p. 1463, § 194, effective July 1. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

**7-80-808. Procedure for and effect of administrative dissolution. (Repealed)**

**Source:** L. 2003: Entire part R&RE, p. 2272, § 192, effective July 1, 2004. L. 2004: (1) and (2) amended, p. 946, § 22, effective July 1; (1) and (2) amended, p. 1463, § 195, effective July 1. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

## SUBPART 3

## JUDICIAL DISSOLUTION

**7-80-809. Approval by judicial act. (Repealed)**

**Source:** L. 2003: Entire part R&RE, p. 2272, § 192, effective July 1, 2004. L. 2004: Entire section repealed, p. 1464, § 196, effective July 1.

**7-80-810. Judicial dissolution.** (1) A limited liability company may be dissolved in a proceeding by the attorney general if it is established that:

- (a) The limited liability company obtained its articles of organization through fraud; or
- (b) The limited liability company has continued to exceed or abuse the authority conferred upon it by law.

(2) A limited liability company may be dissolved in a proceeding by or for a member or manager of the limited liability company if it is established that it is not reasonably practicable to carry on the business of the limited liability company in conformity with the operating agreement of said company.

(3) A limited liability company may be dissolved in a proceeding by a creditor of the limited liability company if it is established that:

- (a) The creditor's claim has been reduced to judgment, execution upon such judgment has been returned unsatisfied, and the limited liability company is insolvent; or
- (b) The limited liability company is insolvent and the limited liability company has admitted in writing that the creditor's claim is due and owing.

(4) (a) If a limited liability company has been dissolved by voluntary action taken under subpart 1 of this part 8:

(I) The limited liability company may bring a proceeding to wind up and liquidate its business and affairs under judicial supervision in accordance with section 7-80-803; and



(II) The attorney general, a member, a manager, or a creditor, as the case may be, may bring a proceeding to wind up and liquidate the business and affairs of the limited liability company under judicial supervision in accordance with section 7-80-803, upon establishing the grounds set forth for such person, respectively, in subsections (1) to (3) of this section.

(b) As used in sections 7-80-811 to 7-80-813, a "judicial proceeding brought to dissolve a limited liability company" includes a proceeding brought under this subsection (4), and a "decree of dissolution" includes an order of court entered in a proceeding under this subsection (4) that directs that the business and affairs of a limited liability company shall be wound up and liquidated under judicial supervision.

**Source:** L. 2003: Entire part R&RE, p. 2273, § 192, effective July 1, 2004. L. 2004: (4)(b) amended, p. 1464, § 197, effective July 1. L. 2005: IP(4)(a) amended, p. 1219, § 28, effective October 1.

**Editor's note:** This section is similar to former § 7-80-808 as it existed prior to 2004.

### ANNOTATION

**Law reviews.** For article, "Business Entity Changes", see 31 Colo. Law. 55 (November 2002).  
Legislation 2002: Filing Procedures and LLC

**7-80-811. Procedure for judicial dissolution.** (1) A judicial proceeding by the attorney general to dissolve a limited liability company shall be brought in the district court for the county in this state in which the street address of the limited liability company's principal office or the street address of its registered agent is located or, if the limited liability company has no principal office in this state and no registered agent, in the district court for the city and county of Denver. A judicial proceeding brought by any other party named in section 7-80-810 to dissolve a limited liability company shall be brought in the district court for the county in this state in which the street address of the limited liability company's principal office is located or, if it has no principal office in this state, in the district court for the county in which the street address of its registered agent is located, or, if the limited liability company has no registered agent, in the district court for the city and county of Denver.

(2) It is not necessary to make managers or members parties to a judicial proceeding to dissolve a limited liability company unless relief is sought against them individually.

(3) A court in a judicial proceeding brought to dissolve a limited liability company may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the limited liability company's assets wherever located, and carry on the business of the limited liability company until a full hearing can be held.

**Source:** L. 2003: Entire part R&RE, p. 2274, § 192, effective July 1, 2004. L. 2004: Entire section amended, p. 1464, § 198, effective July 1. L. 2006: (2) amended, p. 864, § 37, effective July 1.

**7-80-812. Receivership or custodianship.** (1) A court in a judicial proceeding brought to dissolve a limited liability company may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the limited liability company. The court shall hold a hearing, after giving notice to all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the limited liability company and all of its property, wherever located.

(2) The court may appoint an individual, a domestic entity, or a foreign entity authorized to transact business or conduct activities in this state as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(a) The receiver:

(I) May dispose of all or any part of the property of the limited liability company wherever located, at a public or private sale, if authorized by the court; and

(II) May sue and defend in the receiver's own name as receiver of the limited liability company in all courts; or

(b) The custodian, with the authority of a manager of a limited liability company, the articles of organization of which provide that it is to be managed by managers, may exercise all of the powers of the limited liability company, through or in place of its managers or members, to the extent necessary to manage the affairs of the limited liability company in the best interests of its members and creditors.

(4) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the limited liability company and its members and creditors.

(5) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and such person's counsel from the assets of the limited liability company or proceeds from the sale of the assets.

**Source:** L. 2003: Entire part R&RE, p. 2274, § 192, effective July 1, 2004. L. 2006: (3)(b) amended, p. 864, § 38, effective July 1.

**7-80-813. Decree of dissolution.** (1) If, in a judicial proceeding brought to dissolve a limited liability company, after a hearing the court determines that one or more grounds for judicial dissolution described in section 7-80-810 exist, it may enter a decree dissolving the limited liability company and stating the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the secretary of state for filing pursuant to part 3 of article 90 of this title.

(2) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the limited liability company's business and affairs in accordance with section 7-80-803 and the giving of notice to claimants in accordance with sections 7-90-911 and 7-90-912.

(3) The court's order or decision may be appealed as in other civil proceedings.

**Source:** L. 2003: Entire part R&RE, p. 2275, § 192, effective July 1, 2004. L. 2004: (1) and (2) amended, p. 1465, § 199, effective July 1. L. 2006: (2) amended, p. 864, § 39, effective July 1.

## PART 9

### FOREIGN LIMITED LIABILITY COMPANIES

**Editor's note:** This article was added in 1990, and this part 9 was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 9 prior to 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**7-80-901. Foreign limited liability companies.** Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign limited liability companies.

**Source:** L. 2003: Entire part R&RE, p. 2275, § 193, effective July 1, 2004.



**7-80-902. Registered agent - service of process.** Part 7 of article 90 of this title, providing for registered agents and service of process, applies to foreign limited liability companies.

**Source: L. 2003:** Entire part R&RE, p. 2275, § 193, effective July 1, 2004.

## PART 10

### MERGER AND CONVERSION

#### 7-80-1001 to 7-80-1007. (Repealed)

**Editor's note:** (1) This part 10 was added in 1994. For amendments to this part 10 prior to its repeal in 2003, effective July 1, 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 7-80-1007 provided for the repeal of this part, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

## PART 11

### APPLICABILITY OF ARTICLE

#### 7-80-1101. Application to limited liability companies formed prior to July 1, 1994.

(1) A limited liability company formed under this article prior to July 1, 1994, shall be governed by the provisions of this article.

(2) (Deleted by amendment, L. 2004, p. 1465, § 200, effective July 1, 2004.)

**Source: L. 94:** Entire part added, p. 725, § 34, effective July 1. **L. 2004:** Entire section amended, p. 1465, § 200, effective July 1.

## CORPORATIONS AND ASSOCIATIONS

### ARTICLE 90

#### Colorado Corporations and Associations Act

**Law reviews:** For article, "House Bill 1489: Additional Steps To Simplify Colorado's Business Entity Legislation", see 30 Colo. Law. 29 (January 2001); for article, "Colorado Choice of Form of Organization and Structure 2001", see 30 Colo. Law. 11 (October 2001); for article, "Entity and Trade Name Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001); for article, "No Paper Required: Business Entity Legislation Makes Life Easier for Business Lawyers", see 33 Colo. Law. 11 (June 2004); for article, "Conversion of Entities in Colorado", see 33 Colo. Law. 11 (November 2004); for article, "Entity and Trade Name Registration: 2004 Update", see 34 Colo. Law. 11 (January 2005).

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## PART 1

## DEFINITIONS AND APPLICATION - SPECIAL RULES

**7-90-101. Short title.** This article shall be known and may be cited as the "Colorado Corporations and Associations Act".

**Source: L. 97:** Entire article added, p. 1506, § 21, effective June 3.

**7-90-102. Definitions.** As used in this title, except as otherwise defined for the purpose of any section, subpart, part, or article of this title, or unless the context otherwise requires:

(1) "Address" means a mailing address or a street address.

(1.3) (Deleted by amendment, L. 2010, (HB 10-1403), ch. 404, p. 1995, § 12, effective August 11, 2010.)

(1.5) "Articles of association" means, with respect to a domestic limited partnership association, the articles of association as defined in the "Colorado Limited Partnership Association Act", article 63 of this title. With respect to a foreign limited partnership association or partnership association, "articles of association" means the corresponding

document filed with the jurisdiction under the law of which the limited partnership association is formed.

(2) “Articles of incorporation” means, with respect to:

(a) A domestic cooperative that is not a domestic limited cooperative association, a domestic corporation, or other domestic entity that is formed under or subject to the “Colorado Business Corporation Act”, articles 101 to 117 of this title, articles of incorporation as that term is used in the “Colorado Business Corporation Act”;

(b) A corporation formed under or subject to article 40 of this title, a certificate of incorporation as that term is used in article 40 of this title;

(c) A domestic cooperative, a domestic nonprofit corporation, or other domestic entity that is formed under or subject to the “Colorado Revised Nonprofit Corporation Act”, articles 121 to 137 of this title, articles of incorporation as that term is used in the “Colorado Revised Nonprofit Corporation Act”; and

(d) A foreign corporation or foreign nonprofit corporation, the corresponding document filed with the jurisdiction, under the law of which the corporation or nonprofit corporation is formed.

(3) “Articles of organization” means, with respect to:

(a) A domestic limited liability company, the articles of organization as defined in the “Colorado Limited Liability Company Act”, article 80 of this title;

(b) A foreign limited liability company, the corresponding document filed with the filing officer of the jurisdiction under the law of which the foreign limited liability company is formed; and

(c) A domestic limited cooperative association, the articles of organization as defined in the “Colorado Uniform Limited Cooperative Association Act”, article 58 of this title.

(3.3) “Assumed entity name” means an entity name assumed by a foreign entity pursuant to the provisions of section 7-90-603.

(3.5) “Business development corporation” means a corporation incorporated under the “Colorado Business Development Corporation Act”, article 48 of this title.

(3.7) (Deleted by amendment, L. 2002, p. 1837, § 87, effective July 1, 2002; p. 1702, § 85, effective October 1, 2002.)

(3.8) “Commercial registered agent” means a registered agent who has filed the appropriate documentation with the secretary of state to become listed as a commercial registered agent pursuant to section 7-90-707.

**Editor’s note:** Subsection (3.8) is effective ninety days following certification by the secretary of state. (See the editor’s note following this section.)

(3.9) (Deleted by amendment, L. 2004, p. 1465, § 201, effective July 1, 2004.)

(4) “Constituent document” means a constituent filed document or a constituent operating document.

(5) “Constituent entity” means, with respect to a merger, each merging entity and the surviving entity; with respect to a conversion, the converting entity and the resulting entity; and, with respect to a share or equity capital exchange, each entity whose owner’s interests will be acquired and each entity acquiring those interests.

(6) “Constituent filed document” means the articles of incorporation, articles of organization, certificate of limited partnership, articles of association, statement of registration, or other document of similar import filed or recorded by or for an entity in the jurisdiction under the law of which the entity is formed, by which it is formed, or by which the entity obtains its status as an entity or the entity or any or all of its owners obtain the attribute of limited liability. Where a constituent filed document has been amended or restated, “constituent filed document” means the constituent filed document as last amended or restated.

(7) “Constituent operating document” means articles of incorporation, operating agreement, or partnership agreement, and bylaws of a corporation, nonprofit corporation, cooperative, or limited partnership association.

(8) “Converting entity” means the entity that converts into a resulting entity pursuant to section 7-90-201.



(9) "Cooperative" means a domestic cooperative or a foreign cooperative.

(9.5) "Cooperative housing corporation" means a corporation formed pursuant to article 33.5 of title 38, C.R.S.

(10) "Corporation" means a domestic corporation or a foreign corporation.

(10.3) "Delinquent entity" means an entity that has been declared delinquent pursuant to section 7-90-902 and that has not cured its delinquency.

(10.5) "Deliver" includes mail; except that delivery to the secretary of state means actual receipt by the secretary of state. "Deliver" to any person by the secretary of state includes delivery or mail to the registered agent address of the person's registered agent, or to the principal office address of the person, unless otherwise specified in section 7-90-902 or by an organic statute other than this article. "Deliver" by the secretary of state to a person that has neither a principal office address nor a registered agent address includes delivery to the address that such person may have provided to the secretary of state for such purpose, unless otherwise specified by an organic statute other than this article.

(11) "Domestic cooperative" means an entity formed under article 55 of this title; an entity formed under the "Colorado Cooperative Act", article 56 of this title; an entity formed under the "Colorado Uniform Limited Cooperative Association Act", article 58 of this title; or an entity formed under any other act of the state of Colorado that has elected to be subject to the "Colorado Cooperative Act".

(11.5) (Deleted by amendment, L. 2003, p. 2276, § 194, effective July 1, 2004.)

(12) "Domestic corporation" means a corporation formed under or subject to the "Colorado Business Corporation Act", articles 101 to 117 of this title.

(13) "Domestic entity" means a domestic corporation, a domestic general partnership, a domestic cooperative, a domestic limited liability company, a domestic limited partnership, a domestic limited partnership association, a domestic nonprofit association, a domestic nonprofit corporation, or any other organization or association that is formed under a statute or common law of this state or as to which the law of this state governs relations among the owners and between the owners and the organization or association and that is recognized under the law of this state as a separate legal entity.

(13.5) "Domestic entity name" means the name of a domestic entity as stated in the entity's constituent filed document or as changed pursuant to section 7-90-601.5 or 7-90-601.6.

(14) "Domestic general partnership" means a partnership as defined in the "Uniform Partnership Law", article 60 of this title, or as defined in the "Colorado Uniform Partnership Act (1997)", article 64 of this title if, in either case, the law of this state governs relations among the partners and between the partners and the partnership. The term includes a limited liability partnership as defined in the "Uniform Partnership Law", article 60 of this title, or as defined in the "Colorado Uniform Partnership Act (1997)", article 64 of this title.

(14.5) "Domestic limited cooperative association" means a limited cooperative association formed under or subject to the "Colorado Uniform Limited Cooperative Association Act", article 58 of this title.

(15) "Domestic limited liability company" means a limited liability company formed under the "Colorado Limited Liability Company Act", article 80 of this title.

(15.3) "Domestic limited liability limited partnership" means a domestic limited partnership that is registered as a limited liability limited partnership under section 7-60-144 or 7-64-1002.

(15.5) "Domestic limited liability partnership" means a domestic general partnership that is a limited liability partnership as defined in the "Uniform Partnership Law", article 60 of this title, or as defined in the "Colorado Uniform Partnership Act (1997)", article 64 of this title.

(16) "Domestic limited partnership" means a limited partnership as defined in the "Uniform Limited Partnership Law of 1931", article 61 of this title, or as defined in the "Colorado Uniform Limited Partnership Act of 1981", article 62 of this title. The term includes a limited partnership that is a limited liability limited partnership.

(17) "Domestic limited partnership association" means a limited partnership association formed under the "Colorado Limited Partnership Association Act", article 63 of this title.

(18) "Domestic nonprofit association" means a nonprofit association as defined in the "Uniform Unincorporated Nonprofit Association Act", article 30 of this title.

(19) "Domestic nonprofit corporation" means a corporation formed under or subject to article 40 of this title or the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of this title.

(19.3) (Deleted by amendment, L. 2004, p. 1465, § 201, effective July 1, 2004.)

(19.5) "Effective date", when referring to a document filed by the secretary of state, means the time and date determined in accordance with section 7-90-304.

(19.7) "Effective date of dissolution of an entity" means, with respect to any domestic entity other than a general partnership that was a reporting entity before dissolution, the earlier of the effective date of the entity's articles of dissolution or statement of dissolution or the date as shown by the records of the secretary of state on which the entity was administratively or judicially dissolved.

(20) "Entity" means a domestic entity or a foreign entity.

(20.5) "Entity name" means a domestic entity name or a foreign entity name.

(20.6) "Fee" means a fee determined and collected by the secretary of state as provided in section 24-21-104, C.R.S., and includes a fee imposed as a penalty for a late filing or otherwise.

(20.7) "Filed document" means any document filed by the secretary of state pursuant to this title, whether or not effective.

(21) "Foreign cooperative" means an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic cooperative.

(21.5) (Deleted by amendment, L. 2003, p. 2276, § 194, effective July 1, 2004.)

(22) "Foreign corporation" means an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic corporation.

(23) "Foreign entity" means a foreign corporation, a foreign cooperative, a foreign general partnership, a foreign limited liability partnership, a foreign limited liability company, a foreign limited partnership, a foreign limited liability limited partnership, a foreign limited partnership association, a foreign nonprofit association, a foreign nonprofit corporation, or any other organization or association that is formed under a statute or common law of a jurisdiction other than this state or as to which the law of a jurisdiction other than this state governs relations among the owners and between the owners and the organization or association and is recognized under the law of such jurisdiction as a separate legal entity.

(23.3) "Foreign entity name" means:

(a) The name of a foreign entity under which it is authorized to transact business or conduct activities in this state, whether such name is its true name or an assumed entity name, as such name may be changed pursuant to section 7-90-601.6; or

(b) As to a foreign entity that is not authorized to transact business or conduct activities in this state but that has registered its true name pursuant to section 7-90-604, that true name.

(23.5) "Foreign general partnership" means an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic general partnership.

(23.7) "Foreign limited cooperative association" means an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic limited cooperative association.

(24) "Foreign limited liability company" means an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic limited liability company.

(24.3) "Foreign limited liability limited partnership" means an entity that is functionally equivalent to a domestic limited liability limited partnership and is formed under the law of a jurisdiction other than this state or as to which the law of a jurisdiction other than



this state governs relations among the owners and between the owners and the entity and is recognized under the law of this state as a separate legal entity.

(24.5) "Foreign limited liability partnership" means an entity that is functionally equivalent to a domestic limited liability partnership and is formed under the law of a jurisdiction other than this state or as to which the law of a jurisdiction other than this state governs relations among the owners and between the owners and the entity and is recognized under the law of this state as a separate legal entity.

(25) "Foreign limited partnership" means a partnership formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic limited partnership.

(26) "Foreign limited partnership association" means a limited partnership association formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic limited partnership association.

(27) (Deleted by amendment, L. 2000, p. 959, § 44, effective July 1, 2000.)

(28) "Foreign nonprofit association" means an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic nonprofit association.

(29) "Foreign nonprofit corporation" means an entity formed under the law of a jurisdiction other than this state that is functionally equivalent to a domestic nonprofit corporation.

(29.3) (Deleted by amendment, L. 2004, p. 1465, § 201, effective July 1, 2004.)

(29.5) "Formed" includes incorporated, created, and organized, and each of the terms includes the others as the context may require. With respect to an entity that was initially formed under the law of one jurisdiction and, by merger, conversion, consolidation, redomestication, or other action, is treated, after such action, according to the law of the jurisdiction under which it was initially formed, as having been formed under the law of a second jurisdiction, the entity shall be considered to have been formed under the law of the second jurisdiction for purposes of this title.

(30) "General partner" means a partner in a general partnership and a general partner in a limited partnership.

(31) "General partnership" means a domestic general partnership or a foreign general partnership.

(31.1) "Health care coverage cooperative" shall have the same meaning as set forth in section 10-16-1002 (2), C.R.S., or a successor statute.

(31.3) "Include" or its variants, when used in reference to any definition or list, indicates that the definition or list is partial and not exclusive.

(31.5) "Individual" means a natural person.

(31.7) "Jurisdiction" includes the United States, a state of the United States, a foreign country or other foreign governmental authority, and any agency, instrumentality, or subdivision thereof.

(32) "Limited liability company" means a domestic limited liability company or a foreign limited liability company.

(32.5) "Limited liability limited partnership" means a domestic limited liability limited partnership or a foreign limited liability limited partnership.

(32.7) "Limited liability partnership" means a domestic limited liability partnership or a foreign limited liability partnership.

(33) "Limited partner" means a limited partner in a limited partnership.

(34) "Limited partnership" means a domestic limited partnership or a foreign limited partnership.

(35) "Limited partnership association" means a domestic limited partnership association or a foreign limited partnership association.

(35.5) "Mail" means deposit in the United States mail, properly addressed, first class postage prepaid, and includes registered, certified, express, or priority mail for which the proper fee has been paid.

(35.6) "Mailing address" means, with respect to any person, a physical location to which mail for such person may be delivered, which physical location shall be described by its street name and number or post office box number, city, state, and (if not the United

States) country, and the postal code, if any, for delivery of mail to the location. If the person has no post office box and, by reason of rural location or otherwise, a street name and number, city, or town does not exist, "mailing address" shall mean an appropriate description fixing as nearly as possible the actual physical location to which mail for that person is delivered, but, for all locations in the United States, the county or parish and, if any, the rural free delivery route and the United States postal code shall be included.

(35.7) "Manager" means:

(a) A member of a limited liability company in which management is not vested in managers rather than members;

(b) A manager of a limited liability company in which management is vested in managers rather than members;

(c) A member of a limited partnership association in which management is not vested in managers rather than members;

(d) A manager of a limited partnership association in which management is vested in managers rather than members;

(e) A general partner;

(f) An officer or director of a corporation, a nonprofit corporation, a cooperative, or a limited partnership association; or

(g) Any person whose position with respect to an entity, as determined under the constituent documents and organic statutes of the entity, without regard to the person's title, is the functional equivalent of any of the positions described in paragraphs (a) to (f) of this subsection (35.7).

(35.9) "Means" denotes an exhaustive definition or list.

(36) "Member" means:

(a) A member of a cooperative;

(a.5) A member of a limited cooperative association as defined in section 7-58-102;

(b) A member of a nonprofit association;

(c) A member of a limited liability company;

(d) In the case of a nonprofit corporation with one or more classes of voting members, a voting member of a nonprofit corporation; or

(e) In the case of a nonprofit corporation with no voting members, a director of a nonprofit corporation.

(37) "Merging entity" means any entity that merges into a surviving entity pursuant to section 7-90-203 or pursuant to the organic statutes other than this article.

(38) "Nonprofit association" means a domestic nonprofit association or a foreign nonprofit association.

(39) "Nonprofit corporation" means a domestic nonprofit corporation or a foreign nonprofit corporation.

(40) "Nonprofit entity" means a nonprofit corporation or a nonprofit association.

(40.5) "Obligation" means any debt, obligation, duty, or liability whether sounding in tort, contract, or otherwise.

(40.7) "On file in the records of the secretary of state", "on file in the office of the secretary of state", and "on file with the secretary of state", with reference to a document, means that the document has been filed by the secretary of state and has become effective pursuant to section 7-90-304 or otherwise. pursuant to law and that, subsequent to the commencement of the document's effectiveness, no action has been taken, or omission has occurred, that has caused the document to become ineffective or to be superseded in effect.

(41) "Operating agreement" means the operating agreement of a domestic limited liability company or the functionally equivalent document of a foreign limited liability company.

(42) "Organic statutes" means, with respect to any entity:

(a) This article;

(b) The statute, whether of this state or of another jurisdiction, under which the entity is formed; and

(c) All other statutes of this state or such other jurisdiction that govern the organization and internal affairs of the entity.



(43) "Owner" means a shareholder of a corporation, a member, a partner, or a person having an interest in any other entity that is functionally equivalent to an owner's interest.

(44) "Owner's interest" means the shares of stock in a corporation, a membership in a nonprofit corporation, a membership interest in a limited liability company, the interest of a member in a cooperative or in a limited cooperative association, a partnership interest in a limited partnership, a partnership interest in a partnership, and the interest of a member in a limited partnership association.

(45) "Partner" means a general partner and a limited partner.

(46) "Partnership" means a domestic general partnership, a foreign general partnership, a domestic limited partnership, or a foreign limited partnership.

(47) "Partnership agreement" means the partnership agreement of a domestic general partnership or a domestic limited partnership, or the functional equivalent for a foreign general partnership or a foreign limited partnership.

(47.1) (Deleted by amendment, L. 2000, p. 959, § 44, effective July 1, 2000.)

(48) (Deleted by amendment, L. 2003, p. 2276, § 194, effective July 1, 2004.)

(48.5) "Periodic report" means the report required by section 7-90-501.

(49) "Person" means an individual, an estate, a trust, an entity, or a state or other jurisdiction.

(50) "Primary constituent documents" means articles of incorporation with respect to a corporation and constituent documents with respect to other entities.

(50.5) (a) "Principal address" means principal office address or, for a person that has no principal office address, the street address of the person's usual place of business in this state if it has one, the street address of the person's residence in this state if it has one but has no principal place of business in this state, the street address of the person's usual place of business outside this state if it has one but has no usual place of business or residence in this state, or street address of the person's residence outside this state if it has one but has no principal place of business anywhere and no residence in this state.

(b) In each case enumerated in paragraph (a) of this subsection (50.5), for a person that has no principal office address, "principal address" means the mailing address of the person if it is different from the address determined pursuant to paragraph (a) of this subsection (50.5).

(51) "Principal office" means the office of an entity located at the principal office address of the entity.

(51.5) "Principal office address" means the street address and, if different, the mailing address inside or outside this state, that has been stated by or for an entity to be the principal office address of the entity in the first filed document, in which document the entity or another person has been required, by a provision of this title or by a form or cover sheet the use of which is required by the secretary of state, to state the entity's principal office address; or, if the entity's principal office address has been changed pursuant to section 7-90-705, the principal office address of the entity as last so changed.

(52) "Proceeding" includes a civil suit, arbitration, or mediation and a criminal, administrative, or investigatory action.

(53) "Provider network" means an entity created pursuant to part 3 of article 18 of title 6, C.R.S., or any functionally equivalent entity formed under any subsequently enacted statute of this state.

(54) "Receive", when used in reference to receipt of a writing or other document by an entity, means that the entity actually obtains the writing or other document.

(55) "Registered agent" means the registered agent required to be maintained by an entity pursuant to part 7 of this article or appointed pursuant to article 70 of this title.

**Editor's note:** This version of subsection (55) is effective until ninety days following certification by the secretary of state. (See the editor's note following this section.)

(55) "Registered agent" means the registered agent required to be maintained by an entity pursuant to part 7 of this article or appointed pursuant to article 70 of this title. "Registered agent" includes a commercial registered agent.

**Editor's note:** This version of subsection (55) is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

(56) “Registered agent address” means the street address and, if different, the mailing address of the registered agent’s primary residence in this state or usual place of business in this state if the registered agent is an individual, or of the registered agent’s usual place of business in this state if the registered agent is an entity.

(56.5) “Registered agent name” means, with respect to a registered agent who is an individual or a domestic entity, the true name of the registered agent and, with respect to a registered agent that is a foreign entity, the foreign entity name of the foreign entity.

(57) (Deleted by amendment, L. 2004, p. 1465, § 201, effective July 1, 2004.)

(58) “Reporting entity” means any domestic entity as to which a constituent filed document is on file in the records of the secretary of state other than a domestic limited partnership that is not a reporting limited partnership and any foreign entity authorized to transact business or conduct activities in this state. An entity ceases to be a reporting entity upon the dissolution of the entity, the entity becoming delinquent, the relinquishment of the entity’s authority to transact business or conduct activities in this state, or, if the entity is a limited liability partnership or a limited liability limited partnership that is not a reporting limited partnership, its withdrawal of its statement of registration. A dissolved entity that was a reporting entity before its dissolution again becomes a reporting entity upon its reinstatement under part 10 of this article, and a delinquent entity again becomes a reporting entity upon the curing of its delinquency pursuant to section 7-90-904.

(58.5) “Reporting limited partnership” means:

(a) A domestic limited partnership formed after July 26, 2009;

(b) A domestic limited partnership formed under article 61 of this title that elects after July 26, 2009, to be governed by article 62 of this title;

(c) A domestic limited partnership formed under or governed by article 62 of this title for which, after July 26, 2009, a statement of registration is delivered to the secretary of state, for filing pursuant to part 3 of this article, and which is subsequently on file in the records of the secretary of state; or

(d) Any other domestic limited partnership formed under or governed by article 62 of this title as to which a statement of election to be a reporting entity is on file in the records of the secretary of state after July 26, 2009.

(59) “Resulting entity” means the entity that results from the conversion of an entity pursuant to section 7-90-201.

(60) (Deleted by amendment, L. 2003, p. 2276, § 194, effective July 1, 2004.)

(61) “State”, when referring to a part of the United States, includes the following:

(a) A state;

(b) A commonwealth;

(c) The District of Columbia;

(d) All agencies, instrumentalities, and subdivisions of a state, a commonwealth, or the District of Columbia; or

(e) Any territory or insular possessions of the United States together with all agencies and governmental subdivisions thereof.

(61.1) “Statement of change” means a statement of change as described in section 7-90-305.5.

(61.3) “Statement of correction” means a statement of correction as described in section 7-90-305.

(61.4) “Statement of conversion” means a statement of conversion as described in section 7-90-201.7.

(61.5) “Statement of election to be a reporting entity” means a statement of election to be a reporting entity as described in section 7-90-501 (7.5).

(61.6) “Statement of merger” means a statement of merger as described in section 7-90-203.7.

(61.7) “Statement of registration” means, with respect to a domestic limited liability partnership or a domestic limited liability limited partnership, the statement of registration as described in section 7-60-144 or section 7-64-1002. With respect to a foreign limited liability partnership or a foreign limited liability limited partnership, “statement of registration” means the corresponding document filed with the filing officer of the jurisdiction



under the law of which the foreign limited liability partnership or the foreign limited liability limited partnership is formed.

(62) “Street address” means, with respect to a physical location, the street name and number, city, state, and (if not the United States) country, and the postal code, if any, that is required for delivery of mail to the location. If, by reason of rural location or otherwise, a street name and number, city, or town does not exist, “street address” shall mean an appropriate description fixing as nearly as possible the actual physical location, but, for all locations in the United States, the county or parish and, if any, the rural free delivery route and the United States postal code shall be included.

(63) “Surviving entity” means the entity into which a merging entity or entities have merged pursuant to section 7-90-203 or pursuant to the organic statutes other than this article.

(63.3) “Trade name” means a name of a person other than the true name of the person, or, in the case of a general partnership that is not a limited liability partnership, other than the true name of each general partner of the general partnership, under which the person may transact business or conduct activities pursuant to the provisions of article 71 of this title.

(63.7) “True name” means, with respect to an individual, the first name and surname of the individual; with respect to a domestic entity, the domestic entity name, if any, of the domestic entity, or, if the domestic entity does not have a domestic entity name, the name under which the domestic entity most commonly transacts business or conducts activities in this state; and, with respect to a foreign entity, the functional equivalent of such a name.

(64) “United States” includes any district, authority, office, bureau, commission, department, and any other agency of the United States of America.

(65) “Unit owner’s association” means an entity created pursuant to part 3 of article 33.3 of title 38, C.R.S., or any functionally equivalent entity formed under any subsequently enacted statute of this state.

**Source: L. 97:** Entire article added, p. 1506, § 21, effective June 3. **L. 98:** (2), (5), (11), (13), (14), (16), (18), (19), (20), (21), (24), (25), (26), (27), (28), (29), (41), (42), and (48) amended and (10.5), (19.5), (24.3), (24.5), (31.3), (31.7), (32.5), (32.7), (35.5), and (47.1) added, p. 613, § 9, effective July 1. **L. 2000:** (1), (6), (10), (11), (13), (16), (17), (18), (19), (19.5), (22), (23), (24.5), (27), (30), IP(36), (39), (45), (46), (47), (47.1), (48), and (49) amended and (1.5), (3.5), (3.7), (9.5), (11.5), (13.5), (15.3), (15.5), (20.5), (21.5), (23.3), (23.5), (31.1), (31.5), (35.7), (35.9), (40.5), (50), (51), (52), (53), (54), (55), (56), (57), (58), (59), (60), (61), (62), (63), (64), and (65) added, p. 959, § 44, effective July 1. **L. 2002:** (3.7) and (19.5) amended, p. 1837, § 87, effective July 1; (3.7) and (19.5) amended, p. 1702, § 85, effective October 1. **L. 2003:** IP, (1), (1.5), (2), (3), (3.5), (5), (6), (7), (8), (9.5), (10), (10.5), (11), (11.5), (12), (13), (13.5), (14), (15), (15.3), (15.5), (16), (17), (18), (19), (21), (21.5), (22), (23), (23.3), (23.5), (24), (24.3), (24.5), (25), (26), (28), (29), (30), (31.1), (31.3), (31.5), (31.7), (35.5), (35.7)(f), IP(36), (39), (42), (43), (45), (46), (47), (48), (49), (51), (54), (55), (56), (58), (59), (60), (61)(d), and (62) amended and (1.3), (3.3), (3.9), (19.3), (20.7), (29.3), (29.5), (35.6), (51.5), (56.5), (61.1), (61.3), (61.7), (63.3), and (63.7) added, pp. 2276, 2355, §§ 194, 344, effective July 1, 2004. **L. 2004:** IP, (2), (3), (3.9), (6), (7), (10.5), (13), (13.5), (14), (15.3), (15.5), (16), (19.3), (23), (23.3)(b), (24.5), (26), (29.3), (31.7), (35.6), (35.7)(g), (36)(d), (36)(e), (42), (49), (57), (58), (63.3), and (63.7) amended and (40.7) added, p. 1465, § 201, effective July 1; (31.1) amended, p. 1010, § 19, effective August 4; (63.3) amended, p. 1544, § 4, effective May 30, 2006. **L. 2005:** (2), (10.5), (13.5), (15.3), (16), (17), (23.3), (32.5), (32.7), (37), (40.7), (49), and (58) amended, p. 1204, § 4, effective October 1. **L. 2006:** (8), (10.5), (20.7), (35.6), and (62) amended and (10.3) and (19.7) added, p. 864, § 40, effective July 1. **L. 2007:** (20.6), (50.5), (58.5), (61.4), (61.5), and (61.6) added and (35.7)(g), (51.5), (55), and (58) amended, p. 227, § 20, effective May 29. **L. 2008:** (63) amended, p. 19, § 5, effective August 5. **L. 2010:** (1.3) amended and (48.5) added, (HB 10-1403), ch. 404, p. 1995, § 12, effective August 11. **L. 2011:** (2), (3), (11), (36), and (44) amended and (14.5) and (23.7) added, (SB 11-191), ch. 197, p. 818, § 2, effective April 2, 2012. **L. 2012:** (3.8) added and (55) amended, (SB 12-123), ch. 171, p. 611, § 2, effective (see editor’s note).

**Editor's note:** (1) Amendments to subsection (58) by sections 194 and 344 of House Bill 03-1377 were harmonized.

(2) Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act adding subsection (3.8) and amending subsection (55) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement said subsections. As of publication date, the revisor of statutes had not received certification from the secretary of state.

**Cross references:** For the provisions of articles 20 to 29 of this title, the "Colorado Nonprofit Corporation Act", prior to its repeal on July 1, 1998, see volume 2 of the 1997 Colorado Revised Statutes.

**7-90-102.5. Relationship between constituent documents and organic statutes.** For purposes of this article, the constituent documents of an entity shall govern to the extent not inconsistent with any provision of the organic statutes that may not be waived by the constituent documents of the entity.

**Source:** L. 2000: Entire section added, p. 966, § 45, effective July 1. L. 2004: Entire section amended, p. 1470, § 202, effective July 1.

**7-90-103. Reservation of power to amend or repeal.** The general assembly has the power to amend or repeal all or part of this article at any time, and all entities subject to said article shall be governed by the amendment or repeal.

**Source:** L. 97: Entire article added, p. 1510, § 21, effective June 3.

**7-90-104. Nonapplication of uniform commercial code to owner's interest.** Sections 4-9-406 and 4-9-408, C.R.S., shall not apply to an owner's interest.

**Source:** L. 2006: Entire section added, p. 866, § 41, effective July 1; entire section amended, p. 1521, § 89, effective July 1.

## PART 2

### MERGER AND CONVERSION OF ENTITIES

**Editor's note:** This article was added in 1997, and this part 2 was subsequently repealed and reenacted in 2000, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 2 prior to 2000, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

**7-90-201. Conversion of an entity.** (1) Pursuant to a plan of conversion approved in accordance with section 7-90-201.4:

(a) A domestic entity of one form may be converted into any other form of domestic entity.

(b) A domestic entity may be converted into any form of foreign entity recognized in the jurisdiction under the law of which the entity will be considered to have been formed after the conversion.

(2) A foreign entity may be converted into a domestic entity if the conversion is not prohibited by the constituent documents or organic statutes and if the foreign entity complies with all of the requirements, if any, of its constituent documents and organic statutes in effecting the conversion.

**Source:** L. 2000: Entire part R&RE, p. 966, § 46, effective July 1. L. 2002: IP(5) amended, p. 1838, § 88, effective July 1; IP(5) amended, p. 1702, § 86, effective October 1. L. 2003: (1), (2), (3), (4)(a), (4)(c)(II), (5), and (6) amended, p. 2285, § 195, effective July 1, 2004. L. 2004: (2), (3), (4), (5), and (6) amended and (5.5) added, p. 1470, § 203,



effective July 1. **L. 2005:** (1) and (5.5) amended, p. 1206, § 5, effective October 1. **L. 2006:** (2), (4)(b), (4)(c)(III), (4)(c)(IV), IP(5), (5)(b), and (5.5) amended and (4)(c)(III.3), (4)(c)(III.7), and (5.3) added, pp. 866, 868, §§ 42, 43, effective July 1. **L. 2007:** Entire section amended, p. 229, § 21, effective May 29.

**Editor's note:** This section is similar to former § 7-90-201 as it existed prior to 2000.

**7-90-201.3. Plan of conversion.** (1) A plan of conversion shall state:

(a) The entity name or, for an entity that has no entity name, the true name, the jurisdiction under the law of which the entity is formed, and the form of entity of the converting entity;

(b) The entity name or, for an entity that has no entity name, the true name, the jurisdiction under the law of which the entity is formed, and the form of the resulting entity;

(c) The terms and conditions of the conversion, including the manner and basis of changing the owners' interests of each converting entity into owners' interests or obligations of the resulting entity or into money or other property in whole or in part.

**Source: L. 2007:** Entire section added, p. 232, § 22, effective May 29.

**7-90-201.4. Approval of plan of conversion.** (1) In the case of domestic entities described in this subsection (1), the plan of conversion shall be approved:

(a) In the case of a corporation, as provided in section 7-111-101.5;

(b) In the case of a nonprofit corporation, as provided in section 7-131-101.5;

(c) In the case of a cooperative formed under, or subject to, article 56 of this title, as provided in section 7-56-602; and

(d) In the case of a cooperative formed under article 55 of this title, as provided in section 7-55-112.

(2) In the case of a domestic entity other than an entity described in subsection (1) of this section, the plan of conversion shall be approved as follows:

(a) If the organic statutes or primary constituent documents expressly provide for the approval of the conversion, the terms and conditions of the conversion shall be approved in accordance with those provisions.

(b) If neither the primary constituent documents nor the organic statutes expressly provide for the approval of the plan of conversion, the plan of conversion shall be approved in accordance with the provisions of the primary constituent documents that contain the most stringent terms for approval of a merger.

(c) If the primary constituent documents do not expressly provide for the approval of a merger, the plan of conversion shall be approved in accordance with the provisions of the entity's organic statutes that contain the most stringent terms for the approval of a merger.

(d) If neither the primary constituent documents nor the entity's organic statutes expressly provide for the approval of a merger, the plan of conversion shall be approved in accordance with the provisions for amendment of the primary constituent documents set forth in the organic statutes and the primary constituent documents.

(e) If neither the primary constituent documents nor the organic statutes expressly provide for the approval of a plan of conversion, for the approval of a merger, or for the approval of an amendment to the primary constituent documents, the plan of conversion shall be approved by all of the owners of the converting entity.

(3) For purposes of this section, the provisions of the organic statutes and constituent documents applicable to approval include provisions relating to any preliminary approval by managers for submission to the owners, notices, quorum, voting, and consent by owners or third parties. References in this section to the most stringent provisions of the primary constituent documents or organic statutes are references to those provisions of such documents or statutes that establish the highest voting requirements for approval of a merger. Nothing in this section shall be deemed to permit any primary constituent document to contain merger provisions that are proscribed by the entity's organic statutes.

**Source: L. 2007:** Entire section added, p. 232, § 22, effective May 29.

**7-90-201.7. Statement of conversion - when conversion effective.** (1) After the conversion of an entity is approved in accordance with section 7-90-201.4, the converting entity shall cause a statement of conversion to be delivered to the secretary of state, for filing pursuant to part 3 of this article, if the converting entity has a constituent filed document or a statement of foreign entity authority filed in the records of the secretary of state and the resulting entity will not be an entity for which a constituent filed document will be filed in the records of the secretary of state. The statement of conversion shall state:

(a) The entity name of the converting entity, its principal office address, the jurisdiction under the law of which it is formed, and its form of entity;

(b) The true name of the resulting entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(c) A statement that the converting entity has been converted into the resulting entity pursuant to this section; and

(d) Any other matters relating to the conversion that the converting entity determines to include therein.

(2) After the conversion of an entity is approved in accordance with section 7-90-201, if neither the resulting entity nor the converting entity is or will be an entity that will have a constituent filed document filed in the records of the secretary of state, either the resulting entity or the converting entity may deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of conversion stating:

(a) The true name of the converting entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(b) The true name of the resulting entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(c) That the converting entity has been converted into the resulting entity pursuant to this section; and

(d) Any other matters relating to the conversion that the entity filing the statement of conversion determines to include therein.

(3) (a) After the conversion of an entity is approved in accordance with section 7-90-201, if the resulting entity will be an entity for which a constituent filed document is to be filed in the records of the secretary of state, the converting entity shall deliver to the secretary of state, for filing pursuant to part 3 of this article, a combined statement of conversion and the constituent filed document that complies with the requirements of the organic statutes. In addition to complying with the requirements of the organic statutes for the constituent filed document, a combined statement of conversion and constituent filed document shall state:

(I) The entity name or, for an entity that has no entity name, the true name of the converting entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(II) The entity name of the resulting entity;

(III) That the converting entity has been converted into the resulting entity pursuant to this section; and

(IV) Any other matters relating to the conversion that the entity filing the statement of conversion determines to include therein.

(b) Notwithstanding the requirement in paragraph (a) of this subsection (3), a combined statement of conversion and constituent filed document, once accepted for filing by the secretary of state, shall for all purposes be deemed to be two separate documents: The statement of conversion and the constituent filed document.

(4) The conversion shall become effective as specified by the organic statutes. If the organic statutes do not specify an effective date, the conversion shall become effective when the statement of conversion, if any, becomes effective as determined pursuant to section 7-90-304, or, if no statement of conversion is filed, the conversion shall become effective at the time and on the date determined by the owners of the converting entity.



**7-90-202. Effect of conversion - entity unchanged.** (1) At the time the conversion becomes effective, the converting entity shall be converted into the resulting entity, and the resulting entity shall thereafter be subject to all of the provisions of the organic statutes.

(2) Unless otherwise agreed, the conversion of any converting entity into a resulting entity shall not be deemed to affect any obligations of the converting entity incurred prior to the conversion to the resulting entity or the personal liability of any person incurred prior to such conversion.

(3) Unless otherwise agreed or otherwise provided by the organic statutes, other than this article, the converting entity shall not be required to wind up the entity's affairs or pay obligations and distribute the entity's assets, and the conversion shall not be deemed to constitute a dissolution of the converting entity and shall constitute a continuation of the existence of the converting entity in the form of the resulting entity.

(4) The resulting entity is the same entity as the converting entity.

**Source:** L. 2000: Entire part R&RE, p. 967, § 46, effective July 1. L. 2004: (1) and (3) amended, p. 1472, § 204, effective July 1.

**Editor's note:** This section is similar to former § 7-90-202 as it existed prior to 2000.

**7-90-203. Merger of entities.** (1) One or more domestic entities may merge into a domestic entity of a form the same as or different from any of the merging entities pursuant to a plan of merger approved pursuant to section 7-90-203.4.

(2) One or more domestic entities may merge into a foreign entity of a form the same as or different from that of any of the merging entities, or one or more foreign entities may merge into a domestic entity of a form the same as or different from that of any of the merging entities, pursuant to a plan of merger approved, in the case of a domestic entity, pursuant to section 7-90-203.4, if the merger is not prohibited by the constituent documents or organic statutes of each foreign entity and if each foreign entity complies with all of the requirements, if any, of its constituent documents and organic statutes in effecting the merger.

(3) to (7) (Deleted by amendment, L. 2007, p. 235, § 23, effective May 29, 2007.)

**Source:** L. 2000: Entire part R&RE, p. 968, § 46, effective July 1. L. 2002: IP(5) amended, p. 1838, § 89, effective July 1; IP(5) amended, p. 1702, § 87, effective October 1. L. 2003: (1), (2), (3), (4)(c)(II), (5), and (6) amended and (4)(c)(III) and (4)(c)(IV) added, p. 2286, § 196, effective July 1, 2004. L. 2004: (2), (3)(a), (3)(b), (4)(c), (5), and (6) amended and (3)(f) added, p. 1472, § 205, effective July 1. L. 2005: (5)(c) amended, p. 1206, § 6, effective October 1. L. 2006: (3)(a), (3)(b), (4)(b), (4)(c)(II)(B), (4)(c)(II)(D), and (5) amended, p. 868, § 44, effective July 1. L. 2007: Entire section amended, p. 235, § 23, effective May 29.

**Editor's note:** This section is similar to former § 7-90-203 as it existed prior to 2000.

**7-90-203.3. Plan of merger.** (1) A plan of merger shall state:

(a) The entity name or, for an entity that has no entity name, the true name, the jurisdiction under the law of which the entity is formed, and the form of entity of each of the merging entities;

(b) The entity name or, for an entity that has no entity name, the true name, the jurisdiction under the law of which the entity is formed, and the form of the surviving entity into which the merging entities are to merge;

(c) The terms and conditions of the merger, including the manner and basis of changing the owners' interests of each merging entity into owners' interests or obligations of the surviving entity or into money or other property in whole or in part; and

(d) Any amendments to the constituent documents of the surviving entity to be effected by the merger.

**Source:** L. 2007: Entire section added, p. 238, § 24, effective May 29.

**7-90-203.4. Approval of plan of merger.** (1) In the case of domestic entities described in this subsection (1), the plan of merger shall be approved:

- (a) In the case of a corporation, as provided in section 7-111-101;
- (b) In the case of a nonprofit corporation, as provided in section 7-131-101;
- (c) In the case of a cooperative formed under, or subject to, article 56 of this title, as provided in section 7-56-602; and
- (d) In the case of a cooperative formed under article 55 of this title, as provided in section 7-55-112.

(2) In the case of a domestic entity other than an entity described in subsection (1) of this section, the plan of merger shall be approved:

(a) In accordance with the provisions of the primary constituent documents dealing with mergers of the type, and with entities of the forms, described in the plan of merger;

(b) If there are no such provisions, in accordance with the provisions of the primary constituent documents that contain the most stringent terms for approval of a merger;

(c) If there are no such provisions, in accordance with the provisions of the entity's organic statutes dealing with mergers of the type, and with entities of the forms, described in the plan of merger;

(d) If there are no such provisions, in accordance with the provisions of the entity's organic statutes that contain the most stringent terms for approval of a merger;

(e) If neither the primary constituent documents nor the organic statutes expressly provide for the approval of the merger, in accordance with the provisions for amendment of the primary constituent documents set forth in the organic statutes and the primary constituent documents; or

(f) If neither the primary constituent documents nor the organic statutes expressly provide for a merger or for the approval of an amendment to the primary constituent documents, by all of the owners of the merging entity.

(3) For purposes of this section, the provisions of the entity's organic statutes and primary constituent documents applicable to approval of the plan of merger include provisions relating to any preliminary approval by managers for submission to the owners, notices, quorum, voting, and consent by owners or third parties. References in this section to the most stringent provisions of the primary constituent documents or organic statutes are references to those provisions of such documents or statutes that establish the highest voting requirements for approval of a merger. Nothing in this section shall be deemed to permit any primary constituent document to contain merger provisions that are proscribed by the entity's organic statutes.

**Source: L. 2007:** Entire section added, p. 238, § 24, effective May 29.

**7-90-203.7. Statement of merger - when merger effective.** (1) After a merger is approved in accordance with section 7-90-203, if any merging entity is an entity for which a constituent filed document has been filed by the secretary of state, the surviving entity shall deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of merger that shall state:

(a) The entity name or, for an entity that has no entity name, the true name of each merging entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(b) The entity name or, for an entity that has no entity name, the true name of the surviving entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(c) That each merging entity is merged into the surviving entity;

(d) That, if the plan of merger provides for amendments to any constituent filed document of the surviving entity, an appropriate statement of change or other document effecting the amendments shall be delivered to the secretary of state for filing pursuant to part 3 of this article; and

(e) Any other matters relating to the merger the surviving entity determines to include therein.



(2) After a merger is approved in accordance with section 7-90-203, if no merging entity is an entity for which a constituent filed document has been filed by the secretary of state, the surviving entity may deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of merger that shall state:

(a) The entity name or, for an entity that has no entity name, the true name of each merging entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(b) The entity name or, for an entity that has no entity name, the true name of the surviving entity, its principal address, the jurisdiction under the law of which it is formed, and its form of entity;

(c) That each merging entity is merged into the surviving entity; and

(d) Any other matters relating to the merger that the surviving entity determines to include therein.

(3) The merger shall become effective as specified by the organic statutes. If the organic statutes do not specify an effective date, the merger takes effect at the time and on the date the statement of merger becomes effective as determined pursuant to section 7-90-304 or, if no statement of merger is required to be filed, at the time and on the date determined by the owners of the merging entity.

**Source: L. 2007:** Entire section added, p. 239, § 24, effective May 29.

**7-90-204. Effect of merger.** (1) When a merger is effective:

(a) Every merging entity merges into the surviving entity and the separate existence of every merging entity ceases. All of the rights, privileges, and powers of each of the merging entities, all real, personal, and mixed property, and all obligations due to each of the merging entities, as well as all other things and causes of action of each of the merging entities, shall vest as a matter of law in the surviving entity and shall thereafter be the rights, privileges, powers, and property of, and obligations due to, the surviving entity. Title to any property vested in any of the merging entities shall not revert or be in any way impaired by reason of the merger; except that all rights of creditors in and all liens upon any property of any of the merging entities shall be preserved unimpaired in the same property, however held. All obligations of the merging entities shall attach as a matter of law to the surviving entity and may be fully enforced against the surviving entity. A merger does not constitute a conveyance, transfer, or assignment. Nothing in this section affects the validity of contract provisions or of reversions or other forms of title limitations that attach conditions or consequences specifically to mergers.

(b) Any owner who was liable for the obligation of any merging entity solely by reason of being an owner of the merging entity, but who will otherwise not be liable for the obligation of the surviving entity, remains liable for the obligations of the merging entity incurred before the merger unless a contract giving rise to the obligation provides otherwise.

(c) Unless otherwise provided in the constituent documents or required under the organic statutes, no merging entity shall be required to wind up its affairs or pay obligations and distribute assets, and the merger shall not be deemed to constitute a dissolution or liquidation of the merging entity. Unless otherwise provided in the constituent documents of a constituent entity or as required under the organic statutes, any payments in cash or in kind to owners of the constituent entity pursuant to the plan of merger shall not be deemed to constitute a dividend, liquidating distribution, or other distribution that gives rise to contractual distributional preference rights.

**Source: L. 2000:** Entire part R&RE, p. 969, § 46, effective July 1. **L. 2004:** (1)(c) amended, p. 1474, § 206, effective July 1. **L. 2005:** (1)(a) amended, p. 1207, § 7, effective October 1.

**Editor's note:** This section is similar to former § 7-90-204 as it existed prior to 2000.

**7-90-204.5. Foreign entity resulting from conversion or surviving merger.**

(1) Upon the conversion of a domestic entity into a foreign entity or the merger of a domestic entity and a foreign entity in which the foreign entity is the surviving entity, the foreign entity:

(a) Shall either:

(I) Appoint a registered agent if the foreign entity has no registered agent and maintain a registered agent pursuant to part 7 of this article, whether or not the foreign entity is otherwise required to do so, to accept service in any proceeding to enforce any obligation or rights of dissenting owners of any domestic entity party to the conversion or merger or in any proceeding based on a cause of action arising with respect to any domestic entity party to the conversion or merger; or

(II) Be deemed to have authorized service of process on it in connection with such causes of action by mailing in accordance with section 7-90-704 (2);

(b) Shall promptly pay to the dissenting owners of each domestic entity party to the conversion or merger the amount, if any, to which they are entitled under the organic statutes; and

(c) Shall comply with part 8 of this article if it is to transact business or conduct activities in this state.

**Source:** L. 2004: Entire section added, p. 1474, § 207, effective July 1. L. 2006: (1)(a)(I) amended, p. 869, § 45, effective July 1. L. 2007: (1)(a)(I) amended, p. 240, § 25, effective May 29.

**7-90-205. Scope of article - article not exclusive.** The provisions of this article are not exclusive.

**Source:** L. 2000: Entire part R&RE, p. 970, § 46, effective July 1.

**Editor's note:** This section is similar to former § 7-90-205 as it existed prior to 2000.

**7-90-206. Dissenter's rights, prohibitions, restrictions, and requirements.** (1) To the extent that any organic statute or the common law expressly prohibits or restricts the right of any entity to convert into or merge with any other form of entity, grants dissenter's rights with respect to such merger or conversion, or imposes requirements on such conversion or merger, any merger or conversion of such entity under this article shall be subject to such restriction, entitle its owners to such dissenter's rights, and be subject to such requirements.

(2) If an owner of a converting entity would be entitled under the organic statutes to dissenter's rights if the converting entity were merged into an entity of the same form as the converting entity, then such owner shall be entitled to dissenter's rights with respect to the conversion on the same basis as the owner would be so entitled under the organic statutes if the converting entity were being merged into an entity of the same form as the converting entity.

(3) Unless otherwise provided in the plan of conversion or plan of merger, if an entity is converted into another form of entity or merged into another form of entity in a transaction in which dissenters' rights are applicable, an owner of the converting or merged entity who consents to the conversion or merger or who does not consent to the conversion or merger and who does not exercise dissenters' rights shall become an owner of the resulting or surviving entity and shall be deemed to be a party to, and to be bound by, the constituent operating document of the resulting or surviving entity.

**Source:** L. 2000: Entire part R&RE, p. 970, § 46, effective July 1. L. 2006: Entire section amended, p. 870, § 46, effective July 1. L. 2007: (3) added, p. 241, § 26, effective May 29.

**Editor's note:** This section is similar to former § 7-90-206 as it existed prior to 2000.



## PART 3

## FILING DOCUMENTS

**Law reviews:** For article, "Business Entity Legislation 2002: Filing Procedures and LLC Changes", see 31 Colo. Law. 55 (November 2002).

**7-90-301. Filing requirements.** (1) (a) Each document that is required or permitted to be filed in the records of the secretary of state pursuant to any provision of this title or any organic statute of this state shall be subject to this part 3.

(b) To be entitled to be filed pursuant to this part 3, a document shall be subject to this part 3 and shall comply with the requirements of this section and the requirements of any other law of this state that adds to or varies the requirements of this part 3.

(b.5) (Deleted by amendment, L. 2004, p. 1475, § 208, effective July 1, 2004.)

(c) Any provision in this title or any other organic statute of this state that provides for filing of a document with the secretary of state or with the office of the secretary of state or in the records of the secretary of state shall be deemed to mean delivery of the document to the secretary of state, for filing pursuant to this part 3.

(2) Notwithstanding the general recognition in paragraph (b) of subsection (1) of this section of requirements of other law of this state that may add to or vary the requirements of this part 3, and notwithstanding any other provision of this title or any other organic statute of this state requiring the signature of any person on, or execution by any person of, a document, no such signature or execution shall be required as a condition to its being filed pursuant to this part 3.

(3) The document shall contain all information required by the law of this state to be contained in the document but, unless otherwise provided by law, shall not contain other information.

(4) The document shall be on or in such medium as may be acceptable to the secretary of state and from which the secretary of state may create a document that contains all of the information stated in the document and that is typewritten or printed on paper. The secretary of state may require that the document be delivered by any one or more means or on or in any one or more media as may be acceptable to the secretary of state. The secretary of state is not required to file a document that is not delivered by a means and in a medium that complies with the requirements then established by the secretary of state for the delivery and filing of documents. If the secretary of state permits a document to be delivered on paper, the document shall be typewritten or machine printed, and the secretary of state may impose reasonable requirements upon the dimensions, legibility, quality, and color of such paper and typewriting or printing and upon the format and other attributes of any document that is delivered electronically. The secretary of state shall ensure, at the earliest practicable time, that delivery of a document subject to this part 3 for filing may be accomplished electronically, without the necessity for the delivery of a physical original document or the image thereof, if all required information is delivered and is readily retrievable from the data delivered. If the delivery of a document subject to this part 3 for filing is required to be accomplished electronically, such document shall not be accompanied by any physical document unless the secretary of state permits such accompaniment.

(5) The document shall be in the English language. The entity name of any entity contained in the document need not be in English if expressed in English letters or arabic or roman numerals.

(6) The document shall state the section or sections of the organic statutes, other than this part 3, pursuant to which it is delivered to the secretary of state for filing pursuant to this part 3.

(6.5) to (7.7) (Deleted by amendment, L. 2002, p. 1838, § 90, effective July 1, 2002; p. 1702, § 88, effective October 1, 2002.)

(8) The document shall state the true name or true names, and mailing address or mailing addresses, of any one or more of the individuals who cause the document to be delivered for filing, but the document need not state the true name and address of more than one such individual.

(9) The document shall include any form or cover sheet, or both, required pursuant to section 7-90-302.

(10) The document shall be delivered to the secretary of state for filing and shall be accompanied by all required fees.

(11) (Deleted by amendment, L. 2004, p. 1475, § 208, effective July 1, 2004.)

(12) Notwithstanding section 2-4-108, C.R.S., section 24-11-110, C.R.S., or any other provision of law, if the last day of a period for filing a document that is authorized or required to be filed by electronic means falls on a Saturday, Sunday, legal holiday, or any day the secretary of state's physical office is closed, the period shall expire on such day.

**Source:** L. 97: Entire article added, p. 1517, § 21, effective June 3. L. 98: (1), (2), (3), (6), (8), and (10) amended and (6.5) and (7.7) added, p. 618, § 15, effective July 1. L. 2002: Entire section amended, p. 1838, § 90, effective July 1; entire section amended, p. 1702, § 88, effective October 1. L. 2003: (1), (3), (4), (6), (8), and (9) amended and (11) added, p. 2288, § 197, effective July 1, 2004. L. 2004: (1)(a), (1)(b), (1)(b.5), (2), (3), (4), (5), (6), (8), (9), (10), and (11) amended, p. 1475, § 208, effective July 1. L. 2005: (4) amended, p. 1207, § 8, effective October 1. L. 2007: (10) amended, p. 241, § 27, effective May 29. L. 2008: (12) added, p. 24, § 21, effective August 5.

**7-90-301.5. Act of causing document to be delivered for filing.** Causing a document to be delivered to the secretary of state for filing pursuant to this part 3 shall constitute the affirmation or acknowledgment of each individual causing such delivery, under penalties of perjury, that the document is the individual's act and deed, or that the individual in good faith believes the document is the act and deed of the person on whose behalf the individual is causing the document to be delivered for filing, taken in conformity with the requirements of this part 3, the constituent documents, and the organic statutes, and that the individual in good faith believes the facts stated in the document are true and the document complies with the requirements of this part 3, the constituent documents, and the organic statutes.

**Source:** L. 2004: Entire section added, p. 1477, § 209, effective July 1.

**7-90-302. Forms and cover sheets - secretary of state to furnish upon request.**

(1) The secretary of state may prepare and furnish a form or cover sheet, or both, for any document that is subject to this part 3 and may require the use of any such form or cover sheet or both. The form or cover sheet may require the statement of any information the secretary of state deems appropriate to perform the duties of the secretary of state under the law of this state, including information as to the identity of any person to which the document relates, the mailing address of any such person, the registered agent name and registered agent address of the registered agent for any such person who is required or permitted by this title to have a registered agent, and the principal office address of the principal office of any such person who has a principal office. A form or cover sheet shall not preclude in any way the inclusion in any document of any item the inclusion of which is not prohibited by the law of this state and shall not require the inclusion of any item the inclusion of which is not required or permitted by this article or any other law of this state.

(2) The form or cover sheet shall be deemed to be a part of the filed document that uses such form or cover sheet. Information that is contained in such form or cover sheet shall control over any contrary information contained elsewhere in the filed document.

(3) The secretary of state shall furnish, on request, any form or cover sheet that the secretary of state requires to be used pursuant to this section.

**Source:** L. 97: Entire article added, p. 1518, § 21, effective June 3. L. 98: Entire section amended, p. 620, § 16, effective July 1. L. 2002: Entire section amended, p. 1840, § 91, effective July 1; entire section amended, p. 1705, § 89, effective October 1. L. 2003: Entire section amended, p. 2290, § 198, effective July 1, 2004. L. 2004: Entire section amended, p. 1477, § 210, effective July 1. L. 2006: (1) amended, p. 870, § 47, effective July 1. L. 2007: (1) amended, p. 241, § 28, effective May 29.



**7-90-303. Filing, service, and copying fees - subpoenas.** (1) The secretary of state shall charge and collect fees and other charges, which shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., for:

- (a) Issuing any certificate;
- (b) Furnishing any information;
- (c) Furnishing a copy of any filed document; or
- (d) (Deleted by amendment, L. 2004, p. 1477, § 211, effective July 1, 2004.)
- (e) (Deleted by amendment, L. 2003, p. 2290, § 199, effective July 1, 2004.)
- (f) Processing any document delivered to the secretary of state for filing as required or permitted under part 3 of article 18 of title 6 or part 10 of article 16 of title 10 or part 3 of article 33.3 of title 38, C.R.S., or this title.

(2) (a) The secretary of state shall charge and collect, at the time of service of any subpoena upon the secretary of state or any deputy or employee of the secretary of state's office, a fee of fifty dollars and an allowance of ten dollars for meals and a charge for mileage at the rate prescribed by section 24-9-104, C.R.S., for each mile from the state capitol building to the place named in the subpoena. The fee shall be paid to the secretary of state; the meal allowance and mileage charge shall be paid to the person named in the subpoena. If the person named in the subpoena is required to appear at the place named in the subpoena for more than one day, the person shall be paid in advance a per diem allowance of forty-four dollars for each day of attendance in addition to any other fees, allowances, and charges.

(b) Notwithstanding the amount specified for any fee or allowance in paragraph (a) of this subsection (2), the secretary of state may reduce the amount of one or more of the fees or allowances if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees or allowances is credited. After the uncommitted reserves of the fund are sufficiently reduced, the secretary of state by rule or as otherwise provided by law may increase the amount of one or more of the fees or allowances as provided in section 24-75-402 (4), C.R.S.

(3) The secretary of state shall charge and collect all other fees and penalties imposed by or assessed in accordance with the law of this state.

(4) In all cases where fees or charges are imposed under this article, the fee shall include indexing and filing of the document and providing all copies required to be provided by the secretary of state in connection with the filing and shall include affixing the seal of the secretary of state upon any certified copy.

**Source:** **L. 97:** Entire article added, p. 1518, § 21, effective June 3. **L. 98:** (2) amended, p. 1323, § 20, effective June 1; (1)(f) and (3) amended, p. 620, § 17, effective July 1. **L. 2002:** (1)(b) to (1)(d) and (4) amended, p. 1841, § 92, effective July 1; (1)(b) to (1)(d) and (4) amended, p. 1705, § 90, effective October 1. **L. 2003:** (1)(e) and (3) amended, p. 2290, § 199, effective July 1, 2004. **L. 2004:** (1)(c), (1)(d), and (2) amended, p. 1477, § 211, effective July 1; (1)(f) amended, p. 1010, § 20, effective August 4. **L. 2006:** (1)(f) amended, p. 870, § 48, effective July 1.

**7-90-304. Effective time and date of filed document.** (1) Except as provided in subsection (2) or (4) of this section, a document that is filed by the secretary of state is effective:

(a) If no time is stated in the filed document as its effective time, then at the time of filing on the date it is filed, as evidenced by the records of the secretary of state; or

(b) If a time is stated in the filed document as its effective time, then at the later of the stated time on the date it is filed, as such date is stated in the records of the secretary of state, or the time the filed document is filed by the secretary of state, as such time is stated in the records of the secretary of state.

(2) A filed document may state a delayed effective time and date, and if it does so the filed document becomes effective at the later of the time and date so stated or the time and date the filed document is filed by the secretary of state, as such time and date are stated in the records of the secretary of state. If a filed document states a delayed effective date but not a time, the filed document is effective at the later of 11:59 p.m. on that date or the time

and date the filed document is filed by the secretary of state, as such time and date are stated in the records of the secretary of state. If a filed document states a delayed effective date that is later than the ninetieth day after the date the filed document is filed, the filed document is effective at 11:59 p.m. on the ninetieth day after it is filed. A filed document may state the order in which the matters provided for in the filed document are deemed to have occurred. This subsection (2) may be limited by other provisions of this title. In the event of conflict between this subsection (2) and any other provision of this title, such other provision of this title controls.

(3) If a filed document states a delayed effective date pursuant to subsection (2) of this section, the filed document may be prevented from becoming effective if a person to which the filed document relates delivers to the secretary of state, for filing pursuant to this part 3, on or before the earlier of the stated effective date of the document or the ninetieth day after the filed document was filed, a statement of correction revoking the filed document.

(4) If two or more documents are simultaneously delivered to the secretary of state, each of the documents shall be deemed to have been filed simultaneously if each identifies, to the satisfaction of the secretary of state, all of the documents that are to be deemed to have been filed simultaneously and states that all of such documents are to be deemed to have been filed simultaneously. All of such documents shall be deemed to have been filed at the time and on the date of filing of the first of such documents to be filed, as such time and date are evidenced by the records of the secretary of state. If any of such documents is rejected by the secretary of state, all of such documents shall be deemed to have been rejected by the secretary of state.

**Source:** L. 97: Entire article added, p. 1519, § 21, effective June 3. L. 98: IP(3) amended, p. 620, § 18, effective July 1. L. 2002: (1), (2), and IP(3) amended, p. 1841, § 93, effective July 1; (1), (2), and IP(3) amended, p. 1705, § 91, effective October 1. L. 2003: Entire section amended, p. 2290, § 200, effective July 1, 2004. L. 2004: (1)(b), (2), (3), and (4) amended, p. 1478, § 212, effective July 1. L. 2006: (2) amended, p. 871, § 49, effective July 1. L. 2009: (2) amended, (HB 09-1248), ch. 252, p. 1132, § 13, effective May 14.

**7-90-304.5. Restated constituent filed document.** (1) Unless the organic statutes expressly provide otherwise:

(a) A domestic entity may restate its constituent filed document at any time by action of its owners or of any other person authorized by the organic statutes to deliver, on behalf of the entity, articles of restatement to the secretary of state, for filing pursuant to this part 3, effecting such restatement.

(b) Articles of restatement of a constituent filed document may include one or more amendments to the constituent filed document if each amendment to the constituent filed document has been approved in the manner provided in the organic statutes. Such an amendment may:

(I) Delete the statement of the names and addresses of the incorporators or other persons forming the entity;

(II) Delete the statement of the names and addresses of the initial managers of the entity;

(III) Delete the statement of the names and addresses of any or all of the individuals named in the constituent filed document, pursuant to section 7-90-301 (6), as being individuals who caused the constituent filed document to be delivered for filing;

(IV) Delete the statement of the principal office address of the entity; and

(V) If a statement of change changing the registered agent name and registered agent address of the registered agent of the entity is on file in the records of the secretary of state, delete the statement of the registered agent name and registered agent address of the initial registered agent of the entity.

(c) An entity restating its constituent filed document shall deliver to the secretary of state, for filing pursuant to this part 3, articles of restatement stating:

(I) The entity name of the entity; and

(II) The text of the restated constituent filed document.



(III) (Deleted by amendment, L. 2004, p. 1479, § 213, effective July 1, 2004.)

(d) Upon filing of articles of restatement of a constituent filed document by the secretary of state or at any delayed effective date provided in the articles of restatement, determined pursuant to section 7-90-304, the constituent filed document as restated by the articles of restatement supersedes the original constituent filed document and all prior amendments to the original constituent filed document.

**Source:** **L. 98:** Entire section added, p. 620, § 19, effective July 1. **L. 2003:** IP(1), (1)(a), (1)(b), IP(1)(c), and (1)(c)(I) amended, p. 2291, § 201, effective July 1, 2004. **L. 2004:** IP(1), (1)(a), IP(1)(b), (1)(b)(V), IP(1)(c), (1)(c)(I), and (1)(c)(III) amended, p. 1479, § 213, effective July 1. **L. 2006:** (1)(a), IP(1)(b), IP(1)(c), and (1)(d) amended, p. 871, § 50, effective July 1.

**7-90-305. Correcting filed document.** (1) A person may deliver to the secretary of state, for filing pursuant to this part 3, a statement of correction to:

(a) Correct a filed document if the filed document contains information that was incorrect at the time the document was delivered to the secretary of state for filing pursuant to this part 3; or

(b) Revoke a filed document pursuant to section 7-90-304 (3).

(2) A statement of correction:

(a) Shall state the entity name of the entity to which the document relates or, if the entity to which the document relates does not have an entity name, shall state the true name of the entity, or, in the case of a trade name, shall state the trade name and the name of the person transacting business or conducting activities under such name, or, in the case of a statement of trademark registration or any other document relating to a statement of trademark registration, shall identify the statement of trademark registration in a manner satisfactory to the secretary of state;

**Editor's note:** This version of paragraph (a) is effective until ninety days following certification by the secretary of state. (See the editor's note following this section.)

(a) Shall state the entity name of the entity to which the document relates or, if the entity to which the document relates does not have an entity name, shall state the true name of the entity, or, in the case of a trade name, shall state the trade name and the name of the person transacting business or conducting activities under such name, or, in the case of a statement of trademark registration or any other document relating to a statement of trademark registration, shall identify the statement of trademark registration in a manner satisfactory to the secretary of state, or, in the case of a commercial registered agent, shall state the name of the commercial registered agent as reflected in the records of the secretary of state;

**Editor's note:** This version of paragraph (a) is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

(b) Shall identify the filed document to the satisfaction of the secretary of state;

(c) Shall state the information, if any, contained in the filed document to be corrected;

(d) Shall state each such correction;

(d.5) Shall state each addition or deletion of information, if any; and

(e) Shall, if it revokes a filed document pursuant to section 7-90-304 (3), state that the filed document is revoked.

(3) (Deleted by amendment, L. 2003, p. 2292, § 202, effective July 1, 2004.)

(4) Except as otherwise provided in this subsection (4), a statement of correction is effective on the effective date of the filed document it corrects as such date is stated in the records of the secretary of state. As to persons relying on the uncorrected filed document and adversely affected by the correction, a statement of correction is effective when filed. A statement of correction that corrects the effective date of a filed document to an earlier date is effective on such earlier date or on the date the filed document was filed in the

records of the secretary of state as such date is stated in the records of the secretary of state, whichever is later. A statement of correction may not state a delayed effective date for the effectiveness of the statement of correction itself.

**Source:** **L. 97:** Entire article added, p. 1519, § 21, effective June 3. **L. 98:** (2), (3), and (4) amended, p. 621, § 20, effective July 1. **L. 2002:** (1), (2)(b), (2)(c), and (3) amended, p. 1841, § 94, effective July 1; (1), (2)(b), (2)(c), and (3) amended, p. 1706, § 92, effective October 1. **L. 2003:** Entire section amended, p. 2292, § 202, effective July 1, 2004. **L. 2004:** (1), (2), and (4) amended, p. 1480, § 214, effective July 1. **L. 2005:** (2) amended, p. 1207, § 9, effective October 1. **L. 2006:** (2)(a) amended, p. 872, § 51, effective May 30; (2)(a) amended, p. 118, § 2, effective May 29, 2007. **L. 2007:** (1)(a), (2)(c), and (2)(d) amended and (2)(d.5) added, p. 241, § 29, effective May 29. **L. 2012:** (2)(a) amended, (SB 12-123), ch. 171, p. 611, § 3, effective (see editor's note).

**Editor's note:** Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act amending subsection (2)(a) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement said subsection. As of publication date, the revisor of statutes had not received certification from the secretary of state.

**7-90-305.5. Statement of change.** (1) A person may amend, cancel, revoke, or otherwise change a filed document if circumstances occur after the filing of the filed document by the secretary of state that make it appropriate that the filed document be changed.

(2) A filed document is changed by causing to be delivered to the secretary of state, for filing pursuant to this part 3, a statement of change that:

(a) States the entity name of the entity to which the document relates or, if the entity to which the document relates does not have an entity name, states the true name of the entity, or, in the case of a trade name, states the trade name and the name of the person transacting business or conducting activities under such name, or, in the case of a statement of trademark registration or any document relating to a statement of trademark registration, identifies the statement of trademark registration in a manner satisfactory to the secretary of state;

**Editor's note:** This version of paragraph (a) is effective until ninety days following certification by the secretary of state. (See the editor's note following this section.)

(a) States the entity name of the entity to which the document relates or, if the entity to which the document relates does not have an entity name, states the true name of the entity, or, in the case of a trade name, states the trade name and the name of the person transacting business or conducting activities under such name, or, in the case of a statement of trademark registration or any document relating to a statement of trademark registration, identifies the statement of trademark registration in a manner satisfactory to the secretary of state, or, in the case of a commercial registered agent, states the name of the commercial registered agent as reflected in the records of the secretary of state;

**Editor's note:** This version of paragraph (a) is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

(b) Identifies the filed document to the satisfaction of the secretary of state;  
(c) States the information, if any, contained in the filed document that is to be changed;  
(d) States each such change;  
(d.5) States each addition or deletion of information, if any; and  
(e) Complies with all other requirements of this title applicable to the statement of change.

(3) If a person is specifically permitted or required by an organic statute other than this article to amend, cancel, revoke, or otherwise change a filed document, it may amend, cancel, revoke, or otherwise change such filed document only in accordance with such organic statute unless that organic statute or another organic statute other than this article



also permits the amendment, cancellation, revocation, or other change to be effected by a statement of change pursuant to this section.

(4) A statement of change and the change it effects in a filed document become effective as provided in section 7-90-304.

**Source: L. 2003:** Entire section added, p. 2293, § 203, effective July 1, 2004. **L. 2004:** (2) and (3) amended, p. 1481, § 215, effective July 1. **L. 2006:** (2)(a) amended, p. 872, § 52, effective May 30; (2)(a) amended, p. 118, § 3, effective May 29, 2007. **L. 2012:** (2)(a) amended, (SB 12-123), ch. 171, p. 612, § 4, effective (see editor's note).

**Editor's note:** Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act amending subsection (2)(a) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement said subsection. As of publication date, the revisor of statutes had not received certification from the secretary of state.

**7-90-306. Filing duty of secretary of state - manner of filing.** (1) If a document delivered to the secretary of state for filing pursuant to this part 3 complies with the requirements of section 7-90-301, the secretary of state shall file it. The secretary of state has no duty to determine whether the document complies with any or all requirements of any law.

(2) The secretary of state files a document by marking or otherwise associating the words "secretary of state" and the time and date of filing on or with the document and by placing the document in records that the secretary of state shall maintain to contain all filed documents. The records of filed documents that the secretary of state maintains shall be such that any filed document may be retrieved by the secretary of state in perceivable form and with the time and date of its filing.

(3) If the secretary of state permits a document to be delivered in a physical medium and the secretary of state refuses to file the document, the secretary of state shall return it to any individual who has been identified, pursuant to section 7-90-301 (8), as having caused the document to be delivered for filing at the address provided for that individual, together with a written notice providing a brief explanation of the reason for the refusal, within ten days after the document was delivered to the secretary of state; except that no return or notice shall be required with respect to a periodic report that the secretary of state has refused to file.

(4) The secretary of state's duty to file documents under this title is ministerial. The filing of or refusal to file a document does not:

- (a) Affect the validity or invalidity of the document in whole or in part;
  - (b) Relate to the correctness or incorrectness of information contained in the document;
- or
- (c) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

(5) (a) Notwithstanding the foregoing or any other provision of law, the secretary of state may, upon receipt of a written request from and a showing of good cause by an authorized person supported by such validating, verifying, and authenticating documents as the secretary of state may require, remove personal identifying information from the publicly accessible documents and other records of the secretary of state maintained pursuant to this section where such information is not required by law to be included in such documents and records.

(b) A document or record from which the secretary of state removes personal identifying information pursuant to paragraph (a) of this subsection (5) shall not be rendered insufficient or ineffective by such removal notwithstanding any other provision of law.

(c) The secretary of state may retain the original or a copy of a document or record that contains personal identifying information, but such a document or record shall be open for inspection, and copies or printouts of the document or record or information from the document or record shall be furnished only upon application to the secretary of state and

only for good cause shown notwithstanding any provision of part 2 of article 72 of title 24, C.R.S., or any other provision of law.

(6) For the purposes of this section, "personal identifying information" means information about an individual that could reasonably be used to identify such individual, including, but not limited to:

- (a) A social security number;
- (b) A personal identification number;
- (c) A password; or
- (d) A pass code.

**Source:** L. 97: Entire article added, p. 1520, § 21, effective June 3. L. 98: (2) amended, p. 622, § 21, effective July 1. L. 2002: (1), (2), and IP(4) amended, p. 1842, § 95, effective July 1; (1), (2), and IP(4) amended, p. 1706, § 93, effective October 1. L. 2003: (1), (2), and (3) amended, p. 2294, § 204, effective July 1, 2004. L. 2004: (1), (2), and (3) amended, p. 1481, § 216, effective July 1. L. 2005: (5) and (6) added, p. 847, § 5, effective June 1; (3) amended, p. 1208, § 10, effective October 1. L. 2010: (3) amended, (HB 10-1403), ch. 404, p. 1996, § 13, effective August 11.

**7-90-307. Appeal from secretary of state's refusal to file document.** (1) If the secretary of state refuses to file a document delivered to the secretary of state for filing, the person causing the document to be delivered to the secretary of state for filing may, within forty-five days after the effective date of the notice of the refusal given by the secretary of state pursuant to section 7-90-306 (3), appeal to the district court for the county in this state in which the street address of the entity's principal office is located, or, if the entity has no principal office in this state, to the district court for the county in which the street address of its registered agent is located or, if the entity has no registered agent, to the district court for the city and county of Denver. The appeal is commenced by petitioning the court to compel the filing of the document by the secretary of state and by attaching to the petition a copy of the document and a copy of the secretary of state's notice of refusal.

(2) The court may order the secretary of state to file the document or to take such other action as the court considers appropriate.

(3) The court's order or decision may be appealed as in other civil proceedings.

**Source:** L. 97: Entire article added, p. 1521, § 21, effective June 3. L. 2003: (1) amended, p. 2294, § 205, effective July 1, 2004. L. 2004: (1) amended, p. 1482, § 217, effective July 1.

**7-90-308. Evidentiary effect of copy of filed document.** A certificate attached to a copy of a document, bearing the secretary of state's manual or facsimile signature and the seal of this state and stating to the effect that the document is filed in the records of the secretary of state, is prima facie evidence that the document is on file in the records of the secretary of state.

**Source:** L. 97: Entire article added, p. 1521, § 21, effective June 3. L. 2002: Entire section amended, p. 1842, § 96, effective July 1; entire section amended, p. 1707, § 94, effective October 1. L. 2003: Entire section amended, p. 2295, § 206, effective July 1, 2004. L. 2004: Entire section amended, p. 1482, § 218, effective July 1.

**7-90-309. Certificates issued by secretary of state.** (1) The secretary of state shall issue to any person, upon request, a copy of any document filed by the secretary of state pursuant to this title, a certificate endorsed on or accompanying a copy of any filed document identifying the filed document and certifying that the copy is a true copy of the filed document, and, if appropriate, a certificate of good standing concerning any entity. The secretary of state may issue to any person, upon request, any other certificate as to the records of the secretary of state that the secretary of state deems appropriate.



(2) A certificate issued by the secretary of state may be relied upon, subject to any qualification stated in the certificate, as prima facie evidence of the facts stated therein.

**Source:** L. 97: Entire article added, p. 1521, § 21, effective June 3. L. 2002: (1) amended, p. 1843, § 97, effective July 1; (1) amended, p. 1707, § 95, effective October 1. L. 2003: Entire section amended, p. 2295, § 207, effective July 1, 2004. L. 2004: (1) amended, p. 1482, § 219, effective July 1.

**7-90-310. Proof of delivery for filing.** (1) The secretary of state may consider a document to have been received for filing upon proof of such receipt as evidenced by a signed return receipt, an entry in records maintained by the secretary of state of electronic or facsimile transmissions received by the secretary of state, or such other or additional proof of receipt of the documents received as the secretary of state may require. Such proof must be satisfactory to the secretary of state before the document will be considered received.

(2) The secretary of state may require that the receipt of a document by facsimile transmission on or after February 11, 1994, be shown in the records of the secretary of state of facsimile transmissions received by the secretary of state. The secretary of state may condition relief under this section upon fulfillment of such other requirements or conditions that the secretary of state determines appropriate, including, without limitation, the making of a change of entity name of the entity involved and payment of fees for the filing.

(3) Application for relief under this section shall be made in writing and delivered to the secretary of state within sixty days after the purported date of receipt of such document by the secretary of state. The application shall contain information satisfactory to the secretary of state to enable the secretary of state to identify the transaction.

**Source:** L. 97: Entire article added, p. 1521, § 21, effective June 3. L. 98: Entire section amended, p. 622, § 22, effective July 1. L. 2004: Entire section amended, p. 1483, § 220, effective July 1.

#### **7-90-311. Powers. (Repealed)**

**Source:** L. 97: Entire article added, p. 1522, § 21, effective June 3. L. 98: Entire section repealed, p. 622, § 23, effective July 1.

#### **7-90-312. Restated constituent filed documents. (Repealed)**

**Source:** L. 97: Entire article added, p. 1522, § 21, effective June 3. L. 99: Entire section repealed, p. 617, § 3, effective August 4.

**7-90-313. Remedy for failure or refusal to file - presumptions.** Any person who is adversely affected by a failure or refusal of any other person to deliver any document to the secretary of state, for filing pursuant to this part 3, with respect to any entity may petition the district court for the county in this state in which the street address of the entity's principal office is located or, if the entity has no principal office in this state, in the district court for the county in which the street address of its registered agent is located or, if the entity has no registered agent, in the city and county of Denver, to approve the document and direct the appropriate person to deliver the document to the secretary of state, for filing pursuant to this part 3. If the court finds that it is proper for the document to be filed and that there has been a failure or refusal to approve the document and deliver the document to the secretary of state for filing pursuant to this part 3, it shall order the secretary of state to file the document in the form it has approved.

**Source:** L. 2003: Entire section added, p. 2295, § 208, effective July 1, 2004. L. 2004: Entire section amended, p. 1483, § 221, effective July 1.

## PART 4

## SECRETARY OF STATE

**7-90-401. Powers.** The secretary of state has all powers reasonably necessary to perform the duties required by law.

**Source:** L. 2000: Entire part added, p. 971, § 47, effective July 1. L. 2003: Entire section amended, p. 2295, § 209, effective July 1, 2004. L. 2004: Entire section amended, p. 1484, § 222, effective July 1.

**7-90-402. Interrogatories by secretary of state.** (1) The secretary of state may propound to any domestic entity that has a constituent filed document filed in the records of the secretary of state, to any foreign entity that is authorized to transact business or conduct activities in this state, and to any manager thereof, such interrogatories as may be reasonably necessary and proper to enable the secretary of state to ascertain whether the entity has complied with all the provisions of the organic statutes. The interrogatories shall be answered within thirty days after the mailing thereof or within such additional time as fixed by the secretary of state, and the answers thereto shall be full and complete and shall be made in writing. If the interrogatories are directed to an individual, they shall be answered by the individual, and if directed to an entity, they shall be answered by a manager of the entity or by any other person authorized to answer the interrogatories as its agent. The secretary of state need not file any document to which such interrogatories relate until the interrogatories are answered as provided in this section, and not then if the answers thereto disclose that the document is not in conformity with the provisions of the organic statutes. The secretary of state shall certify to the attorney general, for such action as the attorney general may deem appropriate, all interrogatories and answers thereto that disclose a violation of any of the provisions of the organic statutes.

(2) Interrogatories propounded by the secretary of state and the answers thereto shall not be open to public inspection, nor shall the secretary of state disclose any facts or information obtained therefrom, except insofar as the official duty of the secretary of state may require the same to be made public or in the event such interrogatories or the answers thereto are required for evidence in any criminal proceedings or in any other action by this state.

(3) Each entity that fails or refuses to answer truthfully and fully, within the time prescribed by subsection (1) of this section, interrogatories propounded to the entity by the secretary of state in accordance with the provisions of said subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five thousand dollars.

(4) Each manager of an entity who fails or refuses to answer truthfully and fully, within the time prescribed by subsection (1) of this section, interrogatories propounded to the manager by the secretary of state in accordance with the provisions of said subsection (1) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars.

(5) The attorney general may enforce this section in an action brought in the district court for the county in this state in which the street address of the entity's principal office or the street address of its registered agent is located or, if the entity has no principal office in this state and no registered agent, in the district court in and for the city and county of Denver.

**Source:** L. 2006: Entire section added, p. 872, § 53, effective July 1.

**7-90-403. Notices by the secretary of state.** (1) (a) The secretary of state may give notice, in such manner as the secretary of state may determine, to any person about any matter arising under or with respect to this title, including notice regarding:

(I) The due date of a periodic report;



- (II) The existence of grounds for delinquency;
- (III) The pendency of dissolution upon expiration of period of duration;
- (IV) The dissolution upon expiration of period of duration;
- (V) The due date of a trade name renewal; and
- (VI) The due date of a trademark renewal.

(b) The secretary of state may use a phase-in period or any other method to mitigate hardship on the reporting entity caused by electronic notification and may provide exceptions from such electronic notification where hardship or other good cause is shown.

(c) This subsection (1) does not affect a requirement that the secretary of state give notice under another provision of law.

(2) Neither the determination of the secretary of state to give, or not to give, any notice under the authority of subsection (1) of this section nor the failure of any person to receive any notice so given affects any obligation under or requirement of any provision of this title or excuses any noncompliance by any person of any obligation under or requirement of any provision of this title.

**Source: L. 2010:** Entire section added, (HB 10-1403), ch. 404, p. 1996, § 14, effective August 11.

## PART 5

### ANNUAL REPORTS - STATEMENT OF PERSON NAMED IN FILED DOCUMENT

**7-90-501. Periodic reports.** (1) Each reporting entity shall deliver to the secretary of state, for filing pursuant to part 3 of this article, a periodic report that states the entity name of the reporting entity, the jurisdiction under the law of which the reporting entity is formed, and:

(a) and (b) (Deleted by amendment, L. 2003, p. 2296, § 210, effective July 1, 2004.)

(c) The registered agent name and registered agent address of the reporting entity's registered agent;

(d) The principal office address of the reporting entity's principal office.

(e) (Deleted by amendment, L. 2003, p. 2296, § 210, effective July 1, 2004.)

(2) and (3) (Deleted by amendment, L. 2003, p. 2296, § 210, effective July 1, 2004.)

(4) (a) The annual report shall be made in a manner prescribed by the secretary of state.

(b) Repealed.

(c) (I) Unless otherwise elected as provided in subparagraph (II) of this paragraph (c), a reporting entity shall deliver its first periodic report to the secretary of state, for filing pursuant to part 3 of this article, no later than the last day of the second calendar month following the first anniversary of the calendar month in which the reporting entity's constituent filed document or statement of foreign entity authority, as the case may be, became effective or, in the case of a reporting entity that has been reinstated or that has cured its delinquency, no later than the last day of the second calendar month following the first anniversary of the calendar month in which the reinstatement or curing of delinquency occurred. Unless otherwise elected as provided in subparagraph (II) or (III) of this paragraph (c), thereafter, the periodic report shall be delivered to the secretary of state by each reporting entity annually.

(II) The secretary of state may permit, on such conditions as the secretary of state may determine, a reporting entity to select an anniversary month different than the anniversary month as established in subparagraph (I) of this paragraph (c) by delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement of election of alternative anniversary month.

**Editor's note:** This version of subparagraph (II) is effective until ninety days following certification by the secretary of state. (See the editor's note following this section.)

(II) A reporting entity may, at the time of filing the constituent filed document or the periodic report, select an anniversary month different than the anniversary month as established in subparagraph (I) of this paragraph (c). If an entity elects to change its anniversary month pursuant to this subparagraph (II), that entity may not subsequently change its anniversary month for a period of at least one year.

**Editor's note:** This version of subparagraph (II) is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

(III) The secretary of state may permit, on such conditions as the secretary of state may determine, a reporting entity to elect to file the periodic report required by this section biennially by delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement of election of biennial reporting.

(d) Information in the periodic report shall be current as of the date the periodic report is delivered to the secretary of state, for filing pursuant to part 3 of this article, on behalf of the reporting entity. No periodic report shall state a delayed effective date.

(e) (Deleted by amendment, L. 2002, p. 1843, § 98, effective July 1, 2002; p. 1707, § 96, effective October 1, 2002.)

(f) (Deleted by amendment, L. 2005, p. 1208, § 11, effective October 1, 2005.)

(5) (Deleted by amendment, L. 2005, p. 1208, § 11, effective October 1, 2005.)

(5.5) (Deleted by amendment, L. 2010, (HB 10-1403), ch. 404, p. 1997, § 15, effective August 11, 2010.)

(6) (Deleted by amendment, L. 2004, p. 1484, § 223, effective July 1, 2004.)

(7) Each reporting entity that fails or refuses to deliver to the secretary of state a periodic report for filing on or before the due date prescribed by subsection (4) of this section and pay the prescribed processing fee is subject to a penalty, which shall be determined and collected pursuant to section 24-21-104 (3), C.R.S.

(7.5) Beginning July 27, 2009, a domestic limited partnership formed under or governed by article 62 of this title that is not a reporting limited partnership may deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of election to be a reporting entity stating:

(a) The domestic entity name of the domestic limited partnership;

(b) The principal office address of its principal office;

(c) The registered agent name and registered agent address of its registered agent; and

(d) That the domestic limited partnership elects to become a reporting limited partnership.

(8) (Deleted by amendment, L. 2003, p. 2296, § 210, effective July 1, 2004.)

**Source:** **L. 2000:** Entire part added, p. 971, § 47, effective July 1. **L. 2002:** IP(1), (4)(d), (4)(e), (5), and (6) amended, p. 1843, § 98, effective July 1; IP(1), (4)(d), (4)(e), (5), and (6) amended, p. 1707, § 96, effective October 1. **L. 2003:** Entire section amended, p. 2296, § 210, effective July 1, 2004. **L. 2004:** (4)(c), (4)(f), (6), and (7) amended, p. 1484, § 223, effective July 1. **L. 2005:** (4), (5), (5.5), and (7) amended, p. 1208, § 11, effective October 1. **L. 2006:** (4)(d), (5.5), and (7) amended, p. 873, § 54, effective July 1. **L. 2007:** (7.5) added, p. 242, § 30, effective May 29. **L. 2009:** IP(1) amended, (HB 09-1248), ch. 252, p. 1133, § 14, effective May 14. **L. 2010:** IP(1), (4)(c), (4)(d), (5.5), and (7) amended, (HB 10-1403), ch. 404, p. 1997, § 15, effective August 11. **L. 2012:** (4)(c)(II) amended, (SB 12-123), ch. 171, p. 614, § 7, effective (see editor's note).

**Editor's note:** (1) Subsection (4)(b)(II) provided for the repeal of subsection (4)(b), effective January 1, 2002. (See L. 2000, p. 971.)

(2) Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act amending subsection (4)(c)(II) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement said subsection. As of publication date, the revisor of statutes had not received certification from the secretary of state.



**7-90-502. Statement of person named in filed document. (Repealed)**

**Source:** L. 2000: Entire part added, p. 973, § 47, effective July 1. L. 2002: IP(1) amended, p. 1843, § 99, effective July 1; IP(1) amended, p. 1708, § 97, effective October 1. L. 2003: IP(1), (1)(b), and (1)(d) amended, p. 2297, § 211, effective July 1, 2004. L. 2004: Entire section repealed, p. 1484, § 224, effective July 1.

**PART 6****ENTITY NAMES**

**7-90-601. Entity name.** (1) An entity name shall not contain any term the inclusion of which would violate any statute of this state.

(2) Except as provided in section 7-90-604 (4.5), each entity name shall be distinguishable on the records of the secretary of state from every:

(a) Other entity name; and

(b) Name that is reserved with the secretary of state for another person as an entity name pursuant to section 7-90-602.

(c) (Deleted by amendment, L. 2004, p. 1544, § 5, effective May 30, 2006.)

(d) (Deleted by amendment, L. 2003, p. 2298, § 212, effective July 1, 2004.)

(3) In addition to the requirements of subsection (2) of this section:

(a) The entity name of a corporation shall contain the term or abbreviation "corporation", "incorporated", "company", "limited", "corp.", "inc.", "co.", or "ltd."; except that this paragraph (a) shall not apply to any of the following:

(I) A domestic corporation incorporated before January 1, 1959, whose domestic entity name has not been changed by amendment to its articles of incorporation effective after December 31, 1958;

(II) A domestic corporation incorporated under a statute of this state that permits the use of other names; or

(III) Savings and loan associations covered by section 11-41-102, C.R.S.

(b) The entity name of a nonprofit corporation may, but need not, contain the term or abbreviation "corporation", "incorporated", "company", "limited", "corp.", "inc.", "co.", or "ltd."

(c) The entity name of a limited liability company shall contain the term or abbreviation "limited liability company", "ltd. liability company", "limited liability co.", "ltd. liability co.", "limited", "l.l.c.", "llc", or "ltd."

(d) The entity name of a limited liability partnership shall contain the term or abbreviation "limited liability partnership", "registered limited liability partnership", "limited", "llp", "l.l.p.", "rllp", "r.l.l.p.", or "ltd."

(e) (I) The entity name of a limited partnership, that is not a limited liability limited partnership, shall contain the term or abbreviation "limited partnership", "limited", "company", "l.p.", "lp", "ltd.", or "co."

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (e), any limited partnership in existence on October 31, 1981, shall be entitled to elect to be governed by the provisions of article 62 of this title with the true name it had on October 31, 1981.

(f) (I) The entity name of a limited liability limited partnership shall contain the term or abbreviation "limited partnership", "limited", "company", "limited liability limited partnership" or "registered limited liability limited partnership", "l.p.", "lp", "co.", "l.l.l.p.", "lllp", "LTD.", "r.l.l.l.p.", or "rlllp"; or

(II) When the name of a limited partnership that is registered as a limited liability limited partnership in the records of the office of the secretary of state is the same as that stated in a certificate of limited partnership, amended certificate of limited partnership, or statement of registration delivered on or after May 24, 1995, for filing by the secretary of state with respect to the limited partnership and if, upon filing of such certificate or statement, the name was modified by the addition of any word or initial to indicate that the limited partnership is a limited liability limited partnership, then the limited partnership

may acquire, convey, and encumber title to real and personal property and otherwise deal in such name with or without the addition of such word or initial. The fact of the filing of such certificate or statement and the modification of the name of the limited partnership by such additional word or initial may be stated in an affidavit executed by a general partner of the limited partnership or a statement of authority executed pursuant to section 38-30-172, C.R.S., and shall be prima facie evidence of such facts and of the authority of the person executing the same to do so on behalf of the limited partnership. The affidavit may be recorded with the county clerk and recorder of any county.

(g) An entity name need not be in English if written in English letters or arabic or roman numerals.

(4) The entity name of a cooperative may, but need not, contain the term or abbreviation "cooperative", "association", "incorporated", "company", "limited", "coop", "ass'n", "assn", "assoc.", "inc.", "co.", or "ltd.".

(4.5) The entity name of a limited cooperative association shall contain the words "limited cooperative association" or "limited cooperative" or the abbreviation "L.C.A." or "LCA". "Limited" may be abbreviated as "Ltd.". "Cooperative" may be abbreviated as "Co-op" or "Coop". "Association" may be abbreviated as "Assoc." or "Assn.".

(5) For an entity that is specifically permitted by C.R.C.P. 265 or title 12, C.R.S., to use the words "professional company", "professional corporation", or abbreviations thereof in its name:

(a) "Pc." or "pc" shall be a permitted abbreviation for such an entity that is a corporation;

(b) "P.l.l.c." or "pllc" shall be a permitted abbreviation for such an entity that is a limited liability company;

(c) "P.l.l.p." or "pllp" shall be a permitted abbreviation for such an entity that is a limited liability partnership.

(6) The abbreviations stated in subsection (5) of this section are in addition to all others that may be permitted by law.

(7) (a) No person shall use the word "cooperative" or an abbreviation or derivation of it as a part of its business or domestic entity name or as a trade name, trademark, service mark, brand, or designation except:

(I) An entity incorporated under or subject to article 55 or 56 of this title, part 10 of article 16 of title 10, C.R.S., article 33.5 of title 38, C.R.S., or a similar law of another jurisdiction;

(II) An entity operated on a cooperative basis;

(III) An entity described in section 501 (c) (6) of the "Internal Revenue Code of 1986", as amended;

(IV) An association of two or more of the entities described in subparagraphs (I) to (III) of this paragraph (a); or

(V) As authorized by section 7-56-205 or as otherwise required or authorized by any other statute.

(b) An entity described in this subsection (7), or one or more members of such an entity, may, without the necessity of posting a bond, bring an action for an injunction or for actual damages incurred as a result of a violation of this subsection (7) or to enforce this subsection (7). Upon proof that the word "cooperative" or an abbreviation or derivation of that word is used in violation of this section, the court shall enter an order permanently enjoining such use of the word. The prevailing party in the action shall be awarded judgment against the other party for the attorney fees and costs of litigation incurred by the prevailing party in the action. This section shall not apply to any person that has been continuously using the word "cooperative" or an abbreviation or derivation of that word in the person's business on or before July 5, 1973, as part of its trade name, business name, trademark, service mark, brand, true name, or designation.

**Source:** L. 2000: Entire part added, p. 973, § 47, effective July 1. L. 2002: (3)(f)(II) amended, p. 1844, § 100, effective July 1; (3)(f)(II) amended, p. 1708, § 98, effective October 1. L. 2003: (2) and (3) amended and (4) added, p. 2298, §212, effective July 1, 2004. L. 2004: (3)(c), (3)(e)(II), and (3)(f)(I) amended and (5) and (6) added, p. 1485,



§ 225, effective July 1; (2) amended, p. 1544, § 5, effective May 30, 2006. **L. 2006:** IP(5) amended, p. 874, § 55, effective July 1. **L. 2007:** IP(2) amended, p. 242, § 31, effective May 29. **L. 2008:** (7) added, p. 20, § 6, effective August 5. **L. 2011:** (4.5) added, (SB 11-191), ch. 197, p. 820, § 3, effective April 2, 2012.

**7-90-601.5. Domestic entity name and trade name of dissolved domestic entity.**

(1) If a domestic entity that has a constituent filed document dissolves, the domestic entity name of the dissolved entity shall include the word “dissolved” followed by the month, day, and year of the effective date of dissolution of the entity.

(2) (Deleted by amendment, L. 2007, p. 242, § 32, effective May 29, 2007.)

**Source:** **L. 2003:** Entire section added, p. 2300, § 213, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1486, § 226, effective July 1. **L. 2005:** Entire section amended, p. 1209, § 12, effective October 1. **L. 2006:** Entire section amended, p. 874, § 56, effective May 30. **L. 2007:** Entire section amended, p. 242, § 32, effective May 29.

**7-90-601.6. Entity name of delinquent entity.** (1) The entity name of a delinquent entity shall include the word “delinquent”, followed by the month, day, and year of the effective date of the entity’s delinquency, after the four-hundredth day after the effective date of its delinquency under section 7-90-902 (1).

(2) (Deleted by amendment, L. 2007, p. 242, § 33, effective May 29, 2007.)

**Source:** **L. 2005:** Entire section added, p. 1210, § 13, effective October 1. **L. 2006:** Entire section amended, p. 874, § 57, effective May 30. **L. 2007:** Entire section amended, p. 242, § 33, effective May 29. **L. 2010:** (1) amended, (HB 10-1403), ch. 404, p. 1998, § 16, effective August 11.

**7-90-601.7. Foreign entity name and trade name of withdrawn foreign entity.**

(1) If a foreign entity has a statement of foreign entity authority on file in the records of the secretary of state, but such authority has been relinquished, the foreign entity name of the foreign entity shall include the words “Colorado authority relinquished” followed by the effective date of the statement of foreign entity withdrawal by which the foreign entity relinquished its authority.

(2) (Deleted by amendment, L. 2007, p. 243, § 34, effective May 29, 2007.)

**Source:** **L. 2004:** Entire section added, p. 1486, § 227, effective July 1. **L. 2005:** Entire section amended, p. 1210, § 14, effective October 1. **L. 2006:** Entire section amended, p. 874, § 58, effective May 30. **L. 2007:** Entire section amended, p. 243, § 34, effective May 29.

**7-90-602. Reserved entity name.** (1) Any person may apply for the reservation of the exclusive use of a name as an entity name by delivering a statement of reservation of a name to the secretary of state, for filing pursuant to part 3 of this article, stating the name and mailing address of the person, that the person is applying under this section to reserve a name for use as an entity name, and the name proposed to be reserved. If the secretary of state determines that the name applied for would be available for use as an entity name under section 7-90-601, the secretary of state shall reserve the name for the person’s exclusive use for a one-hundred-twenty-day period, which reservation may be renewed successively for one-hundred-twenty-day periods. No statement of reservation of name shall state a delayed effective date.

(2) The holder of a reserved name may transfer the reservation to any other person by delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement of transfer of reserved name that states the reserved name, the name of the holder, and the name and mailing address of the transferee.

(3) If a constituent filed document stating a delayed effective date and stating a new

domestic entity name is filed in the records of the secretary of state, such domestic entity name shall be deemed to be a reserved name until the constituent filed document becomes effective.

**Source:** L. 2000: Entire part added, p. 975, § 47, effective July 1. L. 2002: (1) and (2) amended, p. 1844, § 101, effective July 1; (1) and (2) amended, p. 1708, § 99, effective October 1. L. 2003: Entire section amended, p. 2300, § 214, effective July 1, 2004. L. 2004: (1) and (3) amended, p. 1486, § 228, effective July 1; (1) amended, p. 1544, § 6, effective May 30, 2006. L. 2005: (2) amended, p. 1210, § 15, effective October 1. L. 2006: (1) amended, p. 875, § 59, effective July 1.

**7-90-603. Assumed entity name of foreign entity.** If the name that a foreign entity would use as its foreign entity name is not permitted to be used by the foreign entity under section 7-90-601, the foreign entity, in order to obtain authority to transact business or conduct activities in this state, shall assume for use in this state as its foreign entity name a foreign entity name that would comply with section 7-90-601.

**Source:** L. 2000: Entire part added, p. 975, § 47, effective July 1. L. 2003: Entire section amended, p. 2300, § 215, effective July 1, 2004. L. 2004: Entire section amended, p. 1487, § 229, effective July 1.

**7-90-604. Registered true name of a foreign entity.** (1) A foreign entity that is not authorized to transact business or conduct activities in this state may register its true name, if that true name is a name that could be the entity name of the foreign entity if the foreign entity were authorized to transact business or conduct activities in this state. Such registration shall be effective through December 31 of the year in which the filing becomes effective.

(2) A foreign entity may register a true name pursuant to this section by delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement of registration of true name that complies with the requirements of this subsection (2). When filed, the statement of registration of true name registers the true name. The statement of registration of true name shall state:

- (a) Its true name;
- (b) The jurisdiction under the law of which it is formed;
- (c) The form of the entity as that form is recognized by the jurisdiction under the law of which the entity is formed; and

(d) The principal office address of its principal office.

(e) (Deleted by amendment, L. 2006, p. 875, § 60, effective July 1, 2006.)

(3) A foreign entity that has in effect a registration of its true name pursuant to this section may renew such registration by delivering to the secretary of state, for filing pursuant to part 3 of this article, on or before December 31 of the year of registration, a statement of renewal of registration of true name that complies with this subsection (3). When filed, the statement of renewal of registration renews the registration for the following year. The statement of renewal of registration of true name shall state:

(a) The entity's true name, the registration of which is to be renewed;

(b) The form of entity and the jurisdiction under the law of which it is formed; and

(c) (Deleted by amendment, L. 2009, (HB 09-1248), ch. 252, p. 1133, § 15, effective December 1, 2009.)

(d) The principal office address of the entity's principal office.

(3.5) No statement of renewal of registration of true name shall state a delayed effective date.

(4) (a) A foreign entity that has in effect a registration of its true name may transfer such registration to another foreign entity, if the transferee is not then authorized to transact business or conduct activities in Colorado, if that name is also the true name of the transferee and if, concurrently with the delivery of the foreign entity's statement of transfer of registration of true name to the secretary of state, for filing pursuant to part 3 of this



article, the transferee delivers to the secretary of state a statement of registration of true name pursuant to this section.

(b) A foreign entity that has in effect a registration of its true name may transfer the registration to another foreign entity, whether or not that name is the true name of the transferee, if the transferee is then authorized to transact business or conduct activities in Colorado and if, concurrently with the delivery of the foreign entity's statement of transfer of registration of true name to the secretary of state pursuant to paragraph (a) of this subsection (4), the transferee delivers to the secretary of state, for filing pursuant to part 3 of this article, either:

(I) A statement of trade name stating the transferred name as a trade name of the transferee pursuant to section 7-71-101;

(II) A statement of reservation of name reserving the transferred name as an entity name of the transferee pursuant to section 7-90-602; or

(III) A statement of change to the transferee's statement of foreign entity authority changing the assumed entity name of the transferee to the transferred name or stating that the transferee has acquired rights to use the transferred name as its true name in Colorado, as the case may be.

(c) A foreign entity that has in effect a registration of its true name may transfer such registration to another foreign entity, although that name is not the true name of the transferee, if, concurrently with the delivery of the foreign entity's statement of transfer of registration of true name to the secretary of state pursuant to paragraph (a) of this subsection (4), the transferee delivers to the secretary of state, for filing pursuant to part 3 of this article, a statement of foreign entity authority stating the transferred name as its assumed entity name under section 7-90-803 (1) (a).

(d) A foreign entity that has in effect a registration of its true name may transfer such registration to a person other than a foreign entity, although that name is not the true name of the transferee, if, concurrently with the delivery of the foreign entity's statement of transfer of registration of true name to the secretary of state pursuant to paragraph (a) of this subsection (4), the transferee delivers to the secretary of state, for filing pursuant to part 3 of this article, either:

(I) A statement of trade name stating the transferred name as a trade name pursuant to section 7-71-101;

(II) A statement of reservation of name reserving the transferred name as an entity name pursuant to section 7-90-602; or

(III) An amendment or statement of change to the transferee's constituent filed document changing the entity's domestic entity name to the transferred name.

(e) (Deleted by amendment, L. 2007, p. 243, § 36, effective May 29, 2007.)

(f) The transfer of the registration of the true name shall be effected by the current registrant's delivery to the secretary of state, for filing pursuant to part 3 of this article, of a statement of transfer of registered name that states:

(I) The true name of the foreign entity;

(II) The name of the jurisdiction under the law of which it is formed;

(III) The entity name of the transferee or, if the transferee does not have an entity name, the true name of the transferee;

(IV) The name of the jurisdiction under the law of which the transferee is formed; and

(V) That the registration of the true name is transferred by the entity to the transferee pursuant to this section.

(g) When the statement of transfer of registered name and each other document, if any, required by this subsection (4) to be delivered concurrently to the secretary of state with the statement of transfer of registered name is filed, the transfer of the registration of true name is transferred.

(4.5) A foreign entity that has in effect a registration of its true name may deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of foreign entity authority stating that name as its true name.

(5) A foreign entity that has in effect a registration of its true name may relinquish the registration at any time by delivering to the secretary of state, for filing pursuant to part 3

of this article, a statement of change stating the foreign entity's true name and stating that the registration is relinquished. When filed, the statement of change withdraws the registration of true name.

**Source:** **L. 2000:** Entire part added, p. 975, § 47, effective July 1. **L. 2002:** IP(2) and (3) to (5) amended, p. 1844, § 102, effective July 1; IP(2) and (3) to (5) amended, p. 1709, § 100, effective October 1. **L. 2003:** Entire section amended, p. 2301, § 216, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1487, § 230, effective July 1; (4)(b)(II), (4)(d)(II), and (4)(e) amended, p. 1545, § 7, effective May 30, 2006. **L. 2006:** (2)(b), (2)(e), and (3)(b) amended, p. 875, § 60, effective July 1. **L. 2007:** (3.5) and (4.5) added and IP(4)(d) and (4)(e) amended, p. 243, §§ 35, 36, effective May 29. **L. 2009:** IP(3), (3)(b), and (3)(c) amended and (3)(d) added, (HB 09-1248), ch. 252, p. 1133, § 15, effective December 1.

## PART 7

### REGISTERED AGENT - SERVICE OF PROCESS - CHANGE OF PRINCIPAL OFFICE

**7-90-701. Registered agent.** (1) Every domestic entity for which a constituent filed document is on file in the records of the secretary of state and every foreign entity authorized to transact business or conduct activities in this state shall continuously maintain in this state a registered agent that shall be:

(a) An individual who is eighteen years of age or older whose primary residence or usual place of business is in this state;

(b) A domestic entity having a usual place of business in this state; or

(c) A foreign entity authorized to transact business or conduct activities in this state that has a usual place of business in this state.

(2) An entity having a usual place of business in this state may serve as its own registered agent.

(3) Any document delivered to the secretary of state for filing on behalf of an entity that appoints a person as the registered agent for the entity shall contain a statement that the person has consented to being so appointed.

**Source:** **L. 2003:** Entire part added, p. 2302, § 217, effective July 1, 2004. **L. 2004:** IP(1) amended, p. 1490, § 231, effective July 1.

## ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For note, "Service of Process on Foreign Corporations Outside the Forum", see 34 Rocky Mt. L. Rev. 359 (1962).

**Annotator's note.** Since § 7-90-701 is similar to § 7-115-108 as it existed prior to the 2003 repeal and reenactment of article 115 of title 7 and former § 7-115-108 is similar to § 7-9-117 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing those provisions and their predecessors have been included in the annotations to this section.

**Designation of "general manager" and not a named individual suffices.** The requirement of this section is met by the designation of the "general manager" of a corporation, residing at its principal place of business, as agent to re-

ceive service of process. It is not necessary to give the name of the particular person who happens at the date of the certificate to fill this position, inasmuch as the object of the statute can be best subserved by a certificate of the character filed, for the obvious reason that the death or resignation of the incumbent would not long interfere with the bringing of suits against the corporations. *Goodwin v. Colo. Mtg. Inv. Co.*, 110 U.S. 1, 3 S. Ct. 473, 28 L. Ed 47 (1884).

**Similarly, the president and vice-president of a corporation are agents** of the corporation within the meaning of this section and it is not necessary that an officer serving process should specify in his return that he had served either of these officials in the capacity of agent when it appears that service was upon a specified official of the corporation, which carries with it the information by implication that service was



upon an agent thereof. *Comet Consol. Mining Co. v. Frost*, 15 Colo. 310, 25 P. 506 (1890); *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 P. 623 (1907).

**A foreign corporation's failure to comply with this section must be pleaded in the first**

instance; if one answers to the merits, the omission is waived. *Watson v. Empire Cream Separator Co.*, 66 Colo. 284, 180 P. 685 (1919).

**7-90-702. Change or resignation of registered agent.** (1) An entity that maintains a registered agent pursuant to this part 7 may change its registered agent, the registered agent address, or the registered agent name of its registered agent only by stating a different registered agent, different registered agent address, or different registered agent name for its registered agent, as the case may be, in one of the following:

(a) A statement of change filed pursuant to section 7-90-305.5;

(b) A periodic report filed pursuant to section 7-90-501; or

(c) Any form or cover sheet filed by the secretary of state pursuant to part 3 of this article, which form or cover sheet has been prescribed by the secretary of state for effecting such change.

(2) If the registered agent address or the registered agent name of the registered agent of an entity that is required to maintain a registered agent pursuant to this part 7 changes, the registered agent shall deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of change that, in addition to the information required to be stated in the statement of change pursuant to section 7-90-305.5, states that the person appointed as registered agent has delivered notice of the change to the entity.

(3) (Deleted by amendment, L. 2004, p. 1490, § 232, effective July 1, 2004.)

(4) If a person appointed as the registered agent for an entity in a filed document has resigned or otherwise is no longer the registered agent, the person, or if such person is deceased or a court of competent jurisdiction has appointed a guardian or general conservator for the person, the person's executor, administrator, guardian, conservator, or other legal representative, may deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of change that, in addition to the information required to be stated in the statement of change pursuant to section 7-90-305.5, states:

(a) The registered agent name and registered agent address as contained in the records of the secretary of state;

(b) The date on which the person resigned or otherwise ceased to be the registered agent for the entity; and

(c) That notice of the change has been delivered to the entity.

(5) Notwithstanding the provisions of section 7-90-304, a statement of change delivered by a person pursuant to subsection (4) of this section is effective on the thirty-first day after the date that the statement of change is filed in the records of the secretary of state or on a delayed effective date stated in the statement of change effecting the resignation that is not earlier than the thirty-first day, and not later than the ninetieth day, after the date the statement of change effecting the resignation is filed in the records of the secretary of state or on the effective date of a statement of change appointing a different person as registered agent, whichever occurs first.

(6) A statement of change pursuant to this section shall not be required to comply with section 7-90-305.5 (2) (b).

**Source:** L. 2003: Entire part added, p. 2302, § 217, effective July 1, 2004. L. 2004: IP(1), (2), (3), IP(4), and (4)(c) amended and (6) added, p. 1490, § 232, effective July 1. L. 2005: IP(1) amended, p. 1210, § 16, effective October 1. L. 2007: (5) amended, p. 244, § 37, effective May 29. L. 2008: IP(4) and (4)(c) amended, p. 20, § 7, effective August 5. L. 2010: (1)(b) amended, (HB 10-1403), ch. 404, p. 1998, § 17, effective August 11.

**7-90-703. Correction of registered agent.** (1) A registered agent may correct either or both its registered agent address and registered agent name as contained in a document on file in the office of the secretary of state, if such information was incorrect when that document was delivered for filing, by causing to be delivered to the secretary of state, for

filing pursuant to part 3 of this article, a statement of correction that, in addition to the information required to be stated in the statement of correction pursuant to section 7-90-305, states that notice of the correction has been delivered to the entity.

**Editor's note:** This version of subsection (1) is effective until ninety days following certification by the secretary of state. (See the editor's note following this section.)

(1) A registered agent may correct either or both its registered agent address and registered agent name as contained in a document on file in the office of the secretary of state, if such information was incorrect when that document was delivered for filing, by causing to be delivered to the secretary of state, for filing pursuant to part 3 of this article, a statement of correction that, in addition to the information required to be stated in the statement of correction pursuant to section 7-90-305, states that notice of the correction has been delivered to:

- (a) The entity; or
- (b) If the statement of correction is delivered for filing on behalf of a commercial registered agent, each entity and trademark registrant that the commercial registered agent represents. The filing of a statement of correction delivered on behalf of a commercial registered agent pursuant to this subsection (1) is effective to correct the information regarding the commercial registered agent with respect to each entity and trademark registrant represented by the commercial registered agent.

**Editor's note:** This version of subsection (1) is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

(2) Any person appointed as the registered agent for an entity in a document on file in the office of the secretary of state may, if the person has not consented to be appointed as the registered agent or is otherwise not the registered agent for the entity, cause to be delivered to the secretary of state, for filing pursuant to part 3 of this article, a statement of correction that, in addition to the information required to be stated in the statement of correction pursuant to section 7-90-305 (2) (a) and (2) (b), states:

- (a) That the person is not the registered agent for the entity; and
- (b) That the person has delivered notice of the correction to the entity.

**Source: L. 2003:** Entire part added, p. 2303, § 217, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1491, § 233, effective July 1. **L. 2012:** (1) amended, (SB 12-123), ch. 171, p. 612, § 5, effective (see editor's note).

**Editor's note:** Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act amending subsection (1) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement said subsection. As of publication date, the revisor of statutes had not received certification from the secretary of state.

**7-90-704. Service on entities.** (1) The registered agent of an entity is an agent of the entity authorized to receive service of any process, notice, or demand required or permitted by law to be served on the entity. The registered agent of an entity is an agent of the entity to whom the secretary of state may deliver any form, notice, or other document with respect to the entity under this title, unless otherwise specified by an organic statute.

(2) If an entity that is required to maintain a registered agent pursuant to this part 7 has no registered agent, or if the registered agent is not located under its registered agent name at its registered agent address, or if the registered agent cannot with reasonable diligence be served, the entity may be served by registered mail or by certified mail, return receipt requested, addressed to the entity at its principal address. Service is perfected under this subsection (2) at the earliest of:

- (a) The date the entity receives the process, notice, or demand;
- (b) The date shown on the return receipt, if signed on behalf of the entity; or
- (c) Five days after mailing.



(3) This section does not prescribe the only means, or necessarily the required means, of serving an entity in this state.

**Source:** L. 2003: Entire part added, p. 2304, § 217, effective July 1, 2004. L. 2004: (1) amended, p. 1491, § 234, effective July 1. L. 2007: IP(2) amended, p. 244, § 38, effective May 29.

## ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For note, "Service of Process on Foreign Corporations Outside the Forum", see 34 Rocky Mt. L. Rev. 359 (1962). For comment on Bay Aviation Serv. Co. v. District Court (149 Colo. 542, 370 P.2d 752 (1962)), see 34 Rocky Mt. L. Rev. 544 (1962). For note, "One Year Review of Colorado Law 1964", see 42 Den. L. Ctr. J. 140 (1965). For comment on White-Rodgers Co. v. District Court (160 Colo. 491, 418 P.2d 527 (1966)), see 39 U. Colo. L. Rev. 443 (1967). For note "Doing Business in Colorado for Foreign Corporations: Service of Process, Qualification, Taxation", see 49 Den. L.J. 529 (1973).

**Annotator's note.** Since § 7-90-704 is similar to § 7-115-111 as it existed prior to the 2003 repeal and reenactment of article 115 of title 7 and former § 7-115-111 is similar to § 7-9-119 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Where party did not serve process on a foreign corporation as required by the "long arm" statute,** its provisions concerning contacts sufficient to establish doing business were inapplicable under this section. Geer Co. v. District Court, 172 Colo. 48, 469 P.2d 734 (1970).

**But it is not necessary to rely on the "long arm" statute to sustain jurisdiction** of a court over a foreign corporation where service of process is not made outside of Colorado, but is made upon the agent of the foreign corporation in the state. White-Rodgers Co. v. District Court, 160 Colo. 491, 418 P.2d 527 (1966).

**Service of process may be made on agent or secretary of state.** When a foreign corporation has filed the necessary documents with the secretary of state as required by this article, it voluntarily subjects itself to process in Colorado either by service on an agent or on the secretary of state. Bardahl Mfg. Corp. v. District Court, 150 Colo. 312, 372 P.2d 447 (1962).

**Fact that corporation's employee did not make known to corporation that service had been made upon it** constitutes neither mistake, inadvertence, surprise, nor excusable neglect. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

**In addition to service on the secretary of state,** service under this section must be completed by mail or by personal service within or without the state on the person over whom jurisdiction is sought. Leach v. Farnsworth & Chambers Co., 231 F. Supp. 157 (D. Colo. 1964); Geer Co. v. District Court, 172 Colo. 48, 469 P.2d 734 (1970).

**Determination of "doing business" is matter for court.** The absence of exact measures for the determination of what constitutes doing business in a state for the purpose of becoming amenable to the processes of the courts of the state and the lack of uniformity, taken together with the opportunity of the trial court to observe the witnesses and to weigh their testimony, all lend strength to the wisdom of leaving the matter to the trial court. Am. Type Founders Co. v. District Court, 154 Colo. 156, 389 P.2d 85 (1964).

**But each case must be decided ad hoc so to not violate due process.** The question of what constitutes sufficient minimal contact within the state so as to hold that a foreign corporation has subjected itself to in personam jurisdiction without violating due process clause under the fourteenth amendment of federal constitution is resolved on an ad hoc basis, namely, each case rests upon its own facts. Bolger v. Dial-A-Style Leasing Corp., 159 Colo. 44, 409 P.2d 517 (1966).

**The question of what constitutes doing business is a fact** to be determined as any other fact. Am. Type Founders Co. v. District Court, 154 Colo. 156, 389 P.2d 85 (1964).

**And the burden of proving necessary "presence" in Colorado of foreign corporations for jurisdictional purposes is upon plaintiff.** Bolger v. Dial-A-Style Leasing Corp., 159 Colo. 44, 409 P.2d 517 (1966); Geer Co. v. District Court, 172 Colo. 48, 469 P.2d 734 (1970).

**Purchaser failed to establish seller's status as an agent for a foreign manufacturer** where seller conducted an independent business, purchasing mobile homes outright and selling them in its own business. Hence a motion for substituted service should have been quashed. Geer Co. v. District Court, 172 Colo. 48, 469 P.2d 734 (1970).

**Establishing beachhead for business activity and retaining open lines of communication as well as strings of ownership is "doing business" within the state.** Bolger v. Dial-A-

Style Leasing Corp., 159 Colo. 44, 409 P.2d 517 (1966).

**And since a foreign manufacturer maintained a local distributor in Colorado**, its sales activity was found to constitute doing business to the extent that service on secretary of state was valid service on the manufacturer, such determination resting largely in the sound discretion of the trial court. *Am. Type Founders Co. v. District Court*, 154 Colo. 156, 389 P.2d 85 (1964).

**But not a nonpresent parent corporation because of mere presence of subsidiary.** Although a corporation is totally owned by another corporation, the mere presence in Colorado of the wholly-owned subsidiary, standing alone, does not in and of itself subject the nonpresent parent corporation to the state's jurisdiction where the two companies are operated as distinct entities. *Bolger v. Dial-A-Style Leasing Corp.*, 159 Colo. 44, 409 P.2d 517 (1966).

**Presence in the state has never been doubted when** the activities of a foreign corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or

authorization to an agent to accept service of process has been given. *Am. Type Founders Co. v. District Court*, 154 Colo. 156, 389 P.2d 85 (1964).

**As where regular trips are made into the state to accept delivery.** A nonresident corporation is subject to substituted service by reason of its doing business within the state of Colorado where it conducts regular and continuous trips to the state for the purpose of accepting delivery of all the merchandise which it sells in another state and its entire operation depends on these regular and frequent trips into the state. *Jones v. Wood*, 208 F. Supp. 750 (D. Colo. 1962).

**But where a foreign corporation is in Colorado for one instance**, and that was for a demonstration, this presence in not sufficient to constitute doing business in the state so as to subject the corporation to process of service of summons in Colorado. *Bay Aviation Servs. Co. v. District Court*, 149 Colo. 542, 370 P.2d 752 (1962).

**Applied in** *Adolph Coors Co. v. A. Genderson & Sons*, 486 F. Supp. 131 (D. Colo. 1980).

**7-90-705. Change of principal office address.** (1) An entity that has stated a principal office address in a document filed by the secretary of state may change its principal office address only by stating a different principal office address in one of the following:

(a) A statement of change filed pursuant to section 7-90-305.5, which statement of change shall not be required to comply with section 7-90-305.5 (2) (b);

(b) A periodic report filed pursuant to section 7-90-501;

(c) Any form or cover sheet filed by the secretary of state pursuant to part 3 of this article, which form or cover sheet has been prescribed by the secretary of state for effecting such change; or

(d) A statement of dissolution or articles of dissolution.

**Source:** L. 2003: Entire part added, p. 2304, § 217, effective July 1, 2004. L. 2004: (1)(a) amended and (1)(d) added, p. 1492, § 235, effective July 1. L. 2010: (1)(b) amended, (HB 10-1403), ch. 404, p. 1998, § 18, effective August 11.

#### **7-90-706. Application to dissolved or delinquent entities. (Repealed)**

**Source:** L. 2003: Entire part added, p. 2304, § 217, effective July 1, 2004. L. 2005: Entire section amended, p. 1210, § 17, effective October 1. L. 2009: Entire section repealed, (HB 09-1248), ch. 252, p. 1133, § 16, effective May 14.

**7-90-707. Commercial registered agent.** (1) A registered agent may become listed as a commercial registered agent by delivering a commercial registered agent listing statement to the secretary of state for filing pursuant to part 3 of this article. The statement must include the registered agent name and registered agent address of the registered agent and the e-mail address of the registered agent that will be used to receive notifications from the secretary of state.

(2) The statement must be accompanied by a list of the entities represented by the registered agent at the time the statement is filed. If the registered agent is appointed as an agent for a trademark registrant who is an individual who is not a resident of this state, the registered agent shall identify the statement of trademark registration to the satisfaction of the secretary of state.



(3) A commercial registered agent listing statement must not state a delayed effective date.

**Editor's note:** This section is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

**Source: L. 2012:** Entire section added, (SB 12-123), ch. 171, p. 612, § 6, effective (see editor's note).

**Editor's note:** Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act adding this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement this section. As of publication date, the revisor of statutes had not received certification from the secretary of state.

**7-90-708. Termination of commercial registered agent listing.** (1) A commercial registered agent may terminate its listing as a commercial registered agent by delivering a commercial registered agent termination statement to the secretary of state for filing pursuant to part 3 of this article. The statement must include:

(a) The name of the registered agent as reflected in the records of the secretary of state at the time the statement is filed;

(b) A statement indicating that the commercial registered agent no longer serves as a commercial registered agent in this state; and

(c) A statement indicating that notice of the termination has been delivered to each entity and trademark registrant that the commercial registered agent represents.

(2) Notwithstanding section 7-90-304, a commercial registered agent termination statement is effective on the thirty-first day following the day that the commercial registered agent termination statement is filed in the records of the secretary of state or on a delayed effective date stated in the commercial registered agent termination statement that is not earlier than the thirty-first day and not later than the ninetieth day following the day the commercial registered agent termination statement is filed in the records of the secretary of state.

(3) A commercial registered agent ceases to be the agent for service of process for an entity and trademark registrant formerly represented by the commercial registered agent when the termination statement becomes effective. If an entity or trademark registrant represented by the person that is resigning as a commercial registered agent appoints a registered agent before the effective date of the termination statement, the commercial registered agent ceases to be the agent for that entity or trademark registrant on the effective date of the appointment of the new registered agent.

**Editor's note:** This section is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

**Source: L. 2012:** Entire section added, (SB 12-123), ch. 171, p. 613, § 6, effective (see editor's note).

**Editor's note:** Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act adding this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement this section. As of publication date, the revisor of statutes had not received certification from the secretary of state.

**7-90-709. Change of commercial registered agent name or address.** (1) If a commercial registered agent changes its registered agent name or its registered agent address, the commercial registered agent shall deliver to the secretary of state, for filing pursuant to part 3 of this article, a statement of change that states, in addition to the information required by section 7-90-305.5, that the commercial registered agent has

delivered notice of the change to each entity and trademark registrant represented by the commercial registered agent.

(2) The filing of a statement of change pursuant to this section is effective to change the information regarding the commercial registered agent with respect to each entity and trademark registrant represented by the commercial registered agent.

**Editor's note:** This section is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

**Source: L. 2012:** Entire section added, (SB 12-123), ch. 171, p. 613, § 6, effective (see editor's note).

**Editor's note:** Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act adding this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement this section. As of publication date, the revisor of statutes had not received certification from the secretary of state.

**7-90-710. Listing of entities represented by commercial registered agents.** The secretary of state shall make available upon request a list of filings made during the previous month that contain the name of a commercial registered agent. The secretary of state may assess a fee for the requested lists.

**Editor's note:** This section is effective ninety days following certification by the secretary of state. (See the editor's note following this section.)

**Source: L. 2012:** Entire section added, (SB 12-123), ch. 171, p. 614, § 6, effective (see editor's note).

**Editor's note:** Section 10 of chapter 171, Session Laws of Colorado 2012, provides that the act adding this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that the secretary of state has implemented the necessary computer system changes to implement this section. As of publication date, the revisor of statutes had not received certification from the secretary of state.

## PART 8

### FOREIGN ENTITIES

**7-90-801. Authority to transact business or conduct activities required.** (1) A foreign entity shall not transact business or conduct activities in this state except in compliance with this part 8 and not until its statement of foreign entity authority is filed in the records of the secretary of state. Notwithstanding the foregoing, this part 8 shall not apply to foreign general partnerships that are not foreign limited liability partnerships and shall not apply to foreign unincorporated nonprofit associations. To the extent that a provision of this part 8 is inconsistent with another statute of this state in its application to a foreign entity, such other statute, and not such provision of this part 8, shall apply.

(2) A foreign entity shall not be considered to be transacting business or conducting activities in this state within the meaning of subsection (1) of this section by reason of carrying on in this state any one or more of the following activities:

- (a) Maintaining, defending, or settling in its own behalf any proceeding or dispute;
- (b) Holding meetings of its owners or managers or carrying on other activities concerning its internal affairs;
- (c) Maintaining bank accounts;
- (d) Maintaining offices or agencies for the transfer, exchange, and registration of its own securities or owner's interests, or maintaining trustees or depositories with respect to those securities or owner's interests;
- (e) Selling through independent contractors;



- (f) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;
- (g) Creating, as borrower or lender, or acquiring, indebtedness;
- (h) Creating, as borrower or lender, or acquiring, mortgages or other security interests in real or personal property;
- (i) Securing or collecting debts in its own behalf or enforcing mortgages or security interests in property securing such debts;
- (j) Owning, without more, real or personal property;
- (k) Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature;
- (l) Transacting business or conducting activities in interstate commerce; and
- (m) In the case of a foreign nonprofit corporation:
  - (I) Granting funds; or
  - (II) Distributing information to its members.
- (3) The list of activities in subsection (2) of this section is not exhaustive.
- (4) Nothing in this section shall limit or affect the right to subject a foreign entity that does not, or is not required to, have authority to transact business or conduct activities in this state to the jurisdiction of the courts of this state or to serve upon any foreign entity any process, notice, or demand required or permitted by law to be served upon an entity pursuant to part 7 of this article or sections 13-1-124 and 13-1-125, C.R.S., or any other provision of law or pursuant to the applicable rules of civil procedure.
- (5) A foreign nonprofit entity shall be considered to be transacting business or conducting activities in this state if it is required to file a registration statement with the secretary of state pursuant to section 6-16-104, C.R.S.

**Source:** **L. 2003:** Entire part added, p. 2305, § 217, effective July 1, 2004. **L. 2004:** (1) amended, p. 1492, § 236, effective July 1. **L. 2007:** (5) added, p. 244, § 39, effective May 29.

#### ANNOTATION

**Law reviews.** For article, "The New Colorado Corporation Act", see 35 Dicta 317 (1958). For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For note, "Service of Process on Foreign Corporations Outside the Forum", see 34 Rocky Mt. L. Rev. 359 (1962). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Piercing the Corporate Veil: Limited Liability", see 15 Colo. Law. 795 (1986). For article, "Significant Improvements to Colorado's Limited Partnership Act Adopted", see 15 Colo. Law. 1635 (1986). For article, "Trade Name Registration Requirements and Customs in Colorado — Parts I and II", see 16 Colo. Law. 238 and 454 (1987).

**Annotator's note.** Since § 7-90-801 is similar to § 7-115-101 as it existed prior to the 2003 repeal and reenactment of article 115 of title 7 and former § 7-115-101 is similar to § 7-9-101 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Restrictions on interstate commerce may not be imposed.** The legislature in prescribing

conditions on which a foreign corporation may do business within the state may not impose any restrictions or burdens on interstate commerce. *Int'l. Trust Co. v. A. Leschen & Sons Rope Co.*, 41 Colo. 299, 92 P. 727 (1907).

**Thus this section cannot be construed to impose upon foreign corporations limitations on making contracts for carrying on commerce between the states**, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several states. *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 5 S. Ct. 739, 28 L. Ed. 1137 (1885).

**And so foreign corporations engaged solely in interstate commerce are impliedly excepted from this section** imposing duties and obligations upon foreign corporations generally; otherwise the section must necessarily be held unconstitutional as invading the exclusive power of Congress. *Herman Bros. Co. v. Nasiacos*, 46 Colo. 208, 103 P. 301 (1909).

**This section and § 10 of art. XV, Colo. Const., do not forbid, the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute.** *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 5 S. Ct. 739, 28 L. Ed. 1137 (1885).

**For to "transact business" within the meaning of this section** is to maintain an office, have capital invested, and carry on a regular business in the state. *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 P. 1112 (1913); *Colo. Iron-Works v. Sierra Grande Mining Co.*, 15 Colo. 499, 25 P. 325 (1890).

**And so a single transaction is not "transacting business"**. *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 P. 1112 (1913).

**Nor does "transacting business" include** the mere sale of shares, measures taken for promoting the affairs of the corporation, or meetings of the directors for such purposes only. *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 P. 1112 (1913).

**Corporation without certificate must defend lawsuits.** Although a foreign corporation which does not obtain a certificate of authority has no right to transact business in Colorado,

such corporation maintains its corporate identity with respect to its contracts and other acts, and it cannot refuse to defend lawsuits in Colorado courts. *Nat'l Ass'n of Credit Mgt. v. Burke*, 645 P.2d 1323 (Colo. App. 1982).

**Civil suits.** A foreign corporation not properly qualified to transact business in Colorado can remove the statutory prohibition against maintaining a civil action by taking steps necessary for qualification at any time. *Noldan Corp. v. District Court*, 716 P.2d 120 (Colo. 1986).

**Applied in** *Tabor v. Gross Mfg. Co.*, 11 Colo. 419, 18 P. 537 (1888); *Miller v. Williams*, 27 Colo. 34, 59 P. 740 (1899); *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 F. 1 (8th Cir. 1907); *Great W. Producers Coop. v. Great W. United Corp.*, 200 Colo. 180, 613 P.2d 873 (1980).

**7-90-802. Consequences of transacting business or conducting activities without authority.** (1) (a) No foreign entity transacting business or conducting activities in this state without authority, nor anyone on its behalf, shall be permitted to maintain a proceeding in any court in this state for the collection of its debts until a statement of foreign entity authority for the foreign entity is filed in the records of the secretary of state.

(b) A court may stay a proceeding commenced by a foreign entity until it determines whether the foreign entity should have a statement of foreign entity authority on file with the secretary of state. If the court determines that the foreign entity should have a statement of foreign entity authority on file with the secretary of state, the court may further stay the proceeding until there is a statement of foreign entity authority on file with the secretary of state with respect to the foreign entity. If a foreign entity has a statement of foreign entity authority on file with the secretary of state, no proceeding in any court in this state to which the foreign entity is a party shall, after the effective date of such statement of foreign entity authority, be dismissed by reason of a statement of foreign entity authority not being on file with the secretary of state with respect to the foreign entity.

(2) A foreign entity that transacts business or conducts activities in this state without being authorized to do so shall be liable to this state in an amount equal to the fee as prescribed by the secretary of state from time to time, not to exceed one hundred dollars for each calendar year or part of a calendar year during which it transacted business or conducted activities in this state without being authorized to do so, plus all penalties imposed by this state pursuant to subsection (3) of this section for failure to pay such fees. No statement of foreign entity authority shall be filed until payment of the amounts due under this subsection (2) and subsection (3) of this section is made.

(3) A foreign entity that transacts business or conducts activities in this state without having a statement of foreign entity authority on file in the records of the secretary of state shall be subject to a civil penalty, payable to this state, not to exceed five thousand dollars.

(4) The amounts due to this state under the provisions of subsection (2) of this section and the civil penalties set forth in subsection (3) of this section may be recovered in an action brought by the attorney general in the district court in and for the city and county of Denver. Upon a finding by the court that a foreign entity or any of its managers or agents on its behalf has transacted business or conducted activities in this state in violation of this part 8, the court may issue, in addition to or in lieu of the imposition of a civil penalty, an injunction restraining the further transaction of business or conducting of activities by the foreign entity and the managers and agents, and the further exercise of any rights and privileges of an entity in this state until all amounts plus any interest and court costs that the court may assess have been paid, and until the foreign entity has otherwise complied with this part 8.

(5) Notwithstanding subsection (1) of this section, the transaction of business or conducting of activities in this state by a foreign entity without having a statement of



foreign entity authority on file in the records of the secretary of state does not impair the validity of the acts of the foreign entity or prevent it from defending any proceeding in this state.

**Source:** L. 2003: Entire part added, p. 2306, § 217, effective July 1, 2004. L. 2004: (1), (2), and (4) amended, p. 1492, § 237, effective July 1. L. 2005: (1) amended, p. 1211, § 18, effective October 1.

## ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For article, "One Year Review of Corporations, Partnership and Agency", see 37 Dicta 11 (1960).

**Annotator's note.** Since § 7-90-802 is similar to § 7-115-102 as it existed prior the 2003 repeal and reenactment of article 115 of title 7 and former § 7-115-102 is similar to § 7-9-103 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing those provisions and their predecessors have been included in the annotations to this section.

**The general assembly has power to prescribe the terms and conditions upon which foreign corporations may do business within the state and require a compliance with such terms and conditions such as this section as a condition precedent to their invoking the jurisdiction of its courts.** Int'l. Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299, 92 P. 727 (1907).

**Civil suits.** A foreign corporation not properly qualified to transact business in Colorado can remove the statutory prohibition against maintaining a civil action by taking steps necessary for qualification at any time. Roldan Corp. v. District Court, 716 P.2d 120 (Colo. 1986).

**Until a foreign corporation complies with this section, it has no capacity to sue.** King Copper Co. v. Dreher, 68 Colo. 554, 191 P. 98 (1920).

**And failure to comply can be invoked as defense.** Officer of a foreign corporation, being sued by the corporation, was not estopped from invoking the defense that the corporation had not complied with this section. King Copper Co. v. Dreher, 68 Colo. 554, 191 P. 98 (1920).

**The failure of a foreign corporation to comply with this section goes to its capacity to sue, and is a matter of defense to be pleaded by the defendant in bar of the action.** Illinois Sewing Mach. Co. v. Harrison, 43 Colo. 362, 96 P. 177 (1908); Zelinger v. Uvalde Rock Asphalt Co., 316 F.2d 47 (10th Cir. 1963).

**However, this section prohibits the prosecution of an action until the prescribed certificate has been obtained by a foreign corporation.** The prohibition is, therefore, only provisional and may be removed at any time

under the terms of the section itself. Int'l. Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299, 92 P. 727 (1907).

**And so the purpose of this section is fully accomplished by actual compliance** with its requirements subsequent to the commencement of an action. Int'l. Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299, 92 P. 727 (1907).

**If an application under § 7-115-101 is filed before trial,** the failure to file until after the six-year deadline for filing application for finding of reasonable diligence pursuant to § 37-92-301 does not divest the water court of jurisdiction. Municipal Subdist., N. Colo. Water Conservancy Dist. v. Getty Oil Exploration Co., 997 P.2d 557 (Colo. 2000).

**Corporation must defend lawsuits.** Although a foreign corporation which does not obtain a certificate of authority has no right to transact business in Colorado, such corporation maintains its corporate identity with respect to its contracts and other acts, and it cannot refuse to defend lawsuits in Colorado courts. Nat'l Ass'n of Credit Mgt. v. Burke, 645 P.2d 1323 (Colo. App. 1982).

**A foreign corporation's omission to allege in its complaint that it has complied with this section** can relate only to its capacity to sue and is not one of the facts necessary to constitute its cause of action. Page Woven Wire Fence Co. v. Joslin, 38 Colo. 162, 88 P. 142 (1906).

**And a foreign corporation which has never done any business in Colorado may sue without paying any fees** to the state pursuant to this section. Desserich v. Merle & Heaney Mfg. Co. 48 Colo. 370, 109 P. 949 (1910).

**As this section is intended to govern intra-state commerce** and does not apply to interstate commerce or to the right of a foreign corporation to institute and defend suits in the federal courts. Butler Bros. Shoe Co. v. United States Rubber Co., 156 F. 1 (8th Cir. 1907); Herman Bros. Co. v. Nasiacos, 46 Colo. 208, 103 P. 301 (1909).

**Business not sufficiently intrastate** to bring corporation within the scope of this section. Cement Asbestos Prods. Co. v. Hartford Accident & Indem. Co., 592 F.2d 1144 (10th Cir. 1979).

**Question of transaction of business involves factual matters.** The question whether the plaintiff is transacting business in Colorado

for the purposes of this section involves factual matters. *Viva, Ltd. v. United States*, 490 F. Supp. 1002 (D. Colo. 1980).

**But no compulsion if solely in interstate commerce.** A foreign corporation may not be compelled to qualify in this state if it is engaged solely in interstate commerce. *Cement Asbestos Prods. Co. v. Hartford Accident & Indem. Co.*, 592 F.2d 1144 (10th Cir. 1979); *Viva, Ltd. v. United States*, 490 F. Supp. 1002 (D. Colo. 1980).

**Also, there is nothing in this section which prohibits foreign corporations from acquiring personal property in Colorado.** And having acquired it, they have the right to protect it from unlawful interference; if this were not true, persons might appropriate such property to their own use without fear of punishment. *Craig v. A. Leschen & Sons Rope Co.*, 38 Colo. 115, 87 P. 1143 (1906).

**Limitation on right of foreign corporations to bring lawsuits held inapplicable.** Where foreign corporation sued in the Colorado federal court to quiet title to property against which a federal tax lien had been imposed based upon

assessments against an individual taxpayer claimed to have an interest in the corporation and its property, the state limitation on right of foreign corporations to bring lawsuits did not apply. *Viva, Ltd. v. United States*, 490 F. Supp. 1002 (D. Colo. 1980).

**Liability not extended to corporation's officers, stockholders, or incorporators.** In the absence of definite statutory authority therefor, officers, stockholders, incorporators, or other persons contracting for or on behalf of a non-complying foreign corporation cannot be held liable on its contracts as partners. *Nat'l Ass'n of Credit Mgt. v. Burke*, 645 P.2d 1323 (Colo. App. 1982).

**Liens.** The assertion and filing of a lien is not a "proceeding in court" within the meaning of this statute. Filing a lien qualifies as a "corporate act" within the meaning of the statute. *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859 (Colo. App. 2001).

**Applied in** *Miller v. Williams*, 27 Colo. 34, 59 P. 740 (1899); *Kephart v. People ex rel. Am. Sav. Bank*, 28 Colo. 73, 62 P. 946 (1900).

**7-90-803. Statement of foreign entity authority to transact business or conduct activities.** (1) A foreign entity may cause to be delivered to the secretary of state, for filing pursuant to part 3 of this article, a statement of foreign entity authority stating:

- (a) Its true name and its assumed entity name, if any;
- (b) The jurisdiction under the law of which it is formed;
- (c) The form of the entity as that form is recognized by the jurisdiction under the law of which the entity is formed;
- (d) (Deleted by amendment, L. 2004, p. 1493, § 238, effective July 1, 2004.)
- (e) The principal office address of its principal office;
- (f) The registered agent name and registered agent address of its registered agent; and
- (g) The date it commenced or expects to commence transacting business or conducting activities in this state.
- (h) (Deleted by amendment, L. 2004, p. 1493, § 238, effective July 1, 2004.)

**Source:** **L. 2003:** Entire part added, p. 2307, § 217, effective July 1, 2004. **L. 2004:** (1)(c), (1)(d), and (1)(h) amended, p. 1493, § 238, effective July 1. **L. 2006:** (1)(b) amended, p. 876, § 61, effective July 1.

## ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 *Dicta* 489 (1959). For article, "1984 Revisions to the Colorado Corporation Code: Effective March 1984", which discusses elimination of filing requirements for foreign corporations, see 13 *Colo. Law* 993 (1984).

**Annotator's note.** Since § 7-90-803 is similar to § 7-115-103 as it existed prior to the 2003 repeal and reenactment of article 115 of title 7, to § 7-9-108 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7,

and to laws antecedent thereto, a case construing a predecessor provision has been included in the annotations to this section.

**The secretary of state has the right to treat a report as not filed** and refuse to file it until the fee is paid and until then it would not be filed, notwithstanding its delivery into his possession. *Sherman v. Credit Fin. Corp.*, 78 Colo. 330, 241 P. 722 (1925).

**And the secretary of state is not obliged to treat a check, as payment of the fee**, even if properly endorsed. *Sherman v. Credit Fin. Corp.*, 78 Colo. 330, 241 P. 722 (1925).



**7-90-804. Change of statement of foreign entity authority to transact business or conduct activities.** Upon any change in circumstances that makes any statement contained in its filed statement of foreign entity authority no longer true, a foreign entity authorized to transact business or conduct activities in this state shall deliver to the secretary of state, for filing pursuant to part 3 of this article, an appropriate statement of change so that its statement of foreign entity authority is in all respects true.

**Source:** L. 2003: Entire part added, p. 2307, § 217, effective July 1, 2004.

**7-90-805. Effect of statement of foreign entity authority.** (1) A foreign entity is authorized to transact business or conduct activities in this state from the effective date of its statement of foreign entity authority until the effective date of its statement of foreign entity withdrawal.

(2) A foreign entity that has authority to transact business or conduct activities in this state has the same rights and privileges as, but no greater rights or privileges than, and, except as otherwise provided by this title, is subject to the same duties, restrictions, penalties, and liabilities imposed upon, a functionally equivalent domestic entity.

(3) Nothing in this part 8 authorizes this state to regulate the organization, formation, existence, or internal activities of a foreign entity authorized to transact business or conduct activities in this state.

(4) As to any foreign entity transacting business or conducting activities in this state, the law of the jurisdiction under the law of which the foreign entity is formed shall govern the organization and internal affairs of the foreign entity and the liability of its owners and managers.

**Source:** L. 2003: Entire part added, p. 2308, § 217, effective July 1, 2004. L. 2004: (4) amended, p. 1493, § 239, effective July 1. L. 2005: (1) amended, p. 1211, § 19, effective October 1.

#### ANNOTATION

**Law reviews.** For article, “1959 Amendments to the Colorado Corporation Code”, see 36 Dicta 489 (1959). For note, “Doing Business in Colorado for Foreign Corporations: Service of Process, Qualification, Taxation”, see 49 Den. L.J. 529 (1973). For article, “Signatures on Documents Affecting Title to Colorado Real Property — Part III”, see 12 Colo. Law. 447 (1983).

**Annotator’s note.** Since § 7-90-805 is similar to § 7-115-105 as it existed prior to the 2003 repeal and reenactment of article 115 of title 7 and former § 7-115-105 is similar to § 7-9-104 as it existed prior to the 1993 recodification of the “Colorado Business Corporation Act”, articles 101 to 117 of title 7, cases construing those provisions and their predecessors have been included in the annotations to this section.

**This section recognizes that a foreign corporation has a corporate existence in Colorado if it complies with the provisions of this article.** *Admiral Corp. v. Television Sales & Serv., Inc.*, 138 Colo. 157, 330 P.2d 1106 (1958).

**But a foreign corporation cannot legally carry on business in Colorado until it complies with § 7-9-101 regulating the admission of foreign corporations to do business in this state;**

after such compliance, it becomes a corporation existing under the law of this state. *Admiral Corp. v. Television Sales & Serv., Inc.*, 138 Colo. 157, 330 P.2d 1106 (1958).

**Foreign corporation qualified to do business may use assumed name.** A foreign corporation, having qualified to do business in Colorado, is a corporation existing under the laws of this state within the meaning of § 7-71-101 providing for filing of assumed names. The right of a foreign corporation to transact business under an assumed name relates only to the remedies available to it in the enforcement of its contracts, and where it is provided as in this section that a foreign corporation shall have the same power as a domestic corporation, and domestic corporations are given the power to conduct their business under an assumed name upon compliance with the statute, foreign corporations may exercise the same power upon compliance with the applicable statute. *Admiral Corp. v. Television Sales & Serv., Inc.*, 138 Colo. 157, 330 P.2d 1106 (1958).

**Whether the term “corporation” when used in this code applies to foreign corporations as well as domestic corporations depends upon the subject matter of the statute, its policy, and the context in which the term is employed.**

Jefferson Indus. Bank v. First Golden Bancorp., 762 P.2d 768 (Colo. App. 1988).

**A foreign corporation transacting business in Colorado is subject to the same rules, regulations, and restrictions applicable to domestic corporations** by virtue of this section. Holmes v. Jewett, 55 Colo. 187, 134 P. 665 (1913).

Since nothing in the language of § 7-5-117 indicates an intent by the general assembly to limit its effect to domestic corporations, it also applies to foreign corporations as contemplated by this section. Jefferson Indus. Bank v. First Golden Bancorp., 762 P.2d 768 (Colo. App. 1988).

**Accordingly, this section subjects a foreign corporation to all the liabilities of a domestic**

**corporation** of like character which means that it shall not be subjected to any greater liabilities than are imposed upon a domestic corporation. Am. Smelting & Ref. Co. v. Colo., 204 U.S. 103, 27 S. Ct. 198, 51 L. Ed. 393 (1907).

**Extent of liabilities imposed.** It is a necessary corollary to the rule in this section that a foreign corporation shall not be subjected to any greater liabilities than are imposed upon a domestic corporation. Casselman v. Denver Tramway Corp., 39 Colo. App. 306, 568 P.2d 84 (1977), rev'd on other grounds, 195 Colo. 241, 577 P.2d 293 (1978).

**Applied** in Nat'l Ass'n of Credit Mgt. v. Burke, 645 P.2d 1323 (Colo. App. 1982).

**7-90-806. Withdrawal of foreign entity.** (1) A foreign entity authorized to transact business or conduct activities in this state may relinquish that authority by causing to be delivered to the secretary of state, for filing pursuant to part 3 of this article, a statement of foreign entity withdrawal stating:

- (a) Its true name and its assumed entity name, if any;
- (b) The registered agent name and registered agent address of its registered agent or, if a registered agent is no longer to be maintained, a statement that the entity will not maintain a registered agent, and the mailing address to which service of process may be mailed pursuant to section 7-90-807;
- (c) The principal office address of its principal office;
- (d) The jurisdiction under the law of which it was formed;
- (e) That it will no longer transact business or conduct activities in this state and that it relinquishes its authority to transact business or conduct activities in this state; and
- (f) That any statement of trade name it has on file in the records of the secretary of state pursuant to article 71 of this title, and any assumed entity name pursuant to section 7-90-603, are withdrawn upon the effective date of the statement of foreign entity withdrawal.

(g) (Deleted by amendment, L. 2004, p. 1494, § 240, effective July 1, 2004.)

(2) If a foreign entity causes a statement of foreign entity withdrawal to be delivered to the secretary of state for filing pursuant to part 3 of this article before the date on which a periodic report for the foreign entity is due pursuant to part 5 of this article, the foreign entity is relieved of its obligation to file such annual report or pay the fee therefor.

**Source: L. 2003:** Entire part added, p. 2308, § 217, effective July 1, 2004. **L. 2004:** (1)(c) and (1)(g) amended, p. 1494, § 240, effective July 1; (1)(f) amended, p. 1545, § 8, effective May 30, 2006. **L. 2006:** (1)(b), (1)(d), and (1)(f) amended, p. 876, § 62, effective July 1. **L. 2010:** (2) amended, (HB 10-1403), ch. 404, p. 1998, § 19, effective August 11.

**7-90-807. Service on withdrawn foreign entity.** (1) A foreign entity with respect to which a statement of foreign entity withdrawal has been filed pursuant to section 7-90-806 shall either:

(a) Maintain a registered agent to accept service on its behalf in any proceeding based on a cause of action arising during the time it was authorized to transact business or conduct activities in this state; or

(b) Be deemed to have authorized service of process on it in connection with such causes of action by mailing in accordance with section 7-90-704 (2).

(2) Subsection (1) of this section does not prescribe the only means, or necessarily the required means, of serving a foreign entity with respect to which a statement of foreign entity withdrawal has been filed.

**Source: L. 2003:** Entire part added, p. 2309, § 217, effective July 1, 2004.



**7-90-808. Grounds for revocation. (Repealed)**

**Source:** L. 2003: Entire part added, p. 2309, § 217, effective July 1, 2004. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

**7-90-809. Procedure for and effect of revocation. (Repealed)**

**Source:** L. 2003: Entire part added, p. 2310, § 217, effective July 1, 2004. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

**7-90-810. Appeal from revocation. (Repealed)**

**Source:** L. 2003: Entire part added, p. 2310, § 217, effective July 1, 2004. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

**7-90-811. Application to existing foreign entities.** A foreign entity authorized to transact business or conduct activities in this state in accordance with law as in effect on June 30, 2004, is subject to this part 8 and the filed document pursuant to which it has such authority shall be deemed to be a filed statement of foreign entity authority for purposes of this part 8.

**Source:** L. 2003: Entire part added, p. 2311, § 217, effective July 1, 2004. L. 2004: Entire section amended, p. 1494, § 241, effective July 1.

**7-90-812. Foreign general partnerships.** This part 8 shall not apply to a foreign general partnership that is not a foreign limited liability partnership.

**Source:** L. 2003: Entire part added, p. 2311, § 217, effective July 1, 2004.

**7-90-813. Title 12 limitations.** Nothing in this part 8 shall be construed to permit a foreign entity to engage in a profession or occupation as described in title 12, C.R.S., for which there is a specific statutory provision applicable to the practice of such profession or occupation by a corporation or professional corporation in this state unless authorized under applicable provisions of title 12, C.R.S., or section 25-3-103.7, C.R.S.

**Source:** L. 2003: Entire part added, p. 2311, § 217, effective July 1, 2004. L. 2011: Entire section amended, (SB 11-084), ch. 112, p. 346, § 1, effective August 10.

**PART 9****DELINQUENCY - DISSOLUTION UPON EXPIRATION  
OF TERM - NOTICE TO CREDITORS BY ENFORCEMENT  
OF CLAIMS AGAINST DISSOLVED ENTITIES****SUBPART 1****DELINQUENCY**

**7-90-901. Grounds for delinquency.** (1) A domestic entity that is a reporting entity may be declared delinquent under section 7-90-902 if:

(a) The domestic entity does not pay any fee or penalty imposed by this title when it is due;

(b) The domestic entity does not comply with part 5 of this article, providing for reports from reporting entities; or

(c) The domestic entity does not comply with part 7 of this article, providing for registered agents and service of process.

(2) A foreign entity that is a reporting entity may be declared delinquent under section 7-90-902 if:

(a) The foreign entity does not pay any fee or penalty imposed by this title when it is due;

(b) The foreign entity does not comply with part 5 of this article, providing for reports from reporting entities;

(c) The foreign entity does not comply with part 7 of this article, providing for registered agents and service of process;

(d) The foreign entity does not deliver for filing an appropriate statement of change when necessary to make its statement of foreign entity authority true in all respects; or

(e) The secretary of state receives a duly authenticated certificate from the secretary of state or other official having custody of entity records in the jurisdiction under the law of which the foreign entity was formed to the effect that it no longer exists as the result of a dissolution or merger or otherwise.

**Source: L. 2005:** Entire part added, p. 1211, § 20, effective October 1.

**7-90-902. Declaration of delinquency.** (1) If the secretary of state determines that one or more grounds exist under section 7-90-901 for declaring an entity delinquent and the entity does not correct each ground for declaring it delinquent or demonstrate to the reasonable satisfaction of the secretary of state that such ground does not exist within sixty days after the secretary of state makes such determination, the entity becomes delinquent following the expiration of such sixty days.

(2) (Deleted by amendment, L. 2010, (HB 10-1403), ch. 404, p. 1998, § 20, effective August 11, 2010.)

**Source: L. 2005:** Entire part added, p. 1212, § 20, effective October 1. **L. 2009:** (2) amended, (HB 09-1248), ch. 252, p. 1133, § 17, effective December 1. **L. 2010:** Entire section amended, (HB 10-1403), ch. 404, p. 1998, § 20, effective August 11.

**7-90-903. Effect of delinquency.** (1) A delinquent entity may not maintain a proceeding in any court in this state for the collection of its debts until it has cured its delinquency pursuant to section 7-90-904 (1), (2), or (3).

(2) A court may stay a proceeding commenced by an entity until it determines whether the entity is delinquent. If the court determines that the entity is delinquent, it may further stay the proceeding until the entity cures its delinquency pursuant to section 7-90-904. If a delinquent entity cures its delinquency in accordance with section 7-90-904, no proceeding in any court in this state to which such entity is a party shall thereafter be dismissed by reason of that instance of delinquency.

(3) The delinquency of an entity does not terminate the authority of the registered agent of the entity.

(4) The existence of a domestic entity continues notwithstanding its delinquency.

(5) A delinquent domestic entity may be dissolved at any time and by any manner as may be provided or permitted by its constituent documents and organic statutes and, if it has failed to cure its delinquency for three years or more, the delinquent domestic entity may be dissolved pursuant to section 7-90-908.

**Source: L. 2005:** Entire part added, p. 1213, § 20, effective October 1.

**7-90-904. Cure of delinquency.** (1) A delinquent entity may cure its delinquency by:

(a) Delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement curing delinquency stating:

(I) The entity's principal office address; and

(II) The entity's registered agent's name and address.



(b) (Deleted by amendment, L. 2008, p. 23, § 17, effective August 5, 2008.)

(2) In lieu of curing its delinquency pursuant to subsection (1) of this section, a delinquent foreign entity may cure its delinquency by causing to be delivered to the secretary of state, for filing pursuant to part 3 of this article, a statement of foreign entity withdrawal.

(3) A delinquent domestic entity may cure its delinquency by dissolving.

(4) (a) Except as provided in paragraphs (b) and (c) of this subsection (4), the entity name of an entity following the curing of its delinquency shall be the same as the entity name, determined without regard to section 7-90-601.6, of the entity at the time the entity cures its delinquency if such entity name complies with section 7-90-601 at the time the entity cures its delinquency. If such entity name would not be distinguishable on the records of the secretary of state as contemplated in section 7-90-601, the entity name of the entity following curing of its delinquency shall be such entity name followed by the words "delinquency cured" and the month, day, and year of the effective date of the statement curing delinquency.

(b) In the case of a foreign entity that cures its delinquency pursuant to subsection (2) of this section, the foreign entity name of the foreign entity shall be its foreign entity name at the time it cures its delinquency, determined without regard to section 7-90-601.6, as changed by section 7-90-601.7.

(c) In the case of a domestic entity that cures its delinquency pursuant to subsection (3) of this section, the domestic entity name of the domestic entity shall be its domestic entity name at the time it cures its delinquency, determined without regard to section 7-90-601.6, as changed by section 7-90-601.5.

**Source:** L. 2005: Entire part added, p. 1213, § 20, effective October 1. L. 2006: (4)(a) amended, p. 876, § 63, effective July 1. L. 2008: (1) amended, p. 23, § 17, effective August 5. L. 2009: (4)(a) amended, (HB 09-1248), ch. 252, p. 1134, § 18, effective May 14.

**7-90-905. Appeal from declaration of delinquency.** (1) An entity may appeal a declaration under section 7-90-902 (1) that it is delinquent to the district court for the county in this state in which the street address of the entity's principal office is located, or, if the entity has no principal office in this state, to the district court for the county in which the street address of its registered agent is located or, if the entity has no registered agent, to the district court for the city and county of Denver within thirty days after the effective date of its delinquency. The entity shall commence such appeal by petitioning the court to set aside the declaration of its delinquency or to determine that the entity has cured its delinquency and attaching to the petition copies of such documents in the secretary of state's records as may be relevant.

(2) The court may summarily order the secretary of state to take whatever action the court considers appropriate or may take any other action the court considers appropriate.

(3) The court's order or decision may be appealed as in other civil proceedings.

**Source:** L. 2005: Entire part added, p. 1214, § 20, effective October 1. L. 2010: (1) amended, (HB 10-1403), ch. 404, p. 1999, § 21, effective August 11.

**7-90-906. Limited liability partnerships and limited liability limited partnerships.** Each limited liability partnership and limited liability limited partnership to which section 7-60-152 or section 7-64-1008 was applicable on September 30, 2005, shall be deemed delinquent pursuant to section 7-90-902 (1), effective October 1, 2005.

**Source:** L. 2005: Entire part added, p. 1214, § 20, effective October 1. L. 2010: Entire section amended, (HB 10-1403), ch. 404, p. 1999, § 22, effective August 11.

## SUBPART 2

DISSOLUTION UPON EXPIRATION OF TERM  
OR OF DELINQUENT ENTITY**7-90-907. Dissolution upon expiration of term.**

(1) Repealed.

(2) A domestic entity shall automatically dissolve upon the expiration of the period of duration, if any, stated in its constituent filed document.

**Source: L. 2005:** Entire part added, p. 1214, § 20, effective October 1. **L. 2010:** (1) repealed, (HB 10-1403), ch. 404, p. 1999, § 23, effective August 11.

**7-90-908. Dissolution of delinquent entity.** (1) If a delinquent domestic entity has failed to cure its delinquency for three years or more, any manager of the domestic entity may cause it to dissolve by delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement of dissolution of delinquent entity stating:

(a) The domestic entity name of the delinquent entity;

(b) The principal office address of the delinquent entity's principal office;

(c) That the entity is delinquent and has failed to cure its delinquency for three years or more; and

(d) That, at least thirty days prior to the delivery of the statement of dissolution of delinquent entity to the secretary of state, the delinquent entity has delivered written notice of the delinquent entity's plan to file a statement of dissolution of delinquent entity to all owners and other persons having authority under the organic statutes and under its constituent operating document to bring about or prevent dissolution of the entity and the delinquent entity has not received, as of the date the statement of dissolution of delinquent entity is delivered for filing to the secretary of state, written objections to dissolution from such number of such owners and other persons as would be sufficient to prevent voluntary dissolution of the delinquent entity under the organic statutes and its constituent operating document.

(2) A delinquent domestic entity is dissolved upon the effective date of its statement of dissolution of delinquent entity.

**Source: L. 2005:** Entire part added, p. 1215, § 20, effective October 1.

**7-90-909. Notice of dissolution upon expiration of term. (Repealed)**

**Source: L. 2005:** Entire part added, p. 1215, § 20, effective October 1. **L. 2010:** Entire section repealed, (HB 10-1403), ch. 404, p. 2000, § 24, effective August 11.

**7-90-910. Effect of dissolution under section 7-90-907 or 7-90-908.** A domestic entity that is dissolved pursuant to section 7-90-907 or 7-90-908 continues its existence but may not carry on any business except as is appropriate to wind up and liquidate its business and affairs, and to give notice to claimants, in accordance with the organic statutes.

**Source: L. 2005:** Entire part added, p. 1215, § 20, effective October 1. **L. 2007:** Entire section amended, p. 244, § 40, effective May 29.

## SUBPART 3

NOTICE TO CREDITORS BY DISSOLVED ENTITIES -  
ENFORCEMENT OF CLAIMS AGAINST DISSOLVED ENTITIES

**7-90-911. Disposition of known claims by notification.** (1) A dissolved domestic entity may dispose of claims against it by following the procedures described in this section.



(2) A dissolved domestic entity may deliver written notice under this subsection (2) to any person at any time on or after the effective date of the dissolution. The notice contemplated in this subsection (2) shall state that, unless sooner barred by any other statute limiting actions, any claim of that person against the dissolved domestic entity will be barred if an action to enforce the claim is not commenced by a deadline that is stated in the notice, which deadline shall not be less than two years after the delivery of notice. The notice may contain such other information as the dissolved entity determines to include, including information regarding procedures facilitating the processing of claims against the dissolved entity; except that no obligations on persons having claims against the dissolved entity shall be imposed or implied that do not exist at law.

(3) Unless sooner barred by any other statute limiting actions, a person's claim against the dissolved domestic entity is barred if the dissolved entity delivers a notice of dissolution as contemplated by subsection (2) of this section and an action to enforce the claim is not commenced by the deadline stated in the notice.

(4) (a) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution. For purposes of this section, an action to enforce a claim includes an arbitration under any agreement for binding arbitration between the dissolved domestic entity and the person making the claim and includes a civil action.

(b) For purposes of this section and sections 7-90-912 and 7-90-913, "dissolved domestic entity" means a dissolved domestic cooperative other than a domestic cooperative formed under article 55 of this title, a dissolved domestic corporation, a dissolved domestic limited liability company, or a dissolved domestic nonprofit corporation.

**Source: L. 2006:** Entire section added, p. 876, § 64, effective July 1.

**7-90-912. Disposition of claims by publication.** (1) A dissolved domestic entity may publish notice of its dissolution and request that persons with claims against the dissolved domestic entity present them in accordance with the notice.

(2) The notice contemplated in subsection (1) of this section shall:

(a) Be published one time in a newspaper of general circulation in the county in this state in which the street address of the dissolved domestic entity's principal office is or was last located or, if the dissolved domestic entity has not had a principal office in this state, in the county in which the street address of its registered agent is or was last located; and

(b) State that, unless sooner barred by any other statute limiting actions, any claim against the dissolved entity will be barred if an action to enforce the claim is not commenced within five years after the publication of the notice or within four months after the claim arises, whichever is later. The notice may contain such other information as the dissolved entity determines to include, including information regarding procedures facilitating the processing of claims against the dissolved entity; except that no obligations on persons having claims against the dissolved entity shall be imposed or implied that do not exist at law.

(3) If the dissolved domestic entity publishes a notice in accordance with subsection (2) of this section, then, unless sooner barred under section 7-90-911 or under any other statute limiting actions, the claim of any person against the dissolved domestic entity is barred unless the person commences an action to enforce the claim within five years after the publication date of the notice or within four months after the claim arises, whichever is later.

(4) For purposes of this section and except where permitted to be disposed of under section 7-90-911, "claim" means any claim, excluding claims of this state, whether known, due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, or otherwise. For purposes of this section, an action to enforce a claim includes an arbitration under any agreement for binding arbitration between the dissolved domestic entity and the person making the claim and includes a civil action.

(5) This section shall not apply to a claim with respect to which notice has been delivered by a dissolved domestic entity under section 7-90-911.

**Source: L. 2006:** Entire section added, p. 876, § 64, effective July 1. **L. 2007:** (4) amended, p. 245, § 41, effective May 29.

**7-90-913. Enforcement of claims against a dissolved domestic entity.** (1) A claim may be enforced under section 7-90-911 or 7-90-912:

- (a) Against the dissolved domestic entity to the extent of its undistributed assets; and
- (b) If assets have been distributed in liquidation, against an owner of the dissolved domestic entity; except that an owner's total liability for all claims under this section shall not exceed the total value of assets distributed to the owner, as such value is determined at the time of distribution. Any owner required to return any portion of the value of assets received by the owner in liquidation shall be entitled to contribution from all other owners. Each such contribution shall be in accordance with the contributing owner's rights and interests and shall not exceed the value of the assets received by the contributing owner in liquidation.

**Source: L. 2006:** Entire section added, p. 876, § 64, effective July 1.

## PART 10

### REINSTATEMENT OF DISSOLVED ENTITIES

**7-90-1001. Reinstatement after dissolution.** Any domestic entity as to which a constituent filed document has been filed by, or placed in the records of, the secretary of state and that has been dissolved may be reinstated under this part 10; except that this part 10 shall not apply to domestic general partnerships or to limited partnerships formed under article 61 of this title that have not elected to be governed by article 62 of this title.

**Source: L. 2003:** Entire part added, p. 2311, § 217, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1494, § 242, effective July 1.

**7-90-1002. Vote or consent required - effect of opposition.** (1) An entity eligible for reinstatement under section 7-90-1001 may be reinstated upon compliance with the following conditions:

(a) The affirmative vote or consent shall have been obtained from owners and other persons entitled to vote or consent at that time that is:

- (I) Required for reinstatement under its constituent operating document; or
- (II) If its constituent operating document does not state the vote or consent required for reinstatement, sufficient for dissolution under the organic statutes, or such greater or lesser vote or consent as is required for dissolution under its constituent operating document;

(b) Except as otherwise provided in the constituent operating document, the owners and other persons having authority under the entity's organic statutes and under its constituent operating document to bring about or prevent dissolution of the entity shall not have, before or at the time of the vote or consent required by paragraph (a) of this subsection (1), voted against reinstatement or delivered to the entity their written objection to reinstatement;

(c) In the case of an entity dissolved in an involuntary or judicial proceeding initiated by one or more of the owners, the affirmative vote or consent of each such owner shall have been obtained and shall be included in the vote or consent required by paragraph (a) of this subsection (1);

(d) In the case of an entity dissolved in a proceeding initiated by one or more creditors of the entity, the obligations of the entity to each such creditor shall have been satisfied or discharged in full; and

(e) In the case of an entity dissolved in a proceeding initiated by the attorney general, all grounds for the dissolution asserted by the attorney general shall have been remedied, and the attorney general shall have consented to the reinstatement.

(2) To the extent that an entity's constituent operating document or the organic statutes provide for the voting rights of owners or other persons, for the calling of meetings, for



notices of meetings, for consents and actions of owners and other persons without a meeting, for establishing a record date for meetings, or for other matters concerning the voting or consent of owners and other persons, such provisions shall govern the vote or consent required by paragraph (a) of subsection (1) of this section with respect to the entity and the vote or objection of owners and other persons provided for in paragraph (b) of subsection (1) of this section with respect to the entity.

(3) This section shall not apply to a domestic entity that is described in this subsection (3) and that was administratively dissolved for any reason other than the expiration of the period of duration stated in its constituent filed document until the later of January 1, 2006, or the following date, as applicable:

(a) In the case of a corporation that was administratively dissolved after July 1, 2002, the date that is three years after the date it was administratively dissolved;

(b) In the case of a nonprofit corporation that was administratively dissolved after July 1, 1999, the date that is six years after the date it was administratively dissolved;

(c) In the case of a limited liability company that was administratively dissolved after July 1, 2001, the date that is four years after the date it was administratively dissolved.

**Source:** L. 2003: Entire part added, p. 2311, § 217, effective July 1, 2004. L. 2004: IP(1), (1)(a)(II), (1)(b), (1)(c), and (2) amended, p. 1494, § 243, effective July 1. L. 2005: (1)(b) and (2) amended and (3) added, p. 1216, § 21, effective October 1.

**7-90-1003. Articles of reinstatement.** (1) In order to reinstate an entity under this part 10, articles of reinstatement shall be delivered to the secretary of state, for filing pursuant to part 3 of this article stating:

(a) The domestic entity name of the entity;

(a.5) The domestic entity name of the entity following reinstatement, which entity name shall comply with section 7-90-1004;

(b) The date of formation of the entity;

(c) The Colorado statute under which the entity existed immediately prior to its dissolution;

(d) The date of dissolution of the entity, if known;

(e) (Deleted by amendment, L. 2006, p. 878, § 65, effective July 1, 2006.)

(f) A statement that all applicable conditions of section 7-90-1002 have been satisfied;

(g) The principal office address of the entity's principal office; and

(h) The registered agent name and registered agent address of the entity's registered agent.

(2) If the constituent-filed document referred to in section 7-90-1001 is no longer in the publicly-accessible electronic records of the secretary of state at the time articles of reinstatement are delivered to the secretary of state for filing, the entity shall cause a true and complete copy of its constituent filed document to be attached to its articles of reinstatement.

**Source:** L. 2003: Entire part added, p. 2312, § 217, effective July 1, 2004. L. 2005: (1)(a) and (1)(e) amended, p. 1217, § 22, effective October 1. L. 2006: (1)(a.5) added and (1)(e) amended, p. 878, § 65, effective July 1.

**7-90-1004. Entity name upon reinstatement.** The domestic entity name of a domestic entity following reinstatement shall be the domestic entity name, determined without regard to section 7-90-601.5, of the domestic entity at the time of reinstatement if such domestic entity name complies with section 7-90-601 at the time of reinstatement. If that domestic

entity name does not comply with section 7-90-601, the domestic entity name of the domestic entity following reinstatement shall be that domestic entity name followed by the word "reinstated" and the month, day, and year of the effective date of the articles of reinstatement.

**Source:** **L. 2003:** Entire part added, p. 2313, § 217, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1495, § 244, effective July 1. **L. 2005:** Entire section amended, p. 1217, § 23, effective October 1. **L. 2006:** Entire section amended, p. 879, § 66, effective July 1. **L. 2009:** Entire section amended, (HB 09-1248), ch. 252, p. 1134, § 19, effective May 14.

**7-90-1005. Effect of reinstatement.** (1) Subject to subsection (2) of this section, upon reinstatement, the existence of the entity shall be deemed for all purposes to have continued without interruption; the entity resumes carrying on its business or conducting its activities as if dissolution had never occurred; any debt, obligation, or liability incurred by the entity or an owner or manager of the entity before or after the dissolution shall be determined as if dissolution had never occurred; and, if the entity was, at the time of its dissolution, a limited liability limited partnership, it continues, upon reinstatement, to be a limited liability limited partnership.

(2) The rights of owners and other persons arising by reason of reliance on the dissolution before those persons had notice of the reinstatement shall not be adversely affected by the reinstatement.

**Source:** **L. 2003:** Entire part added, p. 2313, § 217, effective July 1, 2004. **L. 2004:** (1) amended, p. 1495, § 245, effective July 1.

## **CORPORATIONS - Continued**

### **Colorado Business Corporations**

**Cross references:** For the "Uniform Records Retention Act", see article 17 of title 6.

**Law reviews:** For article, "Commercial and Corporate Law", which discusses recent Tenth Circuit decisions dealing with corporate law, see 64 Den. U. L. Rev. 165 (1987); for article, "Recent Judicial Developments in Delaware Takeover Law", see 19 Colo. Law. 47 (1990); for article, "Choice of Entities in Colorado", see 23 Colo. Law. 293 (1994); for article, "Choice of Entity in Colorado: An Update", see 25 Colo. Law. 3 (October 1996); for article, "Colorado Choice of Entity 1998", see 27 Colo. Law. 5 (June 1998); for article, "Colorado Choice of Form of Organization and Structure 2001", see 30 Colo. Law. 11 (October 2001); for article, "Entity and Trade Name Registration: 2001 Update", see 30 Colo. Law. 81 (October 2001); for article, "No Paper Required: Business Entity Legislation Makes Life Easier for Business Lawyers", see 33 Colo. Law. 6 (June 2004); for article, "Buying, Selling, and Combining Businesses Under the Colorado Business Corporation Act", see 33 Colo. Law. 73 (November 2004); for article, "Dissenters' Rights: The Colorado Supreme Court Finally Speaks", see 34 Colo. Law. 53 (April 2005); for article, "Piercing the Veil of an LLC or a Corporation", see 39 Colo. Law. 71 (August 2010).

## **ARTICLE 101**

### **General Provisions**

**Editor's note:** Provisions relating to corporations were contained in articles 1 to 10 of this title prior to July 1, 1994. A comparative table showing the relocation of subject matter from articles 1 through 10 to articles 101 through 117 as a result of the recodification of the Colorado Corporation Code in 1993, effective July 1, 1994, is found in the comparative tables located in the back of the index.

**Cross references:** For definitions applicable to this article, see § 7-90-102.



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SHORT TITLE AND  
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7-101-301  
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(Repealed)

## PART 4

## DEFINITIONS

7-101-401.

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## PART 1

SHORT TITLE AND  
RESERVATION OF POWER

**7-101-101. Short title.** Articles 101 to 117 of this title shall be known and may be cited as the "Colorado Business Corporation Act".

**Source: L. 93:** Entire article added, p. 732, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For article, "Corporate Organization: A Revised Manual of Colorado Procedure", see 20 Rocky Mt. L. Rev. 329 (1948). For article, "The New Colorado Corporation Act", see 35 Dicta 317 (1958). For note, "Corporations-Investment Clubs", see 31 Rocky Mt.

L. Rev. 358 (1959). For article, "One Year Review of Corporations, Partnership and Agency", see 37 Dicta 11 (1960). For article, "The Close Corporation and the Colorado Lawyer", see 39 U. Colo. L. Rev. 299 (1967).

**7-101-102. Reservation of power to amend or repeal.** The general assembly has the power to amend or repeal all or part of articles 101 to 117 of this title at any time, and all domestic and foreign corporations subject to said articles shall be governed by the amendment or repeal.

**Source: L. 93:** Entire article added, p. 732, § 1, effective July 1, 1994.

## PART 2

## FILING DOCUMENTS

**7-101-201. Filing requirements.** (1) Part 3 of article 90 of this title, providing for the filing of documents, applies to any document filed or to be filed by the secretary of state pursuant to articles 101 to 117 of this title.

(2) to (11) (Deleted by amendment, L. 2002, p. 1845, § 103, effective July 1, 2002; p. 1709, § 101, effective October 1, 2002.)

**Source: L. 93:** Entire article added, p. 732, § 1, effective July 1, 1994. **L. 96:** (6)(c) and (11) amended, p. 1310, § 1, effective June 1. **L. 2000:** (5) and (11) amended, p. 976, § 48, effective July 1. **L. 2002:** Entire section amended, p. 1845, § 103, effective July 1; entire section amended, p. 1709, § 101, effective October 1. **L. 2003:** (1) amended, p. 2313, § 218, effective July 1, 2004.

**7-101-202. Forms - secretary of state to furnish upon request - repeal. (Repealed)**

**Source: L. 93:** Entire article added, p. 734, § 1, effective July 1, 1994. **L. 2003:** (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-101-203. Filing, service, and copying fees - subpoenaes. (Repealed)**

**Source: L. 93:** Entire article added, p. 734, § 1, effective July 1, 1994. **L. 98:** (2) amended, p. 1324, § 21, effective June 1. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-101-204. Effective time and date of document. (Repealed)**

**Source: L. 93:** Entire article added, p. 735, § 1, effective July 1, 1994. **L. 96:** IP(3) amended, p. 1310, § 2, effective June 1. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-101-205. Correcting filed document. (Repealed)**

**Source: L. 93:** Entire article added, p. 736, § 1, effective July 1, 1994. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-101-206. Filing duty of secretary of state - manner of filing. (Repealed)**

**Source: L. 93:** Entire article added, p. 736, § 1, effective July 1, 1994. **L. 96:** (2) amended, p. 1311, § 3, effective June 1. **L. 2000:** (2) amended, p. 977, § 49, effective July 1. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-101-207. Appeal from secretary of state's refusal to file document. (Repealed)**

**Source: L. 93:** Entire article added, p. 737, § 1, effective July 1, 1994. **L. 96:** (1) amended, p. 1311, § 4, effective June 1. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-101-208. Evidentiary effect of copy of filed document. (Repealed)**

**Source: L. 93:** Entire article added, p. 737, § 1, effective July 1, 1994. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.



**7-101-209. Certificates issued by secretary of state. (Repealed)**

**Source:** **L. 93:** Entire article added, p. 737, § 1, effective July 1, 1994. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**7-101-210. Proof of delivery for filing. (Repealed)**

**Source:** **L. 94:** Entire section added, p. 91, § 17, effective July 1. **L. 96:** (2) amended, p. 1311, § 5, effective June 1. **L. 2002:** Entire section repealed, p. 1861, § 163, effective July 1; entire section repealed, p. 1728, § 163, effective October 1.

**PART 3****SECRETARY OF STATE****7-101-301 and 7-101-302. (Repealed)**

**Editor's note:** (1) This article was added in 1993. This part 3 was subsequently repealed in 2003, effective July 1, 2004, and was not amended prior to its repeal. For the text of this part 3 prior to 2004, consult the 2003 Colorado Revised Statutes.

(2) Section 7-101-302 provided for the repeal of this part 3, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**PART 4****DEFINITIONS**

**7-101-401. General definitions.** As used in articles 101 to 117 of this title, unless the context otherwise requires:

(1) Repealed.

(2) "Affiliate" means any person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, the person specified.

(3) "Articles of incorporation" includes amended articles of incorporation, restated articles of incorporation, and other instruments, however designated, on file in the records of the secretary of state, which have the effect of amending or supplementing in some respect the original or amended articles of incorporation.

(4) Repealed.

(5) "Authorized shares" means the shares of all classes which a domestic or foreign corporation is authorized to issue.

(6) "Bylaws" includes amended bylaws and restated bylaws.

(7) "Cash" and "money" are used interchangeably in articles 101 to 117 of this title. Each of these terms includes:

(a) Legal tender;

(b) Negotiable instruments readily convertible into legal tender; and

(c) Other cash equivalents readily convertible into legal tender.

(8) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing or typing in contrasting italics, boldface, color, capitals, or underlining is conspicuous.

(9) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting shares, by contract, or otherwise.

(10) (Deleted by amendment, L. 2000, p. 977, § 50, effective July 1, 2000.)

(11) "Corporation" or "domestic corporation" means a corporation for profit which is not a foreign corporation, incorporated under or subject to the provisions of articles 101 to 117 of this title.

(12) Repealed.

(13) "Distribution" means a direct or indirect transfer by a corporation of money or other property, except its own shares, or incurrence of indebtedness by a corporation, to or for the benefit of any of its shareholders in respect of any of its shares. A distribution may be in any form, including a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; or distribution of indebtedness.

(14) Repealed.

(15) "Effective date of notice" has the meaning set forth in section 7-101-402.

(16) "Employee" includes an officer but not a director; except that a director may accept duties that make said director also an employee.

(17) and (18) Repealed.

(19) "Governmental subdivision" includes an authority, county, district, subdistrict, municipality, and any other political subdivision.

(20) to (26) Repealed.

(27) "Receive", when used in reference to receipt of a writing or other document by a domestic or foreign corporation, means that the writing or other document is actually received:

(a) By the corporation at its registered office or at its principal office;

(b) By the secretary of the corporation, wherever the secretary is found; or

(c) By any other person authorized by the bylaws or the board of directors to receive such writings, wherever such person is found.

(28) "Record date" means the date, established under article 106 or 107 of this title, on which a corporation determines the identity of its shareholders and their shareholdings. The determination shall be made as of the close of business on the record date unless another time for doing so is stated when the record date is fixed.

(28.3) and (28.5) Repealed.

(29) "Secretary" means the corporate officer to whom the bylaws or the board of directors has delegated responsibility under section 7-108-301 (3) for the preparation and maintenance of minutes of the meetings of the board of directors and of the shareholders and of the other records and information required to be kept by the corporation under section 7-116-101 and for authenticating records of the corporation.

(30) "Shareholder" means either the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent recognized pursuant to section 7-107-204.

(31) "Shares" means the units into which the proprietary interests in a corporation are divided.

(32) to (33) Repealed.

(34) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

(35) Repealed.

(36) "Voting group" means all the shares of one or more classes or series that, under articles 101 to 117 of this title or under the articles of incorporation, are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by articles 101 to 117 of this title or the articles of incorporation to vote generally on the matter are for that purpose a single voting group.

**Source:** L. 93: Entire article added, p. 738, § 1, effective July 1, 1994. L. 96: (27)(a) and (36) amended and (28.3) and (28.5) added, p. 1311, § 6, effective June 1. L. 97: (4) amended, p. 760, § 25, effective July 1, 1998. L. 2000: (4) and (10) amended, p. 977, § 50, effective July 1. L. 2002: (14) amended, p. 1859, § 156, effective July 1; (14) amended, p. 1711, § 102, effective October 1. L. 2003: (1)(b), (4)(b), (12)(b), (14)(b), (17)(b), (18)(b), (20)(b), (21)(b), (22)(b), (23)(b), (24)(b), (25)(b), (26)(b), (28.3)(b), (28.5)(b), (32.1), (33)(b), and (35)(b) added by revision, pp. 2356, 2357, §§ 347, 348. L. 2004: (3) and (28) amended, p. 1495, § 246, effective July 1. L. 2005: (30) and (31) amended, p. 760, § 10, effective June 1. L. 2006: (3) amended, p. 879, § 67, effective July 1.



**Editor's note:** Subsections (1)(b), (4)(b), (12)(b), (14)(b), (17)(b), (18)(b), (20)(b), (21)(b), (22)(b), (23)(b), (24)(b), (25)(b), (26)(b), (28.3)(b), (28.5)(b), (32.1), (33)(b), and (35)(b) provided for the repeal of subsections (1), (4), (12), (14), (17), (18), (20), (21), (22), (23), (24), (25), (26), (28.3), (28.5), (32.1), (33), and (35), respectively, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

### ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For article, "1984 Revisions to the Colorado Corporation Code: Effective March 1984", which discusses certification requirements, see 13 Colo. Law. 993 (1984). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985).

**Annotator's note.** Since § 7-101-401 is similar to § 7-1-102 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Companies were "affiliates"** when they were under common control of another company. Nat'l Propane Corp. v. Miller, 18 P.3d 782 (Colo. App. 2000).

**Mutual ditch companies are outside the Colorado Corporation Code**, because a literal reading of subsection (11) limits the Code's applicability to "for profit" corporations and because court decisions make it clear that the application of the Code to such companies is not appropriate because they are not "true" corporations. Left Hand Ditch Co. v. Hill, 933 P.2d 1 (Colo. 1997).

**Corporation cannot rely on definition of "receive" as a basis for requiring actual receipt at its corporate office** when corporation designated a post office box as place where corporation would receive payment demands and other communications. M Life Ins. Co. v. S & W, 962 P.2d 335 (Colo. App. 1998).

**Applied** in Nat'l Ass'n of Credit Mgt. v. Burke, 645 P.2d 1323 (Colo. App. 1982).

**7-101-402. Notice.** (1) Notice given pursuant to articles 101 to 117 of this title shall be in writing unless oral notice is reasonable under the circumstances.

(2) Notice may be given in person; by telephone, telegraph, teletype, electronically transmitted facsimile, or other form of wire or wireless communication; or by mail or private carrier.

(3) Written notice by a corporation to its shareholders, if in a comprehensible form, is effective as to each shareholder when mailed, if mailed addressed to the shareholder's address shown in the corporation's current record of shareholders. If three successive notices given to a shareholder pursuant to this subsection (3) have been returned as undeliverable, no further notices to such shareholder shall be necessary until another address for the shareholder is made known to the corporation.

(4) Written notice to a domestic corporation or to a foreign corporation authorized to transact business or conduct activities in this state may be mailed to the registered agent address of its registered agent or to the corporation or its secretary at its principal office.

(5) Except as provided in subsection (3) of this section, written notice, if in a comprehensible form, is effective at the earliest of:

(a) The date received;

(b) Five days after mailing; or

(c) The date shown on the return receipt, if mailed by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(6) Oral notice is effective when communicated if communicated in a comprehensible manner.

(7) Repealed.

(8) If articles 101 to 117 of this title prescribe notice requirements for particular circumstances, those requirements govern. If the articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of articles 101 to 117 of this title, those requirements govern.

**Source:** **L. 93:** Entire article added, p. 741, § 1, effective July 1, 1994. **L. 96:** (7) repealed, p. 1312, § 7, effective June 1. **L. 2003:** (4) amended, p. 2314, § 219, effective July 1, 2004.

## ARTICLE 102

### Incorporation

**Cross references:** (1) For definitions applicable to this article, see §§ 7-90-102 and 7-101-401. (2) For recording certificates of incorporation and other recording requirements, see §§ 38-30-144 and 38-35-109.

**Law reviews:** For article, "Choice of Entities in Colorado", see 23 Colo. Law. 293 (1994); for article, "Choice of Entity in Colorado: An Update", see 25 Colo. Law. 3 (October 1996).

7-102-101. Incorporators.	porate powers.
7-102-102. Articles of incorporation.	7-102-105. Organization of corporation.
7-102-103. Incorporation.	7-102-106. Bylaws.
7-102-104. Unauthorized assumption of cor-	7-102-107. Emergency bylaws.

**7-102-101. Incorporators.** One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the secretary of state, for filing pursuant to part 3 of article 90 of this title. An incorporator who is an individual shall be of the age of eighteen years or older.

**Source:** **L. 93:** Entire article added, p. 742, § 1, effective July 1, 1994. **L. 2002:** Entire section amended, p. 1846, § 104, effective July 1; entire section amended, p. 1711, § 103, effective October 1. **L. 2004:** Entire section amended, p. 1496, § 247, effective July 1.

**7-102-102. Articles of incorporation.** (1) The articles of incorporation shall state:

- (a) The domestic entity name for the corporation, which domestic entity name shall comply with part 6 of article 90 of this title;
- (b) The information regarding shares required by section 7-106-101;
- (c) The registered agent name and registered agent address of the corporation's initial registered agent;
- (d) The principal office address of the corporation's initial principal office;
- (e) The true name and mailing address of each incorporator.
- (f) Repealed.

(2) The articles of incorporation may but need not state:

- (a) The names and addresses of the individuals who are elected to serve as the initial directors;
- (b) Provisions not inconsistent with law regarding:
  - (I) The purpose or purposes for which the corporation is incorporated;
  - (II) Managing the business of the corporation and regulating its affairs;
  - (III) Defining, limiting, and regulating the powers of the corporation, its board of directors, and its shareholders;
  - (IV) A par value for authorized shares or classes of shares;
  - (V) The imposition of personal liability on shareholders for the debts of the corporation to a stated extent and upon stated conditions; and
- (c) Any provision that under articles 101 to 117 of this title is required or permitted to be stated in the bylaws.

(3) For corporations incorporated after December 31, 1958, if cumulative voting is not desired in the election of directors, a statement to that effect shall be made in the articles of incorporation. If no such statement is made, cumulative voting shall be mandatory in the election of directors, subject to the provisions of section 7-107-209. For corporations incorporated before January 1, 1959, the articles of incorporation shall state whether cumulative voting shall be allowed in the election of directors; and, if the articles of



incorporation allow cumulative voting, shareholders shall be permitted to cumulate their shares in the election of directors as provided in section 7-107-209.

(4) The articles of incorporation need not state any of the corporate powers enumerated in articles 101 to 117 of this title.

(5) If articles 101 to 117 of this title condition any matter upon the presence of a provision in the bylaws, the condition is satisfied if such provision is present either in the articles of incorporation or the bylaws. If articles 101 to 117 of this title condition any matter upon the absence of a provision in the bylaws, the condition is satisfied only if the provision is absent from both the articles of incorporation and the bylaws.

**Source:** **L. 93:** Entire article added, p. 743, § 1, effective July 1, 1994. **L. 2000:** (1)(a) amended, p. 977, § 51, effective July 1. **L. 2002:** (1)(f) repealed, p. 1846, § 105, effective July 1; (1)(f) repealed, p. 1711, § 104, effective October 1. **L. 2003:** IP(1), (1)(a), (1)(c), (1)(d), IP(2), (2)(b)(V), (2)(c), and (4) amended, p. 2314, § 220, effective July 1, 2004. **L. 2004:** (1)(e) and (2)(a) amended, p. 1496, § 248, effective July 1. **L. 2006:** (2)(a) amended, p. 879, § 68, effective July 1. **L. 2008:** (1)(e) amended, p. 24, § 18, effective August 5.

## ANNOTATION

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950). For note, "Blank Stock Provisions — An Unlimited Delegation of Authority to the Board of Directors", see 22 Rocky Mt. L. Rev. 312 (1950). For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Corporate Director Liability", see 65 Den. U. L. Rev. 59 (1988). For article, "1988 Update on Colorado Tort Reform Legislation — Part II", see 17 Colo. Law. 1949 (1988).

**Annotator's note.** Since § 7-102-102 is similar to § 7-2-102 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**The essential prerequisite to the formation of a corporation** is articles of incorporation in form and substance as prescribed by statute. *Humphreys v. Mooney*, 5 Colo. 282 (1880).

**But none of the statements which the articles of incorporation are directed to contain are required to be made as condition precedent to the commencement or continuance of business** by the corporation. There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation and such as are required of the individuals seeking to become incorporated, but which are not made prerequisite to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which

the fact of incorporation can be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter. The right to be considered a corporation and the exercise of corporate powers depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence. *Humphreys v. Mooney*, 5 Colo. 282 (1880).

**However, without a certificate of renewal or a bona fide attempt thereto, there is no corporation de facto**, where the company does not make any attempt by certificate or otherwise to renew its life. *Bonfils v. Hayes*, 70 Colo. 336, 201 P. 677 (1921).

**Prior to issuance of certificate of incorporation no de facto corporate status** regardless of substantial attempt to comply with laws creating corporations. *Bowers Bldg. Co. v. Altura Glass Co.*, 694 P.2d 876 (Colo. App. 1984).

**No penalty for omission to comply strictly with this section.** Although this section prescribes the mode of organization and what the articles of incorporation shall contain, it annexes no penalty or liability for the neglect or omission to comply strictly with it. *Humphreys v. Mooney*, 5 Colo. 282 (1880).

**But if any one of these statutory requirements is omitted, such omission is a fatal defect** and confers no de jure right to exercise corporate franchises. *Bates v. Wilson*, 14 Colo. 140, 24 P. 99 (1890).

**This section does not require the articles of incorporation to be executed within the limits of the state.** *Humphreys v. Mooney*, 5 Colo. 282 (1880).

**Nor does this section require a meeting of the incorporators** prior to the execution of the articles. *Humphreys v. Mooney*, 5 Colo. 282 (1880).

**Notice of promoters or stockholders is not notice to corporation.** *Franklin Mining Co. v. O'Brien*, 22 Colo. 129, 43 P. 1016 (1896).

**Reasonable restrictions on the sale of corporation stock are neither against public policy nor void**, as Colorado has judicially and legislatively approved restrictions on the sale of stock. *Irwin v. West End Dev. Co.*, 342 F. Supp. 687 (D. Colo. 1972).

**Furthermore, all voting restrictions in the articles of incorporation not contrary to the statutes are valid.** *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**But those portions of the articles of incorporation which purport to exceed statutory authority are void.** *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**Entitlement of preference stock limited upon corporate dissolution.** When the articles of incorporation are silent as to whether preferred stock participates in a company's equity growth, the general rule is that upon corporate dissolution, preferred shareholders are entitled to no more than the liquidation preference stated in the articles, with the holders of common stock entitled to the rest of the corporate assets. *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982).

**Applied** in *Virginia Canon Toll Rd. Co. v. People ex rel. Vivian*, 22 Colo. 429, 45 P. 398 (1896); *Age Publishing Co. v. Becker*, 110 Colo. 319, 134 P.2d 205 (1943).

**7-102-103. Incorporation.** (1) A corporation is incorporated when the articles of incorporation are filed by the secretary of state or, if a delayed effective date is stated pursuant to section 7-90-304 in the articles of incorporation as filed by the secretary of state and if a statement of change revoking the articles of incorporation is not filed before such effective date, on such delayed effective date. The corporate existence begins upon incorporation.

(2) The secretary of state's filing of the articles of incorporation is conclusive that all conditions precedent to incorporation have been met.

**Source:** **L. 93:** Entire article added, p. 744, § 1, effective July 1, 1994. **L. 96:** (2) amended, p. 1312, § 8, effective June 1. **L. 2002:** (1) amended, p. 1859, § 157, effective July 1; (1) amended, p. 1711, § 105, effective October 1. **L. 2003:** (1) amended, p. 2314, § 221, effective July 1, 2004. **L. 2004:** (1) amended, p. 1496, § 249, effective July 1.

#### ANNOTATION

**Annotator's note.** Since § 7-102-103 is similar to § 7-2-104 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Any attempt to pierce the corporate veil after corporate existence was established** is equitable in nature and therefore may not be heard by a jury. *Straub v. Mountain Trails Resort, Inc.*, 770 P.2d 1321 (Colo. App. 1988).

**7-102-104. Unauthorized assumption of corporate powers.** All persons purporting to act as or on behalf of a corporation without authority to do so and without good faith belief that they have such authority shall be jointly and severally liable for all liabilities incurred or arising as a result thereof.

**Source:** **L. 93:** Entire article added, p. 744, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985).

**Annotator's note.** Since § 7-102-104 is similar to § 7-3-104 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7,

cases construing that provision and its predecessors have been included in the annotations to this section.

**Purpose of section** is to impose personal liability upon those persons who act as a corporation without having undertaken any bona fide effort to achieve corporate status by complying



with the statutory requirements for incorporation. *Micicche v. Billings*, 727 P.2d 367 (Colo. 1986).

**If no steps to incorporate have been initiated, and, therefore, no corporation exists, an individual is personally liable for his acts regardless of his good faith belief in the existence of a corporation.** *Jean Claude Boisset Wines U.S.A. v. Newton*, 830 P.2d 1134 (Colo. App. 1992).

**The statute is intended to impose personal liability upon those persons who take it upon themselves to hold themselves out and improperly act as a corporation without having undertaken any bona fide effort to achieve corporate status.** *Jean Claude Boisset Wines U.S.A. v. Newton*, 830 P.2d 1134 (Colo. App. 1992).

**The statute is not intended to exempt an individual from liability for his personal acts where no corporate documents such as the ar-**

ticles of incorporation were ever prepared. *Jean Claude Boisset Wines U.S.A. v. Newton*, 830 P.2d 1134 (Colo. App. 1992).

**Even if an individual has a good faith belief in the existence of a corporation**, where no steps have been taken to initiate incorporation, an individual is personally liable for such individual's acts purportedly carried out on behalf of the corporation. This section was not intended to exempt an individual from liability for his personal acts where no corporation documents were ever prepared. *Jean Claude Boisset Wines U.S.A., Inc. v. Newton*, 830 P.2d 1134 (Colo. App. 1992).

**This section applies only to representatives of domestic corporations**, and not to agents of foreign corporations. *Nat'l Ass'n of Credit Mgt. v. Burke*, 645 P.2d 1323 (Colo. App. 1982).

**Applied in** *Billings v. Micicche*, 691 P.2d 1155 (Colo. App. 1984).

### **7-102-105. Organization of corporation.** (1) After incorporation:

(a) If initial directors are not elected in the articles of incorporation, the incorporators may hold a meeting, at the call of a majority of the incorporators, to adopt initial bylaws, if desired, and to elect a board of directors; and

(b) The initial directors may hold a meeting, at the call of a majority of the directors, to adopt bylaws, if desired, to appoint officers, and to carry on any other business.

(2) Action required or permitted by articles 101 to 117 of this title to be taken by incorporators at an organizational meeting may be taken without a meeting if the action is taken in the manner provided in section 7-108-202 for action by directors without a meeting.

(3) An organizational meeting may be held in or out of this state.

**Source: L. 93:** Entire article added, p. 744, § 1, effective July 1, 1994.

**7-102-106. Bylaws.** (1) The board of directors or, if no directors have been elected, the incorporators may adopt initial bylaws. If neither the incorporators nor the board of directors have adopted initial bylaws, the shareholders may do so.

(2) The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or with the articles of incorporation.

**Source: L. 93:** Entire article added, p. 745, § 1, effective July 1, 1994.

## **ANNOTATION**

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 *Dicta* 79 (1950).

**Annotator's note.** Since § 7-102-106 is similar to § 7-5-109 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of this title, cases construing that provision and its predecessors have been included in the annotations to this section.

**Directors may make bylaws if certificate so provides.** This section expressly authorizes the directors, if the certificate of incorporation so provides, to make such prudential bylaws as

they deem proper for the management of the affairs of the company not inconsistent with the laws of the state. *Mitchell v. Colo. Fuel & Iron Co.*, 117 F. 723 (D. Colo. 1902).

**And courts will interfere only in case of abuse.** The matter of adopting bylaws for the government of corporations, and the manner in which their business shall be transacted, is a matter so much of discretion that a court should interfere only in a plain case of abuse. *Mitchell v. Colo. Fuel & Iron Co.*, 117 F. 723 (D. Colo. 1902).

**Where bylaws conflict with the articles of incorporation**, the articles of incorporation

control and the bylaws in conflict are void.  
Paulek v. Isgar, 38 Colo. App. 29, 551 P.2d 213  
(1976).

**7-102-107. Emergency bylaws.** (1) Unless otherwise provided in the articles of incorporation, the board of directors may adopt bylaws to be effective only in an emergency as defined in subsection (4) of this section. The emergency bylaws, which are subject to amendment or repeal by the shareholders, may include all provisions necessary for managing the corporation during the emergency, including:

- (a) Procedures for calling a meeting of the board of directors;
- (b) Quorum requirements for the meeting; and
- (c) Designation of additional or substitute directors.

(2) All provisions of the regular bylaws consistent with the emergency bylaws shall remain in effect during the emergency. The emergency bylaws shall not be effective after the emergency ends.

(3) Corporate action taken in good faith in accordance with the emergency bylaws:

- (a) Binds the corporation; and
- (b) May not be the basis for imposition of liability on any director, officer, employee, or agent of the corporation on the ground that the action was not authorized corporate action.

(4) An emergency exists for the purposes of this section if a quorum of the directors cannot readily be obtained because of some catastrophic event.

**Source: L. 93:** Entire article added, p. 745, § 1, effective July 1, 1994.

## ARTICLE 103

### Purposes and Powers

**Cross references:** (1) For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.  
(2) For conveyance of real estate by corporations, see § 38-30-144.

7-103-101. Purposes and applicability.

7-103-104. Ultra vires.

7-103-102. General powers.

7-103-105. Agent may convey real estate -  
repeal. (Repealed)

7-103-103. Emergency powers.

**7-103-101. Purposes and applicability.** (1) Every corporation incorporated under articles 101 to 117 of this title has the purpose of engaging in any lawful business unless a more limited purpose is stated in the articles of incorporation.

(2) Where another statute of this state requires that corporations of a particular class shall be formed or incorporated exclusively thereunder, corporations of that class shall be formed or incorporated under such other statute.

(3) Where another statute of this state requires corporations of a particular class to be formed or incorporated under that other statute and also under general corporation law, such corporations shall be formed or incorporated under such other law and, in addition thereto, under articles 101 to 117 of this title to the extent general corporation law is applicable.

(4) Where another statute of this state permits corporations of a particular class to be formed or incorporated either under such statute or under the general corporation law, a corporation of that class may at the election of its incorporators be formed or incorporated under articles 101 to 117 of this title. Unless the articles of incorporation of such corporation indicate that it is formed or incorporated under such other alternate statute, the corporation shall for all purposes be considered as formed and incorporated under articles 101 to 117 of this title.

(5) Articles 101 to 117 of this title shall apply to corporations of every class, whether or not included in the term "corporation" as defined in section 7-101-401 (11), that are formed or incorporated under and governed by other statutes of this state, to the extent that said articles are not inconsistent with such other statutes. Notwithstanding the foregoing,



except as permitted by section 7-123-101 (8), articles 101 to 117 of this title shall not apply to nonprofit corporations:

- (a) Formed under articles 121 to 137 of this title;
- (b) Governed by articles 121 to 137 of this title pursuant to section 7-137-101 (2); or
- (c) Governed by articles 121 to 137 of this title by reason of an election pursuant to section 7-137-201.

**Source:** L. 93: Entire article added, p. 745, § 1, effective July 1, 1994. L. 96: (5) amended, p. 1312, § 9, effective June 1. L. 97: (5) amended, p. 761, § 26, effective July 1, 1998. L. 2003: Entire section amended, p. 2314, § 222, effective July 1, 2004. L. 2006: (5) amended, p. 879, § 69, effective July 1.

### ANNOTATION

**Annotator's note.** Since § 7-103-101 is similar to § 7-1-103 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Business corporation statutes requiring more than majority vote to achieve corporate**

**action are not applicable to nonprofit corporations.** *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**The phrase "corporations of every class" in subsection (4) refers to all corporations, nonprofit or for profit.** *Hill v. Behrmann*, 911 P.2d 679 (Colo. App. 1995) (decided under former law), *aff'd* on other grounds, 933 P.2d 1 (Colo. 1997).

**7-103-102. General powers.** (1) Unless otherwise provided in the articles of incorporation, every corporation has perpetual duration and succession in its domestic entity name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including the power:

- (a) To sue and be sued, complain, and defend in its entity name;
- (b) To have a corporate seal, which may be altered at will, and to use such seal, or a facsimile thereof, including a rubber stamp, by impressing or affixing it or by reproducing it in any other manner;
- (c) To make and amend bylaws;
- (d) To purchase, receive, lease, and otherwise acquire, and to own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located;
- (e) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;
- (f) To purchase, receive, subscribe for, and otherwise acquire shares and other interests in, and obligations of, any other entity; and to own, hold, vote, use, sell, mortgage, lend, pledge, and otherwise dispose of, and deal in and with, the same;
- (g) To make contracts and guarantees, incur liabilities, borrow money, issue notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;
- (h) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;
- (i) To be an agent, an associate, a fiduciary, a manager, a member, a partner, a promoter, or a trustee of, or to hold any similar position with, any entity;
- (j) To conduct its business, locate offices, and exercise the powers granted by articles 101 to 117 of this title within or without this state;
- (k) To elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;
- (l) To pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share options and rights plans, and benefit or incentive plans for any of its current or former directors, officers, employees, and agents;

(m) To make donations for the public welfare or for charitable, scientific, or educational purposes;

(n) To make payments or donations and to do any other act, not inconsistent with law, that furthers the business and affairs of the corporation;

(o) To indemnify current or former directors, officers, employees, fiduciaries, or agents as provided in article 109 of this title;

(p) To limit the liability of its directors as provided in section 7-108-402 (1);

(q) To cease its corporate activities and dissolve; and

(r) To impose restrictions on the transfer of its shares.

**Source:** **L. 93:** Entire article added, p. 746, § 1, effective July 1, 1994. **L. 96:** (1)(i) amended, p. 1313, § 10, effective June 1. **L. 2000:** IP(1) and (1)(a) amended, p. 977, § 52, effective July 1. **L. 2003:** IP(1) amended, p. 2315, § 223, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950). For article, "The New Colorado Corporation Act", see 35 Dicta 317 (1958). For article, "The Colorado Corporation Act of 1959: Some Aspects of Private Industrial Incentive Plans", see 32 Rocky Mt. L. Rev. 164 (1960). For comment on *Herald Co. v. Seawell* (472 F.2d 1081 (10th Cir. 1972)), see 45 U. Colo. L. Rev. 131 (1973). For article, "Corporate Indemnification: Parts I and II", see 13 Colo. Law. 1404 and 1634 (1984). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985). For article, "Colorado Expands Protections For Corporate Directors", see 16 Colo. Law. 1387 (1987). For article, "Corporate Director Liability", see 65 Den. U. L. Rev. 59 (1988). For article, "1988 Update on Colorado Tort Reform Legislation — Part II", see 17 Colo. Law. 1949 (1988). For article, "Conflicts of Interest and the Director's Duty of Loyalty", see 17 Colo. Law. 1969 (1988).

**Annotator's note.** Since § 7-103-102 is similar to § 7-3-101 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**The statutory powers of a corporation are specifically enumerated.** *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Corporations may be formed for any lawful purpose,** and when so formed, they become bodies corporate and politic. *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 P. 566 (1915).

**And of natural persons.** A private corporation formed under the provisions of this section for the purpose of carrying on a lawful business has all the rights, powers, and privileges of a natural person engaged in the same business. *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 P. 566 (1915).

**Thus corporations may acquire fee simple title.** Where a corporation is empowered to acquire real estate without limitation in point of estate, it has the right to acquire a title in fee simple. *Radetsky v. Jorgensen*, 70 Colo. 423, 202 P. 175 (1921).

**So also a corporation may condemn land for a private way of necessity** where the nature of its business and the situation of its property require the way and where, under like conditions, other persons not corporate may condemn. *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 P. 566 (1915).

**And a corporation is entirely competent to transfer its property** through such agency as it may designate. *Bliss v. Harris*, 38 Colo. 72, 87 P. 1076 (1906).

**May bring action benefitting parent corporation.** Even though the contract involved was entered into for the ultimate benefit of plaintiff's parent corporation, plaintiff is a real party in interest entitled to bring the action without joining its parent corporation. *P & M Vending Co. v. Half Shell of Boston, Inc.*, 41 Colo. App. 78, 579 P.2d 93 (1978).

**Moreover, a right-of-way granted by a company does not cease with the expiration of its charter,** but, having previously been conveyed, its grantee may thereafter continue the use of the same. *Bailey v. Platte & Denver Canal Milling Co.*, 12 Colo. 230, 21 P. 35 (1888).

**Ultra vires no defense to notes where corporation has general power to incur indebtedness.** Where a water users' association was granted the general power to borrow money, to incur and promise to pay indebtedness, and to perform any other necessary or appropriate acts to acquire, maintain, and operate irrigation works, it had the general power to borrow money and to make its notes to repay it. Hence it was no defense to such notes that the money borrowed was used in furtherance of an ultra vires contract. *Grand Valley Water Users' Ass'n v. Zumburn*, 272 F. 943 (8th Cir. 1921).

**Adoption and implementation of an employees stock trust plan** is clearly within the



power and authority granted by this section to a corporation. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**And the fact that a corporation has a substantial financial loss in its transfer of treasury stock to an employee's stock trust is of no consequence**, for subsection (1)(p) anticipates and authorizes a corporation to create such plans "wholly or partly at the expense of the corporation". *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Moreover, corporations through their directors may pay employees extra compensation** in the way of a bonus; and if properly authorized, it is neither a fraud upon dissenting stockholders nor against public policy, for the stage has long since been passed in which stockholders, who merely invest capital and leave it wholly to management to make it fruitful, can make absolutely exclusive claim to all profits against those whose labor, skill, ability, judgment, and effort have made profits available. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**However, it is not a legitimate corporate activity to give away the resources of the corporation**, no matter how worthy or needy the donee may be, nor is it permissible by payment of excessive salaries or allowances to divert funds from stockholders to officers or

directors without lawful reason. There is a distinction between using one's own resources for charitable projects or for proxy or control contests and using the resources of the corporation for those purposes. The law does not permit the use or diversion of corporate funds for purely personal purposes, no matter what form that diversion may take. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**But subsection (1)(o) permits a corporation to indemnify its officers and directors** as against expenses incurred by them in connection with the defense of an action to which they are made parties by reason of having been such officer or director except in relation to matters as to which they shall be adjudged in such action to be liable for negligence or misconduct in the performance of duty; the statute permits a division of fees where a director or officer is not completely vindicated. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**No attorneys fees for officer attacking corporate acts.** Subsection (1)(o) does not permit an award of attorneys fees to an officer who attacks corporate acts. *Breniman v. Agricultural Consultants, Inc.*, 648 P.2d 165 (Colo. App. 1982).

**7-103-103. Emergency powers.** (1) In anticipation of or during an emergency defined in subsection (4) of this section, the board of directors may:

(a) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(b) Relocate the principal office or additional offices or regional offices, or authorize the officers to do so.

(2) During an emergency as contemplated in subsection (4) of this section, unless emergency bylaws provide otherwise:

(a) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication or radio; and

(b) One or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(3) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

(a) Binds the corporation; and

(b) May not be the basis for the imposition of liability on any director, officer, employee, or agent of the corporation on the ground that the action was not authorized corporate action.

(4) An emergency exists for purposes of this section if a quorum of the directors cannot readily be obtained because of some catastrophic event.

**Source: L. 93:** Entire article added, p. 747, § 1, effective July 1, 1994. **L. 2003:** (1)(b) amended, p. 2315, § 224, effective July 1, 2004.

**7-103-104. Ultra vires.** (1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(2) A corporation's power to act may be challenged:

(a) In a proceeding by a shareholder against the corporation to enjoin the act;

(b) In a proceeding by or in the right of the corporation, whether directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(c) In a proceeding by the attorney general under section 7-114-301.

(3) In a shareholder's proceeding under paragraph (a) of subsection (2) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if it would be equitable to do so and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of the injunction.

**Source:** L. 93: Entire article added, p. 748, § 1, effective July 1, 1994. L. 96: (3) amended, p. 1313, § 11, effective June 1.

#### ANNOTATION

**This section prohibits an individual's claim that a corporation is acting beyond the scope of its power.** This section does not bar a claim that an individual lacked power to act for a

corporation, and the law of agency governed such a claim. *Mortgage Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176 (Colo. 2003).

#### **7-103-105. Agent may convey real estate - repeal. (Repealed)**

**Source:** L. 93: Entire article added, p. 749, § 1, effective July 1, 1994. L. 2003: (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

### ARTICLE 104

#### Name

7-104-101. Corporate name. (Repealed)

7-104-102. Reserved name. (Repealed)

#### **7-104-101. Corporate name. (Repealed)**

**Source:** L. 93: Entire article added, p. 749, § 1, effective July 1, 1994. L. 94: (2)(i) added, p. 87, § 13, effective July 1. L. 96: (2) amended, p. 1313, § 12, effective June 1. L. 2000: Entire section repealed, p. 990, § 109, effective July 1.

#### **7-104-102. Reserved name. (Repealed)**

**Source:** L. 93: Entire article added, p. 750, § 1, effective July 1, 1994. L. 2000: Entire section repealed, p. 990, § 109, effective July 1.



**ARTICLE 105****Office and Agent**

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

- |   |   |
|---|---|
| 7-105-101. Registered office and registered agent.                              | 7-105-103. Resignation of registered agent - repeal. (Repealed) |
| 7-105-102. Change of registered office or registered agent - repeal. (Repealed) | 7-105-104. Service on corporation - repeal. (Repealed)          |

**7-105-101. Registered office and registered agent.** (1) Part 7 of article 90 of this title, providing for registered agents and service of process, applies to corporations incorporated under or subject to articles 101 to 117 of this title.

(2) (Deleted by amendment, L. 2003, p. 2315, § 225, effective July 1, 2004.)

**Source:** L. 93: Entire article added, p. 751, § 1, effective July 1, 1994. L. 2003: Entire section amended, p. 2315, § 225, effective July 1, 2004.

**ANNOTATION**

**Law reviews.** For article, “1959 Amendments to the Colorado Corporation Code”, see 36 Dicta 489 (1959).

**Annotator’s note.** Since § 7-105-101 is similar to § 7-3-110 as it existed prior to the 1993 recodification of the “Colorado Business Corporation Act”, articles 101 to 117 of title 7,

cases construing that provision and its predecessors have been included in the annotations to this section.

**Applied** in *Cooper Drilling Inc. v. San Luis Valley Land Company*, 743 P.2d 448 (Colo. App. 1987).

**7-105-102. Change of registered office or registered agent - repeal. (Repealed)**

**Source:** L. 93: Entire article added, p. 751, § 1, effective July 1, 1994. L. 2000: (1)(a) amended, p. 978, § 54, effective July 1. L. 2002: IP(1), (1)(e), and (2) amended, p. 1847, § 106, effective July 1; IP(1), (1)(e), and (2) amended, p. 1711, § 106, effective October 1. L. 2003: (3) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor’s note:** Subsection (3) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-105-103. Resignation of registered agent - repeal. (Repealed)**

**Source:** L. 93: Entire article added, p. 752, § 1, effective July 1, 1994. L. 96: (2) amended, p. 1314, § 13, effective June 1. L. 2002: (1) and (2) amended, p. 1847, § 107, effective July 1; (1) and (2) amended, p. 1712, § 107, effective October 1. L. 2003: (4) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor’s note:** Subsection (4) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-105-104. Service on corporation - repeal. (Repealed)**

**Source:** L. 93: Entire article added, p. 752, § 1, effective July 1, 1994. L. 2003: (4) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor’s note:** Subsection (4) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**ARTICLE 106****Shares and Distributions**

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

**Law reviews:** For article, "Valuation of Stock in Closely Held Corporations", see 18 Colo. Law. 1731 (1989).

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**PART 4****DISTRIBUTIONS****PART 1****SHARES**

**7-106-101. Authorized shares.** (1) The articles of incorporation shall state the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation shall state a distinguishing designation for each class, and, before the issuance of shares of any class, the preferences, limitations, and relative rights of that class shall be stated in the articles of incorporation. All shares of a class shall have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by section 7-106-102.

(2) The articles of incorporation shall authorize:

(a) One or more classes of shares that together have unlimited voting rights; and

(b) One or more classes of shares, which may be the same class or classes as those with voting rights, that together are entitled to receive the net assets of the corporation upon dissolution.

(3) The articles of incorporation may authorize one or more classes of shares that:

(a) Have special, conditional, or limited voting rights, or no right to vote; except that no condition, limitation, or prohibition on voting shall eliminate any right to vote provided by section 7-110-104;

(b) Are redeemable or convertible as stated in the articles of incorporation:

(I) At the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event;

(II) For money, indebtedness, securities, or other property; or

(III) In a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic facts or events;



(c) Entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative; or

(d) Have preference over any other class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(4) The description of the preferences, limitations, and relative rights of classes of shares in subsection (3) of this section is not exhaustive.

**Source:** L. 93: Entire article added, p. 753, § 1, effective July 1, 1994. L. 2003: IP(3)(b) amended, p. 2316, § 226, effective July 1, 2004. L. 2006: (1) amended, p. 880, § 70, effective July 1.

## ANNOTATION

**Law reviews.** For article, “The New Colorado Corporation Act”, see 35 Dicta 317 (1958). For article, “1959 Amendments to the Colorado Corporation Code”, see 36 Dicta 489 (1959). For article, “The 1985 Proposed Revisions to the Colorado Corporation Code”, see 14 Colo. Law. 34 (1985).

**Annotator’s note.** Since § 7-106-101 is similar to § 7-4-101 as it existed prior to the 1993 recodification of the “Colorado Business Corporation Act”, articles 101 to 117 of title 7,

cases construing that provision and its predecessors have been included in the annotations to this section.

**The corporation, by statute, has the power to create and issue the number of shares stated in its articles.** Paulek v. Isgar, 38 Colo. App. 29, 551 P.2d 213 (1976).

**Redemption of common stock authorized in articles of incorporation is a valid “limitation”** under subsection (1). Hamel v. White Wave, Inc., 689 P.2d 709 (Colo. App. 1984).

**7-106-102. Terms of class or series determined by board of directors.** (1) If the articles of incorporation so provide, the board of directors may determine, in whole or in part, the preferences, limitations, and relative rights, within the limits set forth in section 7-106-101, of:

- (a) Any class of shares before the issuance of any shares of that class; or
- (b) One or more series within a class before the issuance of any shares of that series.
- (2) Each series of a class shall be given a distinguishing designation.
- (3) All shares of a series shall have preferences, limitations, and relative rights identical with those of other shares of the same series and, except to the extent otherwise provided in the description of the series, with those of other series of the same class.

(4) Before issuing any shares of a class or series, the preferences, limitations, and relative rights of which are determined by the board of directors under this section, the corporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment to the articles of incorporation, which are effective without shareholder action, that state:

- (a) The domestic entity name of the corporation;
- (b) The text of the amendment determining the designations, preferences, limitations, and relative rights of the class or series of shares;
- (c) The date the amendment was adopted; and
- (d) A statement that the amendment was duly adopted by the board of directors.

**Source:** L. 93: Entire article added, p. 754, § 1, effective July 1, 1994. L. 2002: IP(4) amended, p. 1847, § 108, effective July 1; IP(4) amended, p. 1712, § 108, effective October 1. L. 2003: IP(4) and (4)(a) amended, p. 2316, § 227, effective July 1, 2004.

**7-106-103. Issued and outstanding shares.** (1) A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or cancelled.

(2) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations contained in subsection (3) of this section and is subject to section 7-106-401.

(3) At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution shall be outstanding.

**Source: L. 93:** Entire article added, p. 754, § 1, effective July 1, 1994.

**7-106-104. Fractional shares.** (1) A corporation may:

- (a) Issue fractions of a share or pay in cash the value of fractions of a share;
- (b) Arrange for disposition of fractional shares by the shareholders; or
- (c) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

(2) Each certificate representing scrip shall be conspicuously labeled "scrip" and shall contain the information required to be included in a share certificate by sections 7-106-206 (2) (a), (2) (c), and (4) and 7-106-208 (2).

(3) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(4) The board of directors may authorize the issuance of scrip subject to any condition considered desirable, including:

(a) That the scrip will become void if not exchanged for full shares before a stated date; and

(b) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders.

**Source: L. 93:** Entire article added, p. 755, § 1, effective July 1, 1994. **L. 2003:** (4)(a) amended, p. 2316, § 228, effective July 1, 2004.

#### ANNOTATION

**Law reviews.** For note, "Discount, Bonus and Watered Stock in Colorado", see 33 Rocky Mt. L. Rev. 197 (1961).

**Annotator's note.** Since § 7-106-104 is similar to § 7-4-109 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Section held constitutional.** No impairment of contractual rights, no denial of due process, and no non-consensual taking of private property of minority stockholders exists where corporate reverse stock split and fractional buyout followed enactment of this section which was embodied in corporation's articles of incorporation. *Goldman v. Union Bank and Trust*, 765 P.2d 638 (Colo. App. 1988).

**7-106-105. Reverse split.** (1) Unless otherwise provided in the articles of incorporation, the outstanding shares of a class or series may be reduced to a lesser number of shares by a reverse split made on the terms set forth in this section.

(2) To effect the reverse split, each outstanding share of the class or series shall be divided by the same divisor as is every other such share.

(3) Each share of the class or series shall have, after the reverse split, such par value, if any, as may be stated in the articles of incorporation.

(4) If the articles of incorporation are to be amended in connection with the reverse split, whether to change the number of authorized shares of such class or series or the par value, if any, of the shares of such class or series or for any other reason, such amendment shall be effected pursuant to article 110 of this title.

(5) In lieu of issuing fractional shares upon such reverse split, the corporation may take any of the actions provided for in section 7-106-104.

(6) For the reverse split to be effected:

(a) The board of directors shall recommend the reverse split to the holders of shares of the class or series that is to be reverse split and to each other voting group that is entitled, by reason of any provision in the articles of incorporation, to vote on the reverse split, unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the reverse split; and



(b) The holders of shares of the class or series that is to be reverse split, and each other voting group that is entitled, by reason of any provision in the articles of incorporation, to vote on the reverse split, shall approve the reverse split.

(7) The board of directors may condition the effectiveness of the reverse split on any basis.

(8) The corporation shall give notice, in accordance with section 7-107-105, to each shareholder entitled to vote on the reverse split, of the shareholders' meeting at which the reverse split will be voted upon. The notice of the meeting shall state that the purpose, or one of the purposes, of the meeting is to consider the reverse split, and the notice shall contain or be accompanied by a copy or a summary of the reverse split.

(9) Unless articles 101 to 117 of this title, the articles of incorporation, bylaws adopted by the shareholders, or the proposing board of directors require a greater vote, the reverse split shall be approved by the votes required by sections 7-107-206 and 7-107-207 by every voting group entitled to vote on the reverse split.

**Source: L. 96:** Entire section added, p. 1314, § 14, effective June 1.

## PART 2

### ISSUANCE OF SHARES

**7-106-201. Subscription for shares.** (1) A subscription for shares entered into before incorporation is irrevocable for six months unless the subscription agreement provides a longer or shorter period or all the subscribers agree to revocation before the time the corporation is incorporated and accepts the subscription.

(2) The acceptance by the corporation of a subscription entered into before incorporation and the authorization of the issuance of shares pursuant thereto are subject to section 7-106-202.

(3) The board of directors may determine the payment terms of subscriptions for shares that were entered into before incorporation, unless the subscription agreement states them. A call for payment by the board of directors shall be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement states otherwise.

(4) Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration stated in the subscription agreement.

(5) If a subscriber defaults in payment of money or other property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as it might collect any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid more than twenty days after the corporation sends written demand for payment to the subscriber.

(6) A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to section 7-106-202.

**Source: L. 93:** Entire article added, p. 755, § 1, effective July 1, 1994. **L. 2003:** (3) and (4) amended, p. 2316, § 229, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For comment on *Burch v. Exploration Data Consultants, Inc.* (cited below), see 46 U. Colo. L. Rev. 125 (1974).

**Annotator's note.** Since § 7-106-201 is similar to § 7-4-103 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predeces-

sors have been included in the annotations to this section.

**An accepted subscriber to the capital stock of a corporation becomes a stockholder** by the mere act of subscription, regardless of whether the subscription is paid or not. *Mountain Water Works Constr. Co. v. Holme*, 49 Colo. 412, 113 P. 501 (1911).

**And is entitled to vote the shares held by him** at all meetings of the stockholders even though the stock is not full paid and the corporation retains the certificates to secure payment. *Lilylands Canal & Reservoir Co. v. Wood*, 56 Colo. 130, 136 P. 1026 (1913).

**Thus a bylaw allowing only full paid stock to vote is void.** A corporation cannot declare, through a bylaw, that only such stock as has been full paid shall be represented and allowed to vote at stockholders' meetings. *Lilylands Canal & Reservoir Co. v. Wood*, 56 Colo. 130, 136 P. 1026 (1913).

**Subscription agreements are enforceable and subscription rights are legally transferable.** *Burch v. Exploration Data Consultants, Inc.*, 33 Colo. App. 155, 518 P.2d 288 (1973).

**Subscribers may receive many rights as shareholders before full payment.** Subscribers may, and often do, receive many rights as shareholders, including voting rights, rights to dividends, right to inspection of corporate books

and records, etc., before full payment is made. *Burch v. Exploration Data Consultants, Inc.*, 33 Colo. App. 155, 518 P.2d 288 (1973).

**The unpaid balance upon a stockholder's subscription is not in and of itself a legal debt** due the corporation, and until demand is made as provided and the period mentioned has expired, no cause of action accrues in favor of the corporation and no action can be maintained in its name. *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 P. 890 (1891).

**However judgment creditors of corporations may reach the unpaid balance of the stockholder's subscription** and apply it to the discharge of their judgments. *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 P. 890 (1891).

**The six-year statute of limitations under § 13-80-111 is applicable for the recovery of stock** under this section. *Dunne v. Stotesbury*, 16 Colo. 89, 26 P. 333 (1891) (decided prior to 1986 repeal and reenactment of article 80 of title 13).

**7-106-202. Issuance of shares.** (1) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(2) Subject to the limitations set forth in subsection (5) of this section, the board of directors may authorize the issuance of shares for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, and other securities of the corporation.

(3) Before the corporation issues shares, the board of directors shall determine that the consideration received or to be received for the shares to be issued is adequate. In the absence of fraud in the transaction, that determination by the board of directors is conclusive insofar as the adequacy of such consideration relates to whether the shares are validly issued, fully paid, and nonassessable.

(4) When the corporation receives the consideration for which the board of directors has authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(5) The promissory note of a subscriber or an affiliate of the subscriber for shares shall not constitute consideration for the shares unless the note is negotiable and is secured by collateral, other than the shares, having a fair market value at least equal to the principal amount of the note. For the purposes of this subsection (5), "promissory note" means a negotiable instrument on which there is an obligation to pay independent of collateral and does not include a nonrecourse note.

(6) Unless otherwise expressly provided in the articles of incorporation or bylaws, shares having a par value may be issued for less than the par value.

**Source: L. 93:** Entire article added, p. 756, § 1, effective July 1, 1994.

## ANNOTATION

I. General Consideration.

II. Consideration for Issuance of Shares.

III. Promissory Notes and Future Services.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Consideration for Stock Under the Colorado Constitution and Cases", see 29 *Rocky Mt. L. Rev.* 112 (1956).

For comment on *Burch v. Exploration Data Consultants, Inc.* (33 Colo. App. 155, 518 P.2d 288 (1973)), see 46 *U. Colo. L. Rev.* 125 (1974). For article, "Counseling the Corporation In Financial Crisis", see 17 *Colo. Law.* 631 (1988).

**Annotator's note.** Since § 7-106-202 is similar to §§ 7-4-104 and 7-4-105 as they existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to



117 of title 7, cases construing those provisions and their predecessors have been included in the annotations to this section.

## II. CONSIDERATION FOR ISSUANCE OF SHARES.

**Under this section capital stock of a corporation is regarded as money or its equivalent.** Robinson v. Dolores No. Two Land & Canal Co., 2 Colo. App. 17, 29 P. 750 (1892); Fulton Inv. Co. v. Smith, 27 Colo. App. 279, 149 P. 444 (1915).

**And services and property to the value of the stock at par are a good consideration for its issue.** Barnard v. Sweet, 74 Colo. 302, 221 P. 1093 (1923).

**Designated water rights** are a valid consideration for the payment of shares. Paulek v. Isgar, 38 Colo. App. 29, 551 P.2d 213 (1976).

**The consideration must be reasonably worth the par value of the stock** which is issued for it. Frink v. Carman Distrib. Co., 97 Colo. 211, 48 P.2d 805 (1935).

**And it is presumed that in its original issue the stock of a corporation is paid in full,** where nothing to the contrary appears. Henry v. Semonian, 27 Colo. App. 487, 150 P. 818 (1915).

**Thus in a transaction whereby property is conveyed in consideration of the issuance of capital stock,** such property is a valuable consideration. Fulton Inv. Co. v. Smith, 27 Colo. App. 279, 149 P. 444 (1915).

**And an action lies for value of stock issued.** The fact that the purchaser from a stockholder is without notice that the stock is issued for an insufficient consideration does not prevent an action for the value of corporate stock issued. Barnard v. Sweet, 74 Colo. 302, 221 P. 1093 (1923).

**This section authorizes the directors of a corporation to sell or dispose of treasury stock** for a consideration fixed by the board of directors. Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

**And the fact that a corporation has a substantial financial loss in its transfer of the treasury stock to an employees stock trust is of no consequence,** for § 7-3-101 (1)(p) anticipates and authorizes a corporation to create such plans "wholly or partly at the expense of the corporation". Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

**A stock purchase warrant is purely an option to purchase stock** that does not vest in the prospective purchaser an equitable title to, or any interest or right in, the stock. The value of such an option is speculative - any number of corporate or collateral events may change its value - and the burden of such risk falls on the holder of the warrant. Anderson v. Somatogen, Inc., 940 P.2d 1079 (Colo. App. 1996).

**Unless the contract provides otherwise, a warrant holder may not complain,** for example, when a corporation issues new capital stock, although such issue may lessen or destroy the value of the option. Therefore, whatever rights a stock purchase warrant holder may have to require the obligor corporation to maintain the integrity of the shares are purely contractual. Anderson v. Somatogen, Inc., 940 P.2d 1079 (Colo. App. 1996).

**The precise protection afforded by an "antidilution" clause** to a warrant holder will depend on the express terms of the contract itself. Anderson v. Somatogen, Inc., 940 P.2d 1079 (Colo. App. 1996).

**Applied** in Homestead Mining Co. v. Reynolds, 30 Colo. 330, 70 P. 422 (1902).

## III. PROMISSORY NOTES AND FUTURE SERVICES.

**Stocks and bonds issued except as provided in this section are in direct violation of Colo. Const., art. XV, § 9 and § 7-4-105 and are, thus, ipso facto invalid.** Arkansas River Land Co. v. Farmers' Loan Co., 13 Colo. 587, 22 P. 954 (1889); In re Dreiling, 233 Bankr. 848 (Bankr. D. Colo. 1999).

**Both § 9 of art. XV, Colo. Const. and this section are aimed at preventing the watering of corporate stock;** their purpose is to prevent corporations from issuing stock without receiving full value, and so to prevent the diluting of the holdings of innocent stockholders and the reliance by creditors on false or nonexistent capital resulting from the issuance of "watered" stock. Haselbush v. AlSCO of Colo., Inc., 161 Colo. 138, 421 P.2d 113 (1966).

The policy behind § 7-4-105 (2) and § 9 of art. XV, Colo. Const., is to protect other stockholders of the corporation, creditors, and good faith future stockholders from the dilution of their investment by "watered" stock. Burch v. Exploration Data Consultants, Inc., 33 Colo. App. 155, 518 P.2d 288 (1973).

**But this purpose would not be served by holding that these provisions may be used to defeat an action by a corporation seeking to enforce payment** on a promissory note given for the issuance of stock when the transaction has been made in good faith. Haselbush v. AlSCO of Colo., Inc., 161 Colo. 138, 421 P.2d 113 (1966).

The fact that the stock the plaintiff had contracted to purchase became worthless prior to his having made final payment on the note does not entitle plaintiff to recover amounts paid, nor does it furnish a justification for a refusal to pay the remainder due under the terms of the note. Moneys paid and to be paid belong to the creditors of the defendant corporation. Jacobs v. Frontier Tractor & Equipment, Inc., 712 P.2d 493 (Colo. App. 1985).

As this section does not forbid a corporation from taking a note or obligation from a perspective stockholder; on the contrary, it impliedly recognizes the right to do so, but declares that no such note shall be considered as payment and no certificate shall issue until the note is paid. *Haselbush v. AlSCO of Colo., Inc.*, 161 Colo. 138, 421 P.2d 113 (1966); *Jacobs v. Frontier Tractor & Equipment, Inc.*, 712 P.2d 493 (Colo. App. 1985).

Moreover, the issuance of the certificate

does not affect the enforceability of the note. *Haselbush v. AlSCO of Colo., Inc.*, 161 Colo. 138, 421 P.2d 113 (1966).

**Shares not rendered void.** The fact that § 9 of art. XV, Colo. Const., and subsection (2) of this section may prohibit execution and delivery of share certificates in exchange for promissory notes does not render the shares void. *Burch v. Exploration Data Consultants, Inc.*, 33 Colo. App. 155, 518 P.2d 288 (1973).

**7-106-203. Liability of shareholders.** (1) A purchaser from a corporation of shares issued by the corporation is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued under section 7-106-202 or stated in a subscription agreement under section 7-106-201.

(2) Unless otherwise provided in the articles of incorporation, a shareholder or a subscriber for shares of a corporation is not personally liable for the acts or debts of the corporation; except that such person may become personally liable by reason of the person's own acts or conduct.

(3) Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be personally liable to the corporation or its creditors for any unpaid portion of such consideration.

**Source:** L. 93: Entire article added, p. 757, § 1, effective July 1, 1994. L. 2003: (1) amended, p. 2317, § 230, effective July 1, 2004.

#### ANNOTATION

**Law reviews.** For article, "Some Observations on Living Trusts", see 7 Dicta 3 (1930).

**Annotator's note.** Since § 7-106-203 is similar to § 7-4-120 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**This section recognizes a subscriber who has not paid his subscription as a stockholder.** See *Mountain Water Works Constr. Co. v. Holme*, 49 Colo. 412, 113 P. 501 (1911); *Lilylands Canal & Reservoir Co. v. Wood*, 56 Colo. 130, 136 P. 1026 (1913).

**The intention of this section is that stock issued by a corporation shall represent value.** *Buck v. Jones*, 18 Colo. App. 250, 70 P. 951 (1902).

**By virtue of this section a corporate creditor may maintain an action against an individual stockholder and recover to the amount of unpaid stock held by him.** *Smith v. Londoner*, 5 Colo. 365 (1880).

**Although the creditor who sues is also a stockholder in the corporation**, this fact does not make any difference, provided he has paid in full for the stock held by him and consequently is not individually liable for the debts of the corporation. *Smith v. Londoner*, 5 Colo. 365 (1880).

**But a stockholder is not liable for the acts of the corporation beyond his statutory liability**, and a majority stockholder, in the absence of a showing that he used his interest for fraudulent purposes, is governed by the same rule. *Liebhart v. Wilson*, 38 Colo. 1, 88 P. 173 (1906).

**And proof that stock is not full paid is essential** to maintenance of an action against stockholders under this section, and the burden is on plaintiff to make such proof. *Speer v. Bordeleau*, 20 Colo. App. 413, 79 P. 332 (1905); *Henry v. Semonian*, 27 Colo. App. 487, 150 P. 818 (1915).

**A complaint joining the company and stockholders as defendants does not misjoin the parties**, and a separate judgment may be rendered against a stockholder in the same suit for unpaid debts of the corporation. *Smith v. Colo. Fire Ins. Co.*, 14 F. 399 (D. Colo. 1882); *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 P. 537 (1889).

**To protect fiduciaries from personal liability**, it must appear on the books of the corporation that the holding is in such capacity. *Adams v. Clark*, 36 Colo. 65, 85 P. 642 (1906).

**Entry of personal judgment against stockholder was proper.** Where stockholder, who owned practically all of the outstanding stock of the debtor corporation and was their principal officer, transferred corporate property to himself



and then resold and leased the property, the interests of third parties would not be voided and thus, entry of personal judgment against the stockholder in favor of the creditor of the corporation was proper. *Epcon Co. v. Bar B Que Baron Int'l, Inc.*, 32 Colo. App. 393, 512 P.2d 646 (1973).

**Corporate veil pierced by application of the alter ego doctrine.** Where the corporate entity has been used to defeat public convenience, or to justify or protect wrong, fraud, or crime, or in other situations where equity requires, stockholders may be held personally liable for corporate obligations. *Reader v. Dertina & Associates Marketing*, 693 P.2d 398 (Colo. App. 1984).

**Outside reverse piercing is appropriate when a claimant demonstrates that a controlling insider and a corporation are alter egos of each other and justice requires recognizing the substance of that relationship over the form to achieve an equitable result.** Outside

reverse piercing claims occur when a corporate outsider pressing an action against a corporate insider seeks to disregard the corporate entity and to subject corporate assets to the claim or when an outsider with a claim against a corporate insider seeks to assert that claim against the corporation in an action between the claimant and the corporation. Outside reverse piercing actions involve a corporate outsider seeking to obligate a corporation for the debts of a dominant shareholder or other corporate insider. In *re Phillips*, 139 P.3d 639 (Colo. 2006).

**This section is not limited by § 12-2-131 (2)(d).** *Magnuson v. Smith and Saetveit, P.C.*, 722 P.2d 1020 (Colo. App. 1986).

**Failure of corporation to provide legally required workmen's compensation insurance** does not per se meet test for piercing of the corporate veil. *Matter of Death of Smithour*, 778 P.2d 303 (Colo. App. 1989).

**Applied in** *Colo. Fuel Co. v. Sedalia Smelting Co.*, 13 Colo. App. 474, 59 P. 222 (1899).

**7-106-204. Share dividends.** (1) Unless otherwise provided in the articles of incorporation, shares may be issued pro rata and without consideration to the shareholders or to the shareholders of one or more classes or series of its shares. An issuance of shares pursuant to this subsection (1) is a share dividend.

(2) Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless:

(a) The articles of incorporation so authorize;

(b) Such issuance is approved by a majority of the votes entitled to be cast by the class or series to be issued; or

(c) There are no outstanding shares of the class or series to be issued.

(3) The bylaws or, in the absence of an applicable bylaw, the board of directors may fix a future date as the record date for determining shareholders entitled to a share dividend. If no future record date is so fixed, the record date is the date the board of directors authorizes the share dividend.

**Source: L. 93:** Entire article added, p. 757, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "Corporate Dividend Limitations", see 27 *Dicta* 99 (1950). For note, "Surpluses Which May Be Used For Paying Dividends under the New Colorado Corporation Act", see 31 *Rocky Mt. L. Rev.* 49 (1958). For article, "1959 Amendments to the Colorado Corporation Code", see 36 *Dicta* 489 (1959). For article, "Depreciation Policy and Its Effect in Determining Earnings Available for Dividends", see 36 *U. Colo. L. Rev.* 143 (1963). For article, "Counseling the Corporation in Financial Crisis", see 17 *Colo. Law.* 631 (1988). For article, "Counseling the Corporation in Financial Crisis", see 17 *Colo. Law.* 631 (1988). For article, "Corporate Director Liability", see 65 *Den. U. L. Rev.* 59 (1988).

**Annotator's note.** Since § 7-106-204 is similar to § 7-5-110 as it existed prior to the 1993 recodification of the "Colorado Business Cor-

poration Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**This section does not impose a fiduciary duty within the meaning of 11 U.S.C.A. § 523 (a)(4) of the bankruptcy code.** In *re Anzman*, 73 *Bankr.* 156 (*Bankr. D. Colo.* 1986).

**Directors expressly made personally liable to corporation.** This section and §§ 7-3-102 and 7-5-114 (1)(d) expressly make directors personally liable to the corporation. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 *Colo. App.* 344, 569 P.2d 875 (1977).

**Absolute liability.** Liability under this section and §§ 7-3-102 and 7-5-114 (1)(d) is absolute. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 *Colo. App.* 344, 569 P.2d 875 (1977).

A showing of fraud is not required to impose liability under this section and §§ 7-3-102 and 7-5-114 (1)(d). *Security Nat'l Bank v. Pe-*

*ters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**7-106-205. Share options and other rights - definitions.** (1) For purposes of this section:

(a) "Rights" means rights, options, warrants, or convertible securities entitling the holders thereof to purchase, receive, or acquire shares or fractions of shares of the corporation or assets or debts or other obligations of the corporation.

(b) "Significant shareholder" means any person owning, or offering to acquire, directly or indirectly, a number or percentage, as stated by the board of directors, of the outstanding voting shares of a corporation, or any transferee of such person.

(2) A corporation may create and issue rights, except as precluded or limited by provisions contained in the articles of incorporation at the time of such creation or issuance. The board of directors shall determine the terms upon which the rights are issued, their form and content, and the consideration, if any, for which shares or fractions of shares, assets, or debts or other obligations of the corporation are to be issued pursuant to the rights. In the absence of fraud in the transaction, the judgment of the board of directors as to the adequacy of consideration received for such rights shall be conclusive.

(3) Notwithstanding any other provision of articles 101 to 117 of this title, the terms determined by the board of directors pursuant to subsection (2) of this section for rights issued before, on, or after January 1, 1994, to any shareholders, by way of distribution or otherwise, may, without limitation:

(a) Preclude or limit any significant shareholder from exercising, converting, transferring, or receiving rights;

(b) Impose conditions upon the exercise, conversion, transfer, or receipt of rights by any significant shareholder that differ from those imposed on other holders of the same class of rights; or

(c) Provide that, upon exercise or conversion, any significant shareholder shall be entitled to receive securities, obligations, or assets, the terms or nature of which may differ from the securities, obligations, or assets to be received by the other holders of the same class of rights.

(4) Nothing contained in this section shall be construed to effect a change in the fiduciary duties of directors.

**Source:** L. 93: Entire article added, p. 757, § 1, effective July 1, 1994. L. 2003: (1)(b) amended, p. 2317, § 231, effective July 1, 2004.

**7-106-206. Form and content of certificates.** (1) Shares may, but need not, be represented by certificates. Unless articles 101 to 117 of this title or another statute expressly provide otherwise, the rights and obligations of shareholders are not affected by the fact that their shares are not represented by certificates.

(2) Each share certificate shall state on its face:

(a) The domestic entity name of the issuing corporation and that the corporation is incorporated under the law of this state;

(b) The name of the person to whom the certificate is issued; and

(c) The number and class of shares and the designation of the series, if any, the certificate represents.

(3) Each share certificate:

(a) Shall be signed, either manually or in facsimile, by one or more officers designated in the bylaws or by the board of directors;

(b) May bear the corporate seal or its facsimile; and

(c) May contain such other information as the corporation deems necessary or appropriate.

(4) If the issuing corporation is authorized to issue different classes of shares or different series within a class, the share certificate shall contain a summary, on the front or the back, of the designations, preferences, limitations, and relative rights applicable to each



class, the variations in preferences, limitations, and rights determined for each series, and the authority of the board of directors to determine variations for future classes or series. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish to the shareholder this information on request in writing and without charge.

(5) If the person who signed, either manually or in facsimile, a share certificate no longer holds office when the certificate is issued, the certificate is nevertheless valid.

**Source: L. 93:** Entire article added, p. 758, § 1, effective July 1, 1994. **L. 2003:** (2)(a) amended, p. 2317, § 232, effective July 1, 2004.

## ANNOTATION

- I. General Consideration.
- II. Signatures of Officers.
- III. Notice of Restrictions and Variations in Shares.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Discount, Bonus and Watered Stock in Colorado", see 33 Rocky Mt. L. Rev. 197 (1961). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985).

**Annotator's note.** Since § 7-106-206 is similar to § 7-4-108 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

### II. SIGNATURES OF OFFICERS.

**Stock certificates which have been issued without authority and are not manually signed are nonetheless genuine**, and the statutory requirement of a transfer agent's counter-signature on stock certificates bearing facsimile signatures does not render them invalid or preclude bona fide purchase. *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.*, 293 F. Supp. 1383 (D. Colo. 1968).

**For noncompliance with this section does not render certificates nongenuine** or constitute an absolute defense effective against a purchaser for value and without notice under § 4-8-202 (3) of the commercial code, as certificates signed in facsimile are genuine under the uniform commercial code, "genuine" meaning free of forgery or counterfeiting. Thus even though certificates are issued without authority, it cannot be said that the signatures are either forged

or counterfeit, and so in this sense they are effective against the issuer. *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.*, 293 F. Supp. 1383 (D. Colo. 1968).

### III. NOTICE OF RESTRICTIONS AND VARIATIONS IN SHARES.

**The purpose of this section** is to ensure that a purchaser of stock has notice of voting restrictions at the time of purchase. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

The requirement of subsection (2) is aimed at avoiding shareholder misunderstandings. *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982).

**However, this section does not require that the certificate carry the exact restrictions on the certificate**, but only that the shareholder be informed by the certificate that upon request the corporation will furnish him with information as to classes of stock and their various restrictions. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**Yet this section makes no provision as to the consequences of a violation.** *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**But the stock contract is voidable.** Absent a showing of actual knowledge at the time of purchase, failure to follow the statute renders the stock contract voidable on the part of the stockholder. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**And rescission is the most appropriate remedy.** Where notice has not been given pursuant to the statute and where actual knowledge cannot be shown by the corporation, then, in the absence of fraud, rescission is the most appropriate remedy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**7-106-207. Shares without certificates.** (1) Unless otherwise provided by the by-laws, the board of directors may authorize the issuance by the corporation of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(2) Within a reasonable time after the issuance or transfer of shares without certificates, the corporation shall send to the shareholder a written statement of the information required on certificates by subsections (2) and (4) of section 7-106-206 and section 7-106-208.

**Source: L. 93:** Entire article added, p. 759, § 1, effective July 1, 1994.

**7-106-208. Restriction on transfer of shares and other securities.** (1) The articles of incorporation, the bylaws, an agreement among shareholders, or an agreement among shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction became effective unless the holder of such shares acquired such shares with knowledge of the restriction, is a party to the agreement containing the restriction, or voted in favor of the restriction or otherwise consented to the restriction.

(2) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by section 7-106-207 (2). Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction.

(3) A restriction on the transfer or registration of transfer of shares is authorized:

(a) To maintain the corporation's status when it is dependent on the number or identity of its shareholders;

(b) To preserve entitlements, benefits, or exemptions under federal, state, or local laws; and

(c) For any other reasonable purpose.

(4) A restriction on the transfer or registration of transfer of shares may:

(a) Obligate the shareholder first to offer to the corporation or other persons, separately, consecutively, or simultaneously, an opportunity to acquire the restricted shares;

(b) Obligate the corporation or other persons, separately, consecutively, or simultaneously, to acquire the restricted shares;

(c) Require, as a condition to such a transfer or registration, that any one or more persons, including the corporation or the holders of any of its shares, approve the transfer or registration, if the requirement is not manifestly unreasonable; or

(d) Prohibit the transfer or the registration of a transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable.

(5) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

**Source: L. 93:** Entire article added, p. 759, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "A First Refusal Paradigm for Buy-Sell Agreements", see 24 Colo. Law. 1289 (1995).

**7-106-209. Expense of issue.** A corporation may pay the expenses of selling or underwriting its shares, and of incorporating, organizing, or reorganizing the corporation, from the consideration received for shares.

**Source: L. 93:** Entire article added, p. 760, § 1, effective July 1, 1994.

#### PART 3

#### SUBSEQUENT ACQUISITION OF SHARES BY SHAREHOLDERS AND CORPORATION

**7-106-301. Shareholders' preemptive rights.** (1) The shareholders of a corporation do not have a preemptive right to acquire unissued shares except to the extent provided by



subsections (3) to (6) of section 7-117-101 or the articles of incorporation.

(2) A statement included in the articles of incorporation that “the corporation elects to have preemptive rights”, or words of similar import, means that the following principles apply, except to the extent otherwise provided by subsections (3) to (6) of section 7-117-101 or the articles of incorporation:

(a) The shareholders have a preemptive right, subject to any uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the unissued shares upon the decision of the board of directors to issue them.

(b) A shareholder may waive the shareholder’s preemptive right, and such waiver, if evidenced by a writing, is irrevocable even though it is not supported by consideration.

(c) There is no preemptive right with respect to:

(I) Shares issued as compensation to directors, officers, agents, or employees of the corporation or its subsidiaries or affiliates;

(II) Shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation or its subsidiaries or affiliates;

(III) Shares that are issued within six months after the effective date of incorporation; or

(IV) Shares sold otherwise than for cash.

(d) Holders of shares of any class without general voting rights but with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class.

(e) Holders of shares of any class with general voting rights but without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with preferential rights to distributions or assets unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire shares without preferential rights.

(f) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person, for a period of one year after being offered to shareholders pursuant to such preemptive rights, at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of such one-year period is subject to the shareholders’ preemptive rights.

(3) For purposes of this section, “shares” includes a security convertible into or carrying a right to subscribe for or acquire shares.

**Source: L. 93:** Entire article added, p. 761, § 1, effective July 1, 1994.

**7-106-302. Corporation’s acquisition of its own shares.** (1) A corporation may acquire its own shares, and, except as provided by section 7-117-101 (6), shares so acquired constitute authorized but unissued shares.

(2) If the articles of incorporation prohibit the reissuance of acquired shares:

(a) The number of authorized shares is reduced by the number of shares acquired by the corporation, effective upon amendment to the articles of incorporation; and

(b) The corporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment to the articles of incorporation, which are effective without shareholder action, that state:

(I) The domestic entity name of the corporation;

(II) The reduction in the number of authorized shares, itemized by class and series; and

(III) The total number of authorized shares, itemized by class and series, remaining after reduction of the shares.

**Source: L. 93:** Entire article added, p. 762, § 1, effective July 1, 1994. **L. 2002:** IP(2)(b) amended, p. 1847, § 109, effective July 1; IP(2)(b) amended, p. 1712, § 109, effective October 1. **L. 2003:** IP(2)(b) and (2)(b)(I) amended, p. 2317, § 233, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For note, "Impairment of Capital by the Purchase of a Corporation's Own Stock", see 24 Rocky Mt. L. Rev. 89 (1951). For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For comment on *Herald Co. v. Seawell* (472 F.2d 1081 (10th Cir. 1972)), see 45 U. Colo. L. Rev. 131 (1973). For article, "Corporate Director Liability", see 65 Den. U. L. Rev. 59 (1988).

**Annotator's note.** Since § 7-106-302 is similar to §§ 7-3-102 and 7-6-103 as they existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing those provisions and their predecessors have been included in the annotations to this section.

**No redemption unless articles grant right.** Generally neither a shareholder nor the corporation has the right to force redemption unless the articles of incorporation specifically grant that right. *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982).

**Stockholder control through use of corporate resources not a legitimate corporate purpose.** Neither the achievement or perpetuation of control by a majority or any group of stockholders nor the freezing out or imposition upon minority stockholders is within legitimate corporate purposes to the extent of authorizing utilization of corporate resources and powers for that purpose. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Similarly, it is not proper for management to use corporate resources to retain control and eliminate the possibility of a control antagonistic to that of incumbents.** *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**However, preventing others from obtaining control of corporation by corporation's purchase of its own stock is not improper.** *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Unless it would impair capital.** It is not lawful for a corporation to use any of its funds

for the purpose of buying its own stock if it will cause an impairment of capital. *Colo. Indus. Loan & Inv. Co. v. Clem*, 82 Colo. 399, 260 P. 1019 (1927) (decided under C.L. 1921, § 2260).

**When a corporation purchases its own stock, it shall be held as treasury stock** by the corporation until disposed of in some manner. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**The validity of a corporate stock repurchase may be attacked only by persons who are injured or prejudiced thereby**, and not by the corporation itself. *Minnelusa Co. v. Andrikopoulos*, 929 P.2d 1321 (Colo. 1996).

**Evidence held not to show price paid by corporation for its stock was exorbitant.** *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Directors expressly made personally liable to corporation.** This section and §§ 7-5-114 (4) and 7-5-110 expressly make directors personally liable to the corporation. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Absolute liability.** Liability under this section and §§ 7-5-114 (4) and 7-5-110 is absolute save for the statutory defenses set forth in § 7-5-114 (6). *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**A showing of fraud is not required** to impose liability under this section and §§ 7-5-114 (4) and 7-5-110. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**When liability for violating § 7-5-114 (4) attaches.** A cause of action accrues at the time an improper purchase of treasury shares is made, and any liability imposed on directors for violating § 7-5-114 (4) would therefore attach at the time of the purchase. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**A corporation may "freeze out" minority shareholders** by a reverse stock split and fractional share buyout. *Goldman v. Union Bank and Trust*, 765 P.2d 638 (Colo. App. 1988).

## PART 4

## DISTRIBUTIONS

**7-106-401. Distributions to shareholders.** (1) A board of directors may authorize, and the corporation may make, distributions to its shareholders subject to any restriction in the articles of incorporation and subject to the limitations set forth in subsection (3) of this section.

(2) The bylaws or, in the absence of an applicable bylaw, the board of directors may fix a future date as the record date for determining shareholders entitled to a distribution, other than one involving a purchase, redemption, or other acquisition of the corporation's shares.



If a record date is necessary but no future record date is so fixed, the record date is the date the board of directors authorizes the distribution.

(3) No distribution may be made if, after giving it effect:

(a) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(b) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(4) The board of directors may base a determination that a distribution is not prohibited under subsection (3) of this section either on financial statements prepared on the basis of accounting practices and principles that are reasonable under the circumstances or on a fair valuation or other method that is reasonable under the circumstances.

(5) Except as provided in subsection (6) of this section, the time for measuring the effect of a distribution under subsection (3) of this section is:

(a) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of:

(I) The date money or other property is transferred or debt is incurred by the corporation; or

(II) The date the shareholder ceases to be a shareholder with respect to the acquired shares;

(b) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(c) In all other cases, as of either:

(I) The date the distribution is authorized, if the payment occurs within one hundred twenty days after the date of authorization; or

(II) The date the payment is made, if it occurs more than one hundred twenty days after the date of authorization.

(6) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under subsection (3) of this section if its terms provide that payment of principal and interest thereon are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest thereon is treated as a distribution the effect of which is measured on the date the payment is actually made.

(7) Unless otherwise expressly provided in the articles of incorporation or bylaws, a statement of par value for shares shall not impose any limitation on distributions and shall not require any separate designation, restriction, reservation, or other segregation of any capital account of a corporation.

**Source:** L. 93: Entire article added, p. 762, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "Corporate Dividend Limitations", see 27 *Dicta* 99 (1950). For note, "Surpluses Which May Be Used For Paying Dividends under the New Colorado Corporation Act", see 31 *Rocky Mt. L. Rev.* 49 (1958). For article, "1959 Amendments to the Colorado Corporation Code", see 36 *Dicta* 489 (1959). For article, "Depreciation Policy and Its Effect in Determining Earnings Available for Dividends", see 36 *U. Colo. L. Rev.* 143 (1963). For article, "Corporate Director Liability", see 65 *Den. U. L. Rev.* 59 (1988). For article, "Counseling the Corporation In Financial Cri-

sis", see 17 *Colo. Law.* 631 (1988). For article, "Corporate Director Liability", see 65 *Den. U. L. Rev.* 59 (1988).

**Annotator's note.** Since § 7-106-401 is similar to § 7-5-110 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Directors expressly made personally liable to corporation.** This section and §§ 7-3-102 and 7-5-114 (1)(d) expressly make directors per-

sonally liable to the corporation. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Absolute liability.** Liability under this section and §§ 7-3-102 and 7-5-114 (1)(d) is absolute. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**A showing of fraud is not required** to impose liability under this section and §§ 7-3-102 and 7-5-114 (1)(d). *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Payments made to sole shareholder** by sole shareholder that renders business unable to pay debts violates this section. *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo. App. 2007).

**A corporation may "freeze out" minority shareholders** by a reverse stock split and fractional share buyout. *Goldman v. Union Bank and Trust*, 765 P.2d 638 (Colo. App. 1988).

**This section does not impose a fiduciary duty within the meaning of 11 U.S.C.A. § 523 (a)(4) of the bankruptcy code.** *In re Anzman*, 73 Bankr. 156 (Bankr. D. Colo. 1986).

**Two tests applicable** in determining whether corporation may make valid distribution to shareholder. The first test, the "equity insolvency test", considers whether a distribution

will impair the corporation's ability to pay its debts as they become due in the usual course of business. The second test is the "balance sheet test". *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo. App. 2007).

**The court must consider** whether the business can continue as a going concern and can maintain or replace financing necessary to pay debts as they come due and what the business can do in the future, including whether it will or will not be able pay its debts in the future. *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo. App. 2007).

**The court shall make its findings and conclusions** by comparing the number of debts unpaid, taking into account that the payments of smaller debts did not necessarily mean the company was solvent; determining the amount of the company's delinquency and considering any contingent liabilities as an element of the total debt; determining the materiality of the nonpayments, taking into account any unpaid premiums and future dates when payments will have to be paid on the outstanding claims; evaluating the company's conduct of its financial affairs, including whether the company is still operational and any sources of income; and limiting its measure of the effect of the distributions to the date each distribution was authorized. *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo. App. 2007).

**7-106-402. Unclaimed distributions.** If a corporation has mailed three successive distributions to a shareholder addressed to the shareholder's address shown on the corporation's current record of shareholders and the distributions have been returned as undeliverable, no further attempt to deliver distributions to the shareholder need be made until another address for the shareholder is made known to the corporation, at which time all distributions accumulated by reason of this section shall, except as otherwise provided by law, be mailed to the shareholder at such other address.

**Source: L. 93:** Entire article added, p. 764, § 1, effective July 1, 1994.

ARTICLE 107  
Shareholders

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

**Law reviews:** For article, "Valuation of Stock in Closely Held Corporations", see 18 Colo. Law. 1731 (1989).

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## PART 1

## MEETINGS

**7-107-101. Annual meeting.** (1) A corporation shall hold a meeting of shareholders annually at a time and date stated in or fixed in accordance with the bylaws, or, if not so stated or fixed, at a time and date stated in or fixed in accordance with a resolution of the board of directors.

(2) Annual shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws, or, if not so stated or fixed, at a place stated in or fixed in accordance with a resolution of the board of directors. If no place is so stated or fixed, annual meetings shall be held at the corporation's principal office.

(3) The failure to hold an annual meeting at the time determined pursuant to subsection (1) of this section does not affect the validity of any corporate action and does not work a forfeiture or dissolution of the corporation.

**Source: L. 93:** Entire article added, p. 764, § 1, effective July 1, 1994. **L. 96:** Entire section amended, p. 1315, § 15, effective June 1.

**7-107-102. Special meeting.** (1) A corporation shall hold a special meeting of shareholders:

(a) On call of its board of directors or the person or persons authorized by the bylaws or resolution of the board of directors to call such a meeting; or

(b) If the corporation receives one or more written demands for the meeting, stating the purpose or purposes for which it is to be held, signed and dated by the holders of shares representing at least ten percent of all the votes entitled to be cast on any issue proposed to be considered at the meeting.

(2) If not otherwise fixed under section 7-107-103 or 7-107-107, the record date for determining shareholders entitled to demand a special meeting pursuant to paragraph (b) of subsection (1) of this section is the date of the earliest of any of the demands pursuant to which the meeting is called, or the date that is sixty days before the date the first of such demands is received by the corporation, whichever is later.

(3) Special shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws, or, if not so stated or fixed, at a place stated in or fixed in accordance with a resolution of the board of directors. If no place is so stated or fixed, special meetings shall be held at the corporation's principal office.

(4) Only business within the purpose or purposes described in the notice of the meeting required by section 7-107-105 (3) may be conducted at a special shareholders' meeting.

**Source: L. 93:** Entire article added, p. 764, § 1, effective July 1, 1994. **L. 96:** (1)(a), (2), and (3) amended, p. 1316, § 16, effective June 1.

**7-107-103. Court-ordered meeting.** (1) The holding of a meeting of the shareholders may be summarily ordered by the district court for the county in this state in which the

street address of the corporation's principal office is located or, if the corporation has no principal office in this state, by the district court for the county in which the street address of its registered agent is located or, if the corporation has no registered agent, by the district court for the city and county of Denver:

(a) On application of any shareholder entitled to participate in an annual meeting if an annual meeting was not held within the earlier of six months after the close of the corporation's most recently ended fiscal year or fifteen months after its last annual meeting; or

(b) On application of any person who participated in a call of or demand for a special meeting effective under section 7-107-102 (1), if:

(I) Notice of the special meeting was not given within thirty days after the date of the call or the date the last of the demands necessary to require the calling of the meeting was received by the corporation pursuant to section 7-107-102 (1) (b), as the case may be; or

(II) The special meeting was not held in accordance with the notice.

(2) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, fix a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the notice of the meeting, fix the quorum required for specific matters to be considered at the meeting or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary or appropriate to accomplish the holding of the meeting.

**Source:** L. 93: Entire article added, p. 765, § 1, effective July 1, 1994. L. 96: IP(1) amended, p. 1316, § 17, effective June 1. L. 2003: IP(1) and (2) amended, p. 2317, § 234, effective July 1, 2004.

#### ANNOTATION

**Law reviews.** For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985).

**Annotator's note.** Since § 7-107-103 is similar to § 7-4-111 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Where there is conflict between the bylaws and this section as to who shall call special meetings,** the statute is controlling. *Grant v. Elder*, 64 Colo. 104, 170 P. 198 (1918).

**Otherwise a special meeting has no legal capacity.** Where the time designated by the bylaws for holding the annual stockholders' meeting has passed, unless a special meeting is called by the persons designated by this section, the special meeting has no legal capacity. *Grant v. Elder*, 64 Colo. 104, 170 P. 198 (1918).

**7-107-104. Action without meeting.** (1) Unless the articles of incorporation require that such action be taken at a shareholders' meeting, any action required or permitted by articles 101 to 117 of this title to be taken at a shareholders' meeting may be taken without a meeting if:

(a) All of the shareholders entitled to vote thereon consent to such action in writing; or

(b) Except as otherwise provided in subsection (1.5) of this section and if expressly provided for in the articles of incorporation, the shareholders holding shares having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all of the shares entitled to vote thereon were present and voted consent to such action in writing.

(1.5) If shares are entitled to be voted cumulatively in the election of directors, shareholders may take action under this section to elect or remove directors only if:

(a) The articles of incorporation do not require that such action be taken at a shareholders' meeting; and

(b) All of the shareholders entitled to vote in the election or removal sign writings describing and consenting to the election or removal of the same directors and the writings are received by the corporation in accordance with subsection (2) of this section.

(2) (a) No action taken pursuant to this section shall be effective unless, within sixty



days after the date the corporation first receives a writing describing and consenting to the action and signed by a shareholder, the corporation has received writings that describe and consent to the action, signed by shareholders holding at least the number of shares entitled to vote on the action as required by subsection (1) or (1.5) of this section, as the case may be, disregarding any such writing that has been revoked pursuant to subsection (3) of this section. The bylaws may provide for the receipt of any such writing by the corporation by electronically transmitted facsimile or other form of wire or wireless communication providing the corporation with a complete copy thereof, including a copy of the signature thereto.

(b) Action taken pursuant to this section shall be effective as of the date the corporation receives the last writing necessary to effect the action unless all of the writings necessary to effect the action state another date as the effective date of the action, in which case such stated date shall be the effective date of the action.

(3) Any shareholder who has signed a writing describing and consenting to action taken pursuant to this section may revoke such consent by a writing signed and dated by the shareholder describing the action and stating that the shareholder's prior consent thereto is revoked, if such writing is received by the corporation prior to the effectiveness of the action.

(4) If not otherwise fixed under subsection (7) of this section or section 7-107-107, the record date for determining shareholders entitled to take action pursuant to this section or entitled to be given notice under subsection (5.5) of this section of action taken pursuant to this section is the date the corporation first receives a writing upon which the action is taken pursuant to this section.

(5) Action taken under this section has the same effect as action taken at a meeting of shareholders and may be described as such in any document.

(5.5) If action is taken under subsection (1) of this section with less than unanimous consent of all shareholders entitled to vote upon the action, the corporation or shareholders taking the action shall, upon receipt by the corporation of all writings necessary to effect the action, give notice of the action to all shareholders who were entitled to vote upon the action but who have not consented to the action in the manner provided in subsection (1) of this section. The notice shall contain or be accompanied by the same material, if any, that would have been required under articles 101 to 117 of this title to be given to shareholders in or with a notice of the meeting at which the action would have been submitted to the shareholders.

(6) (Deleted by amendment, L. 96, p. 1316, § 18, effective June 1, 1996.)

(7) The district court for the county in this state in which the street address of the corporation's principal office is located or, if the corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located, or, if the corporation has no registered agent, the district court for the city and county of Denver may, upon application of the corporation or any shareholder who would be entitled to vote on the action at a shareholders' meeting, summarily state a record date for determining shareholders entitled to sign writings consenting to an action under this section and may enter other orders necessary or appropriate to effect the purposes of this section.

**Source:** L. 93: Entire article added, p. 766, § 1, effective July 1, 1994. L. 96: (2), (3), and (6) amended, p. 1316, § 18, effective June 1. L. 2003: (2) and (7) amended, p. 2318, § 235, effective July 1, 2004. L. 2005: (1), (2), (3), (4), and (7) amended and (1.5) and (5.5) added, p. 369, § 1, effective April 22.

**7-107-105. Notice of meeting.** (1) A corporation shall give notice to shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than ten nor more than sixty days before the date of the meeting; except that, if the number of authorized shares is to be increased, at least thirty days' notice shall be given. Unless articles 101 to 117 of this title or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(2) Unless articles 101 to 117 of this title or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(3) Notice of a special meeting shall include a description of the purpose or purposes for which the meeting is called.

(4) If not otherwise fixed under section 7-107-103 or 7-107-107, the record date for determining shareholders entitled to be given notice of and to vote at an annual or special shareholders' meeting is the day before the first notice is given to shareholders.

(5) Subject to the next sentence of this subsection (5) and unless otherwise required by the bylaws, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 7-107-107, notice of the adjourned meeting shall be given under this section to persons who are shareholders as of the new record date.

**Source: L. 93:** Entire article added, p. 767, § 1, effective July 1, 1994.

#### ANNOTATION

**Annotator's note.** Since § 7-107-105 is similar to § 7-4-112 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**A minority stockholder has the right to the statutory notice** in order that he may attend and present his views in regard to the corporate management. *Jones v. Pearl Mining Co.*, 20 Colo. 417, 38 P. 700 (1894) (decided under repealed Mills Ann. Stat. § 481).

**But no additional notice is needed for an adjourned shareholders' meeting** which is but continuation of meeting described in original notice. *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**Amended offer held not to constitute new business requiring new notice.** Where original notice for shareholders' meeting provided that meeting was called to consider and act upon proposals for sale of assets of association and to transact such other business as may properly come before the meeting or any adjournment thereof and an amended proposal for sale of assets was discussed at the meeting and then at an adjourned meeting the amended proposal was accepted, the second meeting was not unlawfully called on theory that consideration of an amended offer constituted new business and that therefore meeting was not adjourned meeting but new meeting which under corporation's bylaws required new notice. *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**7-107-106. Waiver of notice.** (1) A shareholder may waive any notice required by articles 101 to 117 of this title or by the articles of incorporation or the bylaws, whether before or after the date or time stated in the notice as the date or time when any action will occur or has occurred. The waiver shall be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records, but such delivery and filing shall not be conditions of the effectiveness of the waiver.

(2) A shareholder's attendance at a meeting:

(a) Waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting because of lack of notice or defective notice; and

(b) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

**Source: L. 93:** Entire article added, p. 767, § 1, effective July 1, 1994.

**7-107-107. Record date.** (1) The bylaws may fix or provide the manner of fixing a future date as the record date for one or more voting groups in order to determine the



shareholders entitled to be given notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action, and if the bylaws do not fix or provide for fixing a record date, the board of directors may fix a future date as the record date; except that the record date for determining the shareholders entitled to take action without a meeting or entitled to be given notice of action so taken shall be determined as provided in section 7-107-104 (4).

(2) A record date fixed under this section shall not be more than seventy days before the meeting or action requiring a determination of shareholders.

(3) A determination of shareholders entitled to be given notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it shall do if the meeting is adjourned to a date more than one hundred twenty days after the date fixed for the original meeting.

(4) If a court orders a meeting adjourned to a date more than one hundred twenty days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

**Source: L. 93:** Entire article added, p. 768, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959).

**Annotator's note.** Since § 7-107-107 is similar to § 7-4-113 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Corporation elections cannot be stopped to settle questions of legal title,** and it is important to the interests of the corporation that their elections should proceed under their own rules and with their own officers. *Fehr v. Hadden*, 134 Colo. 102, 300 P.2d 533 (1956) (decided under repealed § 31-2-7, CRS 53).

**7-107-108. Meetings by telecommunication.** Unless otherwise provided in the bylaws, any or all of the shareholders may participate in an annual or special shareholders' meeting by, or the meeting may be conducted through the use of, any means of communication by which all persons participating in the meeting may hear each other during the meeting. A shareholder participating in a meeting by this means is deemed to be present in person at the meeting.

**Source: L. 93:** Entire article added, p. 768, § 1, effective July 1, 1994.

#### PART 2

#### VOTING

**7-107-201. Shareholders' list for meeting.** (1) After fixing a record date for a shareholders' meeting, the corporation shall prepare a list of the names of all its shareholders who are entitled to be given notice of the meeting. The list shall be arranged by voting groups and within each voting group by class or series of shares, shall be alphabetical within each class or series, and shall show the address of, and the number of shares of each such class and series that are held by, each shareholder.

(2) The shareholders' list shall be available for inspection by any shareholder, beginning the earlier of ten days before the meeting for which the list was prepared or two business days after notice of the meeting is given and continuing through the meeting, and any adjournment thereof, at the corporation's principal office or at a place identified in the notice of the meeting in the city in which the meeting will be held. A shareholder or an agent or attorney of the shareholder is entitled on written demand to inspect and, subject to the requirements of section 7-116-102 (3) and the provisions of subsections (2) and (3) of

section 7-116-103, to copy the list during regular business hours and during the period it is available for inspection.

(3) The corporation shall make the shareholders' list available at the meeting, and any shareholder or an agent or attorney of the shareholder is entitled to inspect the list at any time during the meeting or any adjournment.

(4) If the corporation refuses to allow a shareholder or an agent or attorney of the shareholder to inspect the shareholders' list before or at the meeting or to copy the list, as permitted by subsection (2) or (3) of this section, the district court for the county in this state in which the street address of the corporation's principal office is located or, if the corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located or, if the corporation has no registered agent, the district court for the city and county of Denver may, on application of the shareholder, summarily order the inspection or copying of the list at the corporation's expense and may postpone or adjourn the meeting for which the list was prepared until the inspection or copying is complete.

(5) If a court orders inspection or copying of the shareholders' list pursuant to subsection (4) of this section, unless the corporation proves that it refused inspection or copying of the list in good faith because it had a reasonable basis for doubt about the right of the shareholder or the agent or attorney of the shareholder to inspect or copy the shareholders' list:

(a) The court shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred in obtaining the order;

(b) The court may order the corporation to pay the shareholder for any damages the shareholder incurred; and

(c) The court may grant the shareholder any other remedy afforded the shareholder by law.

(6) If a court orders inspection or copying of the shareholders' list pursuant to subsection (4) of this section, the court may impose reasonable restrictions on the use or distribution of the list by the shareholder.

(7) Failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting.

**Source:** L. 93: Entire article added, p. 769, § 1, effective July 1, 1994. L. 96: (2), (3), and (4) amended, p. 1317, § 19, effective June 1. L. 2003: (2) and (4) amended, p. 2318, § 236, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959).

**Annotator's note.** Since § 7-107-201 is similar to § 7-4-113 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Corporation elections cannot be stopped to settle questions of legal title**, and it is important to the interests of the corporation that their elections should proceed under their own rules and with their own officers. *Fehr v. Hadden*, 134 Colo. 102, 300 P.2d 533 (1956) (decided under repealed § 31-2-7, CRS 53).

**7-107-202. Voting entitlement of shares.** (1) Except as otherwise provided in subsections (2) and (4) of this section or in the articles of incorporation, each outstanding share, regardless of class, is entitled to one vote, and each fractional share is entitled to a corresponding fractional vote, on each matter voted on at a shareholders' meeting. Only shares are entitled to vote.

(2) Except as otherwise ordered by a court of competent jurisdiction upon a finding that the purpose of this subsection (2) would not be violated in the circumstances presented to the court, the shares of a corporation are not entitled to be voted if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns,



directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation.

(3) Subsection (2) of this section does not limit the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity.

(4) Redeemable shares are not entitled to be voted after notice of redemption is mailed to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares.

**Source:** L. 93: Entire article added, p. 770, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950). For article, "One Year Review of Corporations, Partnerships, and Agency", see 34 Dicta 129 (1957).

**Annotator's note.** Since § 7-107-202 is similar to § 7-4-116 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Shareholder has right to vote one vote for every share.** Under this section, unless otherwise provided in the articles of incorporation, every shareholder of record of a corporation shall have the right at every shareholders' meeting to vote one vote for every share standing in his name on the books of the corporation, even though at some time in the future he intends to dispose of his stock. *Fehr v. Hadden*, 134 Colo. 102, 300 P.2d 533 (1956) (decided under repealed § 31-2-7, CRS 53).

**But denial of voting rights to one class of common stock** in an election for directors of a

corporation does not violate public policy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**The term "trustee" means** a person who holds the legal title to stock for the benefit of some third party who is the stock's equitable owner and entitled to the dividends thereon and whose property, whether held in trust or otherwise, is chargeable with whatever liability may result from the ownership of the stock. Persons holding stock in trust for married women, minors, insane persons, spendthrifts, and the like would be included by the term "trustee". *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

**Pledgor has right to vote his stock.** Where stock is placed in the hands of a person by the real owner to be held merely as collateral security for a debt due from himself to a third person, the stock involved is really held in pledge, and the right to vote the same, in the absence of an express agreement to the contrary, remains with the pledgor. *Miller v. Murray*, 17 Colo. 408, 30 P. 46 (1892); *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

**7-107-203. Proxies.** (1) A shareholder may vote the shareholder's shares in person or by proxy.

(2) Without limiting the manner in which a shareholder may appoint a proxy to vote or otherwise act for the shareholder, the following shall constitute valid means of such appointment:

(a) A shareholder may appoint a proxy by signing an appointment form, either personally or by the shareholder's attorney-in-fact.

(b) A shareholder may appoint a proxy by transmitting or authorizing the transmission of a telegram, teletype, or other electronic transmission providing a written statement of the appointment to the proxy, to a proxy solicitor, proxy support service organization, or other person duly authorized by the proxy to receive appointments as agent for the proxy, or to the corporation; except that the transmitted appointment shall set forth or be transmitted with written evidence from which it can be determined that the shareholder transmitted or authorized the transmission of the appointment.

(3) An appointment of a proxy is effective against the corporation when received by the corporation, including receipt by the corporation of an appointment transmitted pursuant to paragraph (b) of subsection (2) of this section. An appointment is valid for eleven months unless a different period is expressly provided in the appointment form.

(4) Any complete copy, including an electronically transmitted facsimile, of an ap-

pointment of a proxy may be substituted for or used in lieu of the original appointment for any purpose for which the original appointment could be used.

(5) An appointment of a proxy is revocable by the shareholder unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of any of the following persons or their designees:

- (a) A pledgee;
- (b) A person who purchased or agreed to purchase the shares;
- (c) A creditor of the corporation who extended credit to the corporation under terms requiring the appointment;
- (d) An employee of the corporation whose employment contract requires the appointment; or
- (e) A party to a voting agreement created under section 7-107-302.

(6) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises the proxy's authority under the appointment.

(7) An appointment made irrevocable under subsection (5) of this section is revoked when the interest with which it is coupled is extinguished, but such revocation does not affect the right of the corporation to accept the proxy's authority unless:

(a) The corporation had notice that the appointment was coupled with that interest and notice that the interest is extinguished is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises the proxy's authority under the appointment; or

(b) Other notice of the revocation of the appointment is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises the proxy's authority under the appointment.

(8) The corporation shall not be required to recognize an appointment made irrevocable under subsection (5) of this section if it has received a writing revoking the appointment signed by the shareholder either personally or by the shareholder's attorney-in-fact, notwithstanding that the revocation may be a breach of an obligation of the shareholder to another person not to revoke the appointment. This provision shall not affect any claim such other person may have against the shareholder with respect to the revocation.

(9) A transferee for value of shares subject to an irrevocable appointment may revoke the appointment if the transferee did not know of its existence when the transferee acquired the shares and the existence of the irrevocable appointment was not noted on the certificate representing the shares or on the information statement for shares without certificates.

(10) Subject to section 7-107-205 and to any express limitation on the proxy's authority appearing on the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

**Source:** **L. 93:** Entire article added, p. 770, § 1, effective July 1, 1994. **L. 96:** (3) amended, p. 1318, § 20, effective June 1. **L. 2004:** (6), (7)(a), (7)(b), and (9) amended, p. 1496, § 250, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950). For article, "One Year Review of Corporations, Partnerships, and Agency", see 34 Dicta 129 (1957).

**Annotator's note.** Since § 7-107-203 is similar to § 7-4-116 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its precedes-

sors have been included in the annotations to this section.

**Shareholder has right to vote one vote for every share.** Under this section, unless otherwise provided in the articles of incorporation, every shareholder of record of a corporation shall have the right at every shareholders' meeting to vote one vote for every share standing in his name on the books of the corporation, even though at some time in the future he intends to



dispose of his stock. *Fehr v. Hadden*, 134 Colo. 102, 300 P.2d 533 (1956) (decided under repealed § 31-2-7, CRS 53).

**But denial of voting rights to one class of common stock** in an election for directors of a corporation does not violate public policy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**The term "trustee" means** a person who holds the legal title to stock for the benefit of some third party who is the stock's equitable owner and entitled to the dividends thereon and whose property, whether held in trust or otherwise, is chargeable with whatever liability may result from the ownership of the stock. Persons

holding stock in trust for married women, minors, insane persons, spendthrifts, and the like would be included by the term "trustee". *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

**Pledgor has right to vote his stock.** Where stock is placed in the hands of a person by the real owner to be held merely as collateral security for a debt due from himself to a third person, the stock involved is really held in pledge, and the right to vote the same, in the absence of an express agreement to the contrary, remains with the pledgor. *Miller v. Murray*, 17 Colo. 408, 30 P. 46 (1892); *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

**7-107-204. Shares held by nominees.** (1) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure thus established.

- (2) The procedure described in subsection (1) of this section may state:
  - (a) The types of nominees to which it applies;
  - (b) The rights or privileges that the corporation recognizes in a beneficial owner, which may include rights or privileges other than voting;
  - (c) The manner in which the procedure may be used by the nominee;
  - (d) The information that shall be provided by the nominee when the procedure is used;
  - (e) The period for which the nominee's use of the procedure is effective; and
  - (f) Other aspects of the rights and duties thereby created.

**Source:** **L. 93:** Entire article added, p. 772, § 1, effective July 1, 1994. **L. 2003:** IP(2) amended, p. 2319, § 237, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "1984 Revisions to the Colorado Corporation Code: Effective March 1984", see 13 Colo. Law. 993 (1984).

**7-107-205. Corporation's acceptance of votes.** (1) If the name signed on a vote, consent, waiver, proxy appointment, or proxy appointment revocation corresponds to the name of a shareholder, the corporation, if acting in good faith, is entitled to accept the vote, consent, waiver, proxy appointment, or proxy appointment revocation and to give it effect as the act of the shareholder.

(2) If the name signed on a vote, consent, waiver, proxy appointment, or proxy appointment revocation does not correspond to the name of a shareholder, the corporation, if acting in good faith, is nevertheless entitled to accept the vote, consent, waiver, proxy appointment, or proxy appointment revocation and to give it effect as the act of the shareholder if:

- (a) The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;
- (b) The name signed purports to be that of an administrator, executor, guardian, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, proxy appointment, or proxy appointment revocation;
- (c) The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver, proxy appointment, or proxy appointment revocation;

(d) The name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, consent, waiver, proxy appointment, or proxy appointment revocation;

(e) Two or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one of the cotenants or fiduciaries and the person signing appears to be acting on behalf of all the cotenants or fiduciaries; or

(f) The acceptance of the vote, consent, waiver, proxy appointment, or proxy appointment revocation is otherwise proper under rules established by the corporation that are not inconsistent with the provisions of this subsection (2).

(3) The corporation is entitled to reject a vote, consent, waiver, proxy appointment, or proxy appointment revocation if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder.

(4) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, proxy appointment, or proxy appointment revocation in good faith and in accordance with the standards of this section are not liable in damages for the consequences of the acceptance or rejection.

(5) Corporate action based on the acceptance or rejection of a vote, consent, waiver, proxy appointment, or proxy appointment revocation under this section is valid unless a court of competent jurisdiction determines otherwise.

**Source:** L. 93: Entire article added, p. 773, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950). For article, "One Year Review of Corporations, Partnerships, and Agency", see 34 Dicta 129 (1957).

**Annotator's note.** Since § 7-107-205 is similar to § 7-4-116 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Shareholder has right to vote one vote for every share.** Under this section, unless otherwise provided in the articles of incorporation, every shareholder of record of a corporation shall have the right at every shareholders' meeting to vote one vote for every share standing in his name on the books of the corporation, even though at some time in the future he intends to dispose of his stock. *Fehr v. Hadden*, 134 Colo. 102, 300 P.2d 533 (1956) (decided under repealed § 31-2-7, CRS 53).

**But denial of voting rights to one class of common stock** in an election for directors of a

corporation does not violate public policy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**The term "trustee" means** a person who holds the legal title to stock for the benefit of some third party who is the stock's equitable owner and entitled to the dividends thereon and whose property, whether held in trust or otherwise, is chargeable with whatever liability may result from the ownership of the stock. Persons holding stock in trust for married women, minors, insane persons, spendthrifts, and the like would be included by the term "trustee". *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

**Pledgor has right to vote his stock.** Where stock is placed in the hands of a person by the real owner to be held merely as collateral security for a debt due from himself to a third person, the stock involved is really held in pledge, and the right to vote the same, in the absence of an express agreement to the contrary, remains with the pledgor. *Miller v. Murray*, 17 Colo. 408, 30 P. 46 (1892); *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

**7-107-206. Quorum and voting requirements for voting groups.** (1) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless otherwise provided in articles 101 to 117 of this title or in the articles of incorporation, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter, but a quorum shall not consist of fewer than one-third of the votes entitled to be cast on the matter by the voting group.



(2) Once a share is represented for any purpose at a meeting, including the purpose of determining that a quorum exists, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting, unless otherwise provided in the articles of incorporation or unless a new record date is or shall be set for that adjourned meeting.

(3) If a quorum exists, action on a matter other than the election of directors by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast within the voting group opposing the action, unless a greater number of affirmative votes is required by articles 101 to 117 of this title or the articles of incorporation.

(4) An amendment to the articles of incorporation adding, changing, or deleting a quorum or voting requirement for a voting group greater than that specified in subsection (1) or (3) of this section is governed by section 7-107-208 (2).

(5) The election of directors is governed by section 7-107-209.

**Source: L. 93:** Entire article added, p. 774, § 1, effective July 1, 1994.

**7-107-207. Action by single and multiple voting groups.** (1) If articles 101 to 117 of this title or the articles of incorporation provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in section 7-107-206.

(2) If articles 101 to 117 of this title or the articles of incorporation provide for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in section 7-107-206. One voting group may vote on a matter even though no action is taken by another voting group entitled to vote on the matter.

**Source: L. 93:** Entire article added, p. 774, § 1, effective July 1, 1994.

**7-107-208. Greater quorum or voting requirements.** (1) The articles of incorporation or, if authorized by the articles of incorporation, bylaws adopted by the shareholders may provide for a greater quorum or voting requirement for shareholders or voting groups than is provided for by articles 101 to 117 of this title.

(2) An amendment to the articles of incorporation that adds, changes, or deletes a greater quorum or voting requirement shall meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

**Source: L. 93:** Entire article added, p. 775, § 1, effective July 1, 1994.

**7-107-209. Voting for directors - cumulative voting.** (1) At each election for directors, every shareholder entitled to vote at such election has the right:

(a) To vote, in person or by proxy, all of the shareholder's votes for as many persons as there are directors to be elected and for whose election the shareholder has a right to vote unless the articles of incorporation provide otherwise; or

(b) To the extent that the privilege of cumulative voting in the election of directors is in effect pursuant to the provisions of section 7-102-102 (3), to cumulate votes by multiplying the number of votes the shareholder is entitled to cast by the number of directors for whom the shareholder is entitled to vote and casting the product for a single candidate or distributing the product among two or more candidates.

(2) The articles of incorporation may provide that shares otherwise entitled to vote cumulatively may not be voted cumulatively at a meeting unless:

(a) The notice of the meeting or the proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(b) A shareholder who has the right to cumulate votes gives notice to the corporation not less than forty-eight hours before the time set for the meeting of the shareholder's intent

to cumulate votes during the meeting. If one shareholder gives the notice provided for in this paragraph (b), all other shareholders in the same voting group participating in the election shall be entitled to cumulate their votes without giving further notice.

(3) If, before a meeting of shareholders at which directors are to be elected, the corporation receives notice pursuant to paragraph (b) of subsection (2) of this section with respect to that meeting, then:

(a) If such notice is received sufficiently early that the information required by paragraph (a) of subsection (2) of this section can be included, without significant additional expense, in the notice of the meeting or in a proxy statement accompanying the notice, the corporation shall include such information in that notice or proxy statement; or

(b) If such notice is received later than contemplated in paragraph (a) of this subsection (3), the corporation may take such other action as it may deem appropriate to provide notice, to the voting group or groups that are affected by the shareholder's notice, that cumulative voting is authorized at the meeting for such voting group or groups; and, in any event, the corporation shall cause an announcement to be made at the meeting, before the taking of any vote with respect to which cumulative voting is in effect, that cumulative voting is authorized at the meeting.

(4) In an election of directors, that number of candidates equaling the number of directors to be elected, having the highest number of votes cast in favor of their election, are elected to the board of directors.

**Source:** L. 93: Entire article added, p. 775, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950). For article, "One Year Review of Corporations, Partnerships, and Agency", see 34 Dicta 129 (1957).

**Annotator's note.** Since § 7-107-209 is similar to § 7-4-116 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Shareholder has right to vote one vote for every share.** Under this section, unless otherwise provided in the articles of incorporation, every shareholder of record of a corporation shall have the right at every shareholders' meeting to vote one vote for every share standing in his name on the books of the corporation, even though at some time in the future he intends to dispose of his stock. *Fehr v. Hadden*, 134 Colo. 102, 300 P.2d 533 (1956) (decided under repealed § 31-2-7, CRS 53).

**But denial of voting rights to one class of common stock** in an election for directors of a

corporation does not violate public policy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**The term "trustee" means** a person who holds the legal title to stock for the benefit of some third party who is the stock's equitable owner and entitled to the dividends thereon and whose property, whether held in trust or otherwise, is chargeable with whatever liability may result from the ownership of the stock. Persons holding stock in trust for married women, minors, insane persons, spendthrifts, and the like would be included by the term "trustee". *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

**Pledgor has right to vote his stock.** Where stock is placed in the hands of a person by the real owner to be held merely as collateral security for a debt due from himself to a third person, the stock involved is really held in pledge, and the right to vote the same, in the absence of an express agreement to the contrary, remains with the pledgor. *Miller v. Murray*, 17 Colo. 408, 30 P. 46 (1892); *Nat'l Bank of Commerce v. Allen*, 90 F. 545 (8th Cir. 1898).

#### PART 3

#### VOTING TRUSTS AND AGREEMENTS

**7-107-301. Voting trusts.** (1) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust and by transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses



of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and promptly cause the corporation to receive copies of the list and agreement. Thereafter, the trustee shall cause the corporation to receive changes to the list promptly as they occur and amendments to the agreement promptly as they are made.

(2) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name. A voting trust is valid for not more than ten years after its effective date unless extended under subsection (3) of this section.

(3) All or some of the parties to a voting trust may extend it for additional terms of not more than ten years each by signing an extension agreement and obtaining the trustee's written consent to the extension. An extension is valid for not more than ten years after the date the first shareholder signs the extension agreement, unless such signing occurs within two years before the expiration date of the voting trust as originally fixed or as last extended, in which case the extension is valid for not more than ten years after the expiration date of the voting trust as originally fixed or last extended. The trustee shall cause the corporation to receive copies of the extension agreement. An extension agreement binds only those parties signing it.

**Source: L. 93:** Entire article added, p. 776, § 1, effective July 1, 1994.

**7-107-302. Voting agreements.** (1) Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of section 7-107-301.

(2) A voting agreement created under this section is specifically enforceable.

**Source: L. 93:** Entire article added, p. 777, § 1, effective July 1, 1994.

## PART 4

### ACTIONS BY SHAREHOLDERS

**7-107-401. Definition of "shareholder".** As used in this part 4, "shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on the beneficial owner's behalf.

**Source: L. 93:** Entire article added, p. 777, § 1, effective July 1, 1994.

**Cross references:** For additional definitions applicable to this title, see §§ 7-90-102 and 7-101-401.

**7-107-402. Actions by shareholders.** (1) No action shall be commenced by a shareholder in the right of a domestic corporation, and no action shall be commenced in this state by a shareholder in the right of a foreign corporation, unless the plaintiff was a shareholder of the corporation at the time of the transaction of which the plaintiff complains or the plaintiff is a person upon whom shares or voting trust certificates thereafter devolved by operation of law from a person who was a shareholder at such time.

(2) In any action instituted on or after January 1, 1959, in the right of any domestic or foreign corporation by a shareholder, the court having jurisdiction, upon final judgment and a finding that the action was commenced without reasonable cause, shall require the plaintiff to pay to the parties named as defendants the costs and reasonable expenses directly attributable to the defense of such action, but not including fees of attorneys.

(3) In any action pending, instituted, or maintained on or after January 1, 1959, in the right of any domestic or foreign corporation by a shareholder holding less than five percent of the outstanding shares of any class of such corporation or of voting trust certificates therefor, unless the shares or voting trust certificates so held have a market value in excess of twenty-five thousand dollars, the corporation in whose right such action is commenced

shall be entitled, at any time before final judgment, to require the plaintiff to give security for the costs and reasonable expenses which may be directly attributable to and incurred by it in the defense of such action or may be incurred by other parties named as defendant for which it may become legally liable, but not including fees of attorneys. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervenor, as of the date that the plaintiff becomes a party to the action. The amount of such security may from time to time be increased or decreased, in the discretion of the court, upon showing that the security provided has or may become inadequate or is excessive. If the court finds that the action was commenced without reasonable cause, the corporation shall have recourse to such security in such amount as the court shall determine upon the termination of such action.

**Source:** L. 93: Entire article added, p. 777, § 1, effective July 1, 1994.

ANNOTATION

**Law reviews.** For article, “The 1985 Proposed Revisions to the Colorado Corporation Code”, see 14 Colo. Law. 34 (1985).

**Annotator’s note.** Since § 7-107-402 is similar to § 7-4-121 as it existed prior to the 1993 recodification of the “Colorado Business Corporation Act”, articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Use of the term “holder of shares”** instead of “holder of record of shares” (as used in § 7-1-102) suggests that a plaintiff in a derivative claim based on state law need not be a record owner of shares throughout the pendency of the lawsuit. *Mullen v. Sweetwater Development Corp.*, 619 F. Supp. 809 (D. Colo. 1985).

**A stockholder with knowledge of material facts who has acquiesced in a transaction ordinarily cannot attack the transaction on**

behalf of the corporation, nor may that stockholder bring such an action unless he acts promptly. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**But affirmative defenses may not be asserted against corporation in derivative suit.** The affirmative defenses of laches, acquiescence, waiver, ratification, estoppel, and unclean hands on the part of a plaintiff stockholder ordinarily may not be asserted against the corporation in a stockholder’s derivative suit. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev’d on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Similarly, the corporation itself has no standing to urge that plaintiff is guilty of laches.** *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev’d on other grounds sub nom. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

ARTICLE 108

Directors and Officers

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

**Law reviews:** For article, “Commercial and Corporate Law”, which discusses a Tenth Circuit decision dealing with parent company liability for breaching subsidiary-employee contract, see 65 Den. U.L. Rev. 492 (1988).

PART 1		7-108-107.	Resignation of directors.
BOARD OF DIRECTORS		7-108-108.	Removal of directors by shareholders.
		7-108-109.	Removal of directors by judicial proceeding.
		7-108-110.	Vacancy on board.
		7-108-111.	Compensation of directors.
7-108-101.	Requirement for board of directors.	PART 2	
7-108-102.	Qualifications of directors.		
7-108-103.	Number and election of directors.	MEETINGS AND ACTION OF THE DIRECTORS	
7-108-104.	Election of directors by certain classes of shareholders.		
7-108-105.	Terms of directors generally.		
7-108-106.	Staggered terms for directors.	7-108-201.	Meetings.



7-108-202. Action without meeting.

## PART 4

7-108-203. Notice of meeting.

## STANDARDS OF CONDUCT

7-108-204. Waiver of notice.

7-108-205. Quorum and voting.

7-108-206. Committees.

7-108-401. General standards of conduct for directors and officers.

7-108-402. Limitation of certain liabilities of directors and officers.

7-108-403. Liability of directors for unlawful distributions.

## PART 3

## OFFICERS

7-108-301. Officers.

## PART 5

7-108-302. Duties of officers.

7-108-303. Resignation and removal of officers.

## DIRECTOR - CONFLICTS OF INTEREST

7-108-304. Contract rights with respect to officers.

7-108-501. Conflicting interest transaction - repeal.

## PART 1

## BOARD OF DIRECTORS

**7-108-101. Requirement for board of directors.** (1) Except as otherwise provided in its articles of incorporation, each corporation shall have a board of directors.

(2) Subject to any provision stated in the articles of incorporation, all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, the board of directors or such other persons as the articles of incorporation provide shall have the authority and perform the duties of a board of directors.

**Source:** L. 93: Entire article added, p. 778, § 1, effective July 1, 1994. L. 2003: (2) amended, p. 2319, § 238, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "Corporate Organization: A Manual of Colorado Procedure", see 1 Rocky Mt. L. Rev. 3 (1928). For article, "The New Colorado Corporation Act", see 35 Dicta 317 (1958). For article, "Liabilities of Directors of Closely Held Corporations", see 36 U. Colo. L. Rev. 95 (1963). For article, "Conflict of Interest Transactions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders", see 57 Den. L. J. 609 (1980). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Colorado Expands Protections For Corporate Directors", see 16 Colo. Law. 1387 (1987).

**Annotator's note.** Since § 7-108-101 is similar to § 7-5-101 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**This section vests in the board of directors of a corporation all corporate powers.** People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Co. v. Burke, 72 Colo. 486, 212 P. 837

(1923); Dines v. Harris, 88 Colo. 22, 291 P. 1024 (1930).

**Power to issue series of stock.** Directors, acting for the corporation, as they are empowered to do by the articles, have the power to issue series of stock as authorized by the articles. Paulek v. Isgar, 38 Colo. App. 29, 551 P.2d 213 (1976).

**Where power to transact corporate business is lodged in the directors, stockholders cannot contract** either individually or while acting together at stockholders' meetings unless all of the stockholders are in attendance at such meetings. Colo. Springs Co. v. Am. Publishing Co., 97 F. 843 (D. Colo. 1899).

**Or exercise statutory waivers.** It does not lie within the power of stockholders to exercise a statutory waiver in a matter concerning the corporation; rather the discretion to waive the protection afforded by such a statute can only be exercised by the governing officials of the corporation, namely the officers or the board of directors. Weck v. District Court, 158 Colo. 521, 408 P.2d 987 (1965).

**In bankruptcy the trustee acts for the directors.** Since the United States bankruptcy act

confers broad powers upon a trustee in bankruptcy, such a trustee takes the place and exercises the office of the directors of a corporation in bankruptcy. *Weck v. District Court*, 161 Colo. 384, 422 P.2d 46 (1967).

**Directors occupy quasi-fiduciary relation to corporation.** In addition to their statutory powers and duties, directors of a corporation are in a broad sense agents of the corporation in that they occupy a quasi-fiduciary relation to the corporation and to its stockholders. Hence they must manage the corporate affairs in good faith within the limits of the law applicable and give the corporate entity the benefit of their best judgment and care. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Fiduciary duty to minority stockholder was not breached** when the directors interfered with shareholder's management contract with the corporation since the shareholder was acting in his capacity as an independent contractor under the management contract with the corporation rather than as a stockholder. *Bithell v. Western Care Corp.*, 762 P.2d 708 (Colo. App. 1988).

**Discretionary powers, if honestly exercised, are not subject to control.** Within the limits of their legal authority, directors of a corporation possess by necessity a large amount of discretionary power, and that power, if exercised honestly and with reason, is not subject to control by either the stockholders or the courts. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the directors in the reasonable and honest exercise of their judgment and duties. *Rywalt v. Writer Corp.*, 34 Colo. App. 334, 526 P.2d 316 (1974).

**Thus courts will accept business judgments unless unlawful.** Since management, backed by majority stock control, has a wide discretion in making business judgments, a court will hospitably accept those business judgments when made with an eye single to the interest of the corporation unless manifestly unlawful. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**7-108-102. Qualifications of directors.** A director shall be an individual who is eighteen years of age or older. The bylaws may prescribe other qualifications for directors. A director need not be a resident of this state or a shareholder unless the bylaws so prescribe.

**Source:** L. 93: Entire article added, p. 778, § 1, effective July 1, 1994. L. 2004: Entire section amended, p. 1497, § 251, effective July 1.

The good faith acts of directors which are within the powers of the corporation and within the exercise of an honest business judgment are valid. *Rywalt v. Writer Corp.*, 34 Colo. App. 334, 526 P.2d 316 (1974).

**But when self-interest or improper motives are indicated** inconsistent with legitimate corporate purposes or basic principles on which corporations must operate, the court has a duty to carefully scrutinize action by the directors to determine whether it was within the perimeter of permissible action. *Herald Co. v. Bonfils*, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. *Herald v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Thus a contract employing director to secure a particular corporate action violates this section.** A contract of employment which obligates a director to assist one to control the corporate action of the company in securing a particular lease, regardless of his duty as a director to represent and act for all the stockholders alike is against the policy of the law under this section. *Singers-Bigger v. Young*, 166 F. 82 (8th Cir. 1908).

**For a contract of this character would tend to deprive the stockholders** of the benefit of defendant's independent and impartial judgment, subordinate the interests of the corporation, which his duty required him to serve, to the individual interests of his employer, and would be contrary to public policy and void. *Singers-Bigger v. Young*, 166 F. 82 (8th Cir. 1908).

**Remedy of stockholders dissatisfied with corporate management is electing new directors.** The officers and directors of a corporation are presumed to represent the will of a majority of the stockholders; thus, when stockholders simply become dissatisfied with corporate management, ordinarily the remedy is to install new management by the election of new directors. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965); *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**This section gives directors express authority to fix compensation** and the fixing of salaries by directors falls within the "business judgment" rule. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Applied** in *Masinton v. Dean*, 659 P.2d 50 (Colo. App. 1982).



## ANNOTATION

**Law reviews.** For article, "Corporate Organization: A Manual of Colorado Procedure", see 1 Rocky Mt. L. Rev. 3 (1928). For article, "The New Colorado Corporation Act", see 35 Dicta 317 (1958). For article, "Liabilities of Directors of Closely Held Corporations", see 36 U. Colo. L. Rev. 95 (1963). For article, "Conflict of Interest Transactions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders", see 57 Den. L. J. 609 (1980). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Colorado Expands Protections For Corporate Directors", see 16 Colo. Law. 1387 (1987).

**Annotator's note.** Since § 7-108-101 is similar to § 7-5-102 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**This section vests in the board of directors of a corporation all corporate powers.** People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Co. v. Burke, 72 Colo. 486, 212 P. 837 (1923); Dines v. Harris, 88 Colo. 22, 291 P. 1024 (1930).

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**Or exercise statutory waivers.** It does not lie within the power of stockholders to exercise a statutory waiver in a matter concerning the corporation; rather the discretion to waive the protection afforded by such a statute can only be exercised by the governing officials of the corporation, namely the officers or the board of directors. Weck v. District Court, 158 Colo. 521, 408 P.2d 987 (1965).

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**Discretionary powers, if honestly exercised, are not subject to control.** Within the limits of their legal authority, directors of a corporation possess by necessity a large amount of discretionary power, and that power, if exercised honestly and with reason, is not subject to control by either the stockholders or the courts. Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the directors in the reasonable and honest exercise of their judgment and duties. Rywalt v. Writer Corp., 34 Colo. App. 334, 526 P.2d 316 (1974).

**Thus courts will accept business judgments unless unlawful.** Since management, backed by majority stock control, has a wide discretion in making business judgments, a court will hospitably accept those business judgments when made with an eye single to the interest of the corporation unless manifestly unlawful. Herald Co. v. Bonfils, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. Herald v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

The good faith acts of directors which are within the powers of the corporation and within the exercise of an honest business judgment are valid. Rywalt v. Writer Corp., 34 Colo. App. 334, 526 P.2d 316 (1974).

**But when self-interest or improper motives are indicated** inconsistent with legitimate corporate purposes or basic principles on which corporations must operate, the court has a duty to carefully scrutinize action by the directors to determine whether it was within the perimeter of permissible action. Herald Co. v. Bonfils, 315 F. Supp. 497 (D. Colo. 1970), rev'd on other grounds sub nom. Herald v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

**Thus a contract employing director to secure a particular corporate action violates this section.** A contract of employment which obligates a director to assist one to control the corporate action of the company in securing a particular lease, regardless of his duty as a di-

rector to represent and act for all the stockholders alike is against the policy of the law under this section. *Singers-Bigger v. Young*, 166 F. 82 (8th Cir. 1908).

**For a contract of this character would tend to deprive the stockholders** of the benefit of defendant's independent and impartial judgment, subordinate the interests of the corporation, which his duty required him to serve, to the individual interests of his employer, and would be contrary to public policy and void. *Singers-Bigger v. Young*, 166 F. 82 (8th Cir. 1908).

**Remedy of stockholders dissatisfied with corporate management is electing new directors.** The officers and directors of a corporation

are presumed to represent the will of a majority of the stockholders; thus, when stockholders simply become dissatisfied with corporate management, ordinarily the remedy is to install new management by the election of new directors. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965); *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**This section gives directors express authority to fix compensation** and the fixing of salaries by directors falls within the "business judgment" rule. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Applied** in *Masinton v. Dean*, 659 P.2d 50 (Colo. App. 1982).

**7-108-103. Number and election of directors.** (1) A board of directors shall consist of one or more members, with the number stated in or fixed in accordance with the bylaws.

(2) The bylaws may establish a range for the size of the board of directors by fixing a minimum and maximum number of directors. If a range is established, the number of directors may be fixed or changed from time to time within the range by the shareholders or the board of directors.

(3) Directors are elected at each annual meeting of the shareholders except as provided in section 7-108-106.

**Source:** L. 93: Entire article added, p. 778, § 1, effective July 1, 1994. L. 2003: (1) amended, p. 2319, § 239, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "Legislative Update", see 11 Colo. Law. 2142 (1982). For article, "Colorado Expands Protections For Corporate Directors", see 16 Colo. Law. 1387 (1987).

**Annotator's note.** Since § 7-108-103 is similar to § 7-5-102 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Directors named by incorporators are directors by operation of law.** The persons who are named by the incorporators in the articles of incorporation as directors for the first year are created such directors by operation of law and not by election of the stockholders after the corporation is formed. *Humphreys v. Mooney*, 5 Colo. 282 (1880).

**Otherwise selection of the directors of a corporation belongs to the stockholders.** It is in a sense an individual right in them, as distinguished from a power of the corporation in its single aggregate capacity. *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Fort Lyon Canal Co.*, 173 F. 601 (8th Cir. 1909); *People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Co. v. Burke*, 72 Colo. 486, 212 P. 837 (1923).

**Their right to vote for directors is specifically prescribed by this section** and does not

proceed from any act, contract, or bylaw of the corporation. *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Fort Lyon Canal Co.*, 173 F. 601 (8th Cir. 1909).

**However, denial of voting rights to one class of common stock** in an election for directors of a corporation does not violate public policy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**The statute plainly permits shareholders to set the number of directors**, and a bylaw that removes that right is contrary to law. *Harding v. Heritage Health Prods. Co.*, 98 P.3d 945 (Colo. App. 2004).

**This section operates as a restriction upon the jurisdiction of a court to control corporate elections**; a court has no jurisdiction, under the guise of either supervision or regulation, to direct the stockholders to proceed in electing directors in any other way than that which this section has provided. *People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Co. v. Burke*, 72 Colo. 486, 212 P. 837 (1923).

**And so stockholders who refuse to obey the provision of a decree** rendered by a district court requiring them in nominating and voting for directors to observe the provisions of that decree, which is contrary to the way which this section provides, are not guilty of contempt. *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Lubers*, 72 Colo. 513, 212 P. 848 (1923).



**Fiduciary duty to minority stockholder was not breached** when the directors interfered with shareholder's management contract with the corporation since the shareholder was acting in his capacity as an independent contractor

under the management contract with the corporation rather than as a stockholder. *Bithell v. Western Care Corp.*, 762 P.2d 708 (Colo. App. 1988).

**7-108-104. Election of directors by certain classes of shareholders.** If the articles of incorporation authorize dividing the shares of the corporation into classes or series, the articles of incorporation may authorize the election of all or a stated number or portion of directors by the holders of one or more authorized classes or series of shares. A class or series of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

**Source:** **L. 93:** Entire article added, p. 779, § 1, effective July 1, 1994. **L. 2003:** Entire section amended, p. 2319, § 240, effective July 1, 2004.

**7-108-105. Terms of directors generally.** (1) Except as provided in section 7-108-106, the terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(2) Except as provided in section 7-108-106, the terms of all other directors expire at the next annual shareholders' meeting following their election.

(3) A decrease in the number of directors does not shorten an incumbent director's term.

(4) The term of a director elected to fill a vacancy pursuant to section 7-108-110 (1) (b) or 7-108-110 (1) (c) expires at the next annual shareholders' meeting at which directors are elected. The term of a director elected to fill a vacancy pursuant to section 7-108-110 (1) (a) shall be the unexpired term of the director's predecessor in office; except that, if the director's predecessor had been elected to fill a vacancy pursuant to section 7-108-110 (1) (b) or 7-108-110 (1) (c), the term of a director elected pursuant to section 7-108-110 (1) (a) shall be the unexpired term of the last predecessor elected by the shareholders.

(5) Despite the expiration of the director's term, a director continues to serve until the director's successor is elected and qualifies.

(6) (Deleted by amendment, L. 2004, p. 1497, § 252, effective July 1, 2004.)

**Source:** **L. 93:** Entire article added, p. 779, § 1, effective July 1, 1994. **L. 2000:** (6) amended, p. 978, § 55, effective July 1. **L. 2002:** (6) amended, p. 1848, § 110, effective July 1; (6) amended, p. 1712, § 110, effective October 1. **L. 2004:** (4), (5), and (6) amended, p. 1497, § 252, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Legislative Update", see 11 Colo. Law. 2142 (1982).

**Annotator's note.** Since § 7-108-105 is similar to § 7-5-102 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Directors named by incorporators are directors by operation of law.** The persons who are named by the incorporators in the articles of incorporation as directors for the first year are created such directors by operation of law and not by election of the stockholders after the corporation is formed. *Humphreys v. Mooney*, 5 Colo. 282 (1880).

**Otherwise selection of the directors of a corporation belongs to the stockholders.** It is in a sense an individual right in them, as distinguished from a power of the corporation in its single aggregate capacity. *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Fort Lyon Canal Co.*, 173 F. 601 (8th Cir. 1909); *People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Co. v. Burke*, 72 Colo. 486, 212 P. 837 (1923).

**Their right to vote for directors is specifically prescribed by this section** and does not proceed from any act, contract, or bylaw of the corporation. *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Fort Lyon Canal Co.*, 173 F. 601 (8th Cir. 1909).

**However, denial of voting rights to one**

**class of common stock** in an election for directors of a corporation does not violate public policy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**This section operates as a restriction upon the jurisdiction of a court to control corporate elections;** a court has no jurisdiction, under the guise of either supervision or regulation, to direct the stockholders to proceed in electing directors in any other way than that which this section has provided. *People ex rel. Arkansas*

*Valley Sugar Beet & Irrigated Land Co. v. Burke*, 72 Colo. 486, 212 P. 837 (1923).

**And so stockholders who refuse to obey the provision of a decree** rendered by a district court requiring them in nominating and voting for directors to observe the provisions of that decree, which is contrary to the way which this section provides, are not guilty of contempt. *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Lubers*, 72 Colo. 513, 212 P. 848 (1923).

**7-108-106. Staggered terms for directors.** The articles of incorporation may provide for staggering the terms of directors by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of directors in the second group expire at the second annual shareholders' meeting after their election, and the terms of directors in the third group, if any, expire at the third annual shareholders' meeting after their election. Upon the expiration of the initial staggered terms, directors shall be elected for terms of two years or three years, as the case may be, to succeed those whose terms expire.

**Source:** L. 93: Entire article added, p. 779, § 1, effective July 1, 1994.

**7-108-107. Resignation of directors.** (1) A director may resign at any time by giving written notice of resignation to the corporation.

(2) A resignation of a director is effective when the notice is received by the corporation unless the notice states a later effective date.

(3) Repealed.

**Source:** L. 93: Entire article added, p. 780, § 1, effective July 1, 1994. L. 2000: (3) amended, p. 978, § 56, effective July 1. L. 2002: (3) amended, p. 1848, § 111, effective July 1; (3) amended, p. 1713, § 111, effective October 1. L. 2003: (2) amended, p. 2319, § 241, effective July 1, 2004. L. 2004: (3) repealed, p. 1498, § 253, effective July 1.

**7-108-108. Removal of directors by shareholders.** (1) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(2) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove that director.

(3) A director may be removed only if the number of votes cast in favor of removal exceeds the number of votes cast against removal; except that, if cumulative voting is in effect, a director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against such removal.

(4) A director may be removed by the shareholders only at a meeting called for the purpose of removing the director, and the meeting notice shall state that the purpose, or one of the purposes, of the meeting is removal of the director.

(5) (Deleted by amendment, L. 2004, p. 1498, § 254, effective July 1, 2004.)

**Source:** L. 93: Entire article added, p. 780, § 1, effective July 1, 1994. L. 2000: (5) amended, p. 978, § 57, effective July 1. L. 2002: (5) amended, p. 1848, § 112, effective July 1; (5) amended, p. 1713, § 112, effective October 1. L. 2004: (4) and (5) amended, p. 1498, § 254, effective July 1.

**7-108-109. Removal of directors by judicial proceeding.** (1) A director may be removed by the district court for the county in this state in which the street address of the corporation's principal office is located or, if the corporation has no principal office in this



state, by the district court for the county in which the street address of its registered agent is located or, if the corporation has no registered agent, by the district court for the city and county of Denver, in a proceeding commenced either by the corporation or by shareholders holding at least ten percent of the outstanding shares of any class, if the court finds that the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation and that removal is in the best interests of the corporation.

(2) The court that removes a director may bar the director from reelection for a period prescribed by the court.

(3) If shareholders commence a proceeding under subsection (1) of this section, they shall make the corporation a party defendant.

(4) Repealed.

**Source:** **L. 93:** Entire article added, p. 780, § 1, effective July 1, 1994. **L. 96:** (1) amended, p. 1318, § 21, effective June 1. **L. 2000:** (4) amended, p. 978, § 58, effective July 1. **L. 2002:** (4) amended, p. 1848, § 113, effective July 1; (4) amended, p. 1713, § 113, effective October 1. **L. 2003:** (1) amended, p. 2319, § 242, effective July 1, 2004. **L. 2004:** (4) repealed, p. 1498, § 255, effective July 1.

**7-108-110. Vacancy on board.** (1) Unless otherwise provided in the articles of incorporation, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) The shareholders may fill the vacancy;

(b) The board of directors may fill the vacancy; or

(c) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) Notwithstanding subsection (1) of this section, unless otherwise provided in the articles of incorporation, if the vacant office was held by a director elected by a voting group of shareholders:

(a) If one or more of the remaining directors were elected by the same voting group, only such directors are entitled to vote to fill the vacancy if it is filled by directors, and they may do so by the affirmative vote of a majority of such directors remaining in office; and

(b) Only the holders of shares of that voting group are entitled to vote to fill the vacancy if it is filled by the shareholders.

(3) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under section 7-108-107 (2) or otherwise, may be filled before the vacancy occurs, but the new director may not take office until the vacancy occurs.

**Source:** **L. 93:** Entire article added, p. 781, § 1, effective July 1, 1994.

**7-108-111. Compensation of directors.** Unless otherwise provided in the bylaws, the board of directors may fix the compensation of directors.

**Source:** **L. 93:** Entire article added, p. 781, § 1, effective July 1, 1994.

## PART 2

### MEETINGS AND ACTION OF THE DIRECTORS

**Law reviews:** For article, “Contractually Binding Colorado Entities”, see 28 Colo. Law. 33 (December 1999).

**7-108-201. Meetings.** (1) The board of directors may hold regular or special meetings in or out of this state.

(2) Unless otherwise provided in the bylaws, the board of directors may permit any director to participate in a regular or special meeting by, or conduct the meeting through the

use of, any means of communication by which all directors participating may hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

**Source:** L. 93: Entire article added, p. 782, § 1, effective July 1, 1994.

**7-108-202. Action without meeting.** (1) Unless the bylaws require that the action be taken at a meeting, any action required or permitted by articles 101 to 117 of this title to be taken at a board of directors' meeting may be taken without a meeting if all members of the board consent to such action in writing.

(2) Action is taken under this section at the time the last director signs a writing describing the action taken, unless, before such time, any director has revoked the director's consent by a writing signed by the director and received by the secretary or any other person authorized by the bylaws or the board of directors to receive such a revocation.

(3) Action under this section is effective at the time it is taken as provided by subsection (2) of this section, unless the directors establish a different effective date.

(4) Action taken pursuant to this section has the same effect as action taken at a meeting of directors and may be described as such in any document.

**Source:** L. 93: Entire article added, p. 782, § 1, effective July 1, 1994. L. 2004: (2) amended, p. 1498, § 256, effective July 1.

**7-108-203. Notice of meeting.** (1) Unless otherwise provided in the bylaws, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(2) Unless the bylaws provide for a longer or shorter period, special meetings of the board of directors shall be preceded by at least two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the bylaws.

**Source:** L. 93: Entire article added, p. 782, § 1, effective July 1, 1994.

**7-108-204. Waiver of notice.** (1) A director may waive any notice of a meeting before or after the time and date of the meeting stated in the notice. Except as provided by subsection (2) of this section, the waiver shall be in writing and signed by the director entitled to the notice. Such waiver shall be delivered to the corporation for filing with the corporate records, but such delivery and filing shall not be conditions of the effectiveness of the waiver.

(2) A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless:

(a) At the beginning of the meeting or promptly upon the director's later arrival, the director objects to holding the meeting or transacting business at the meeting because of lack of notice or defective notice and does not thereafter vote for or assent to action taken at the meeting; or

(b) If special notice was required of a particular purpose pursuant to section 7-108-203 (2), the director objects to transacting business with respect to the purpose for which such special notice was required and does not thereafter vote for or assent to action taken at the meeting with respect to such purpose.

**Source:** L. 93: Entire article added, p. 782, § 1, effective July 1, 1994. L. 2004: IP(2) and (2)(a) amended, p. 1498, § 257, effective July 1.

**7-108-205. Quorum and voting.** (1) Unless a greater number is required by the bylaws, a quorum of a board of directors consists of:

(a) A majority of the number of directors fixed if the corporation has a fixed board size; or



(b) A majority of the number of directors fixed or, if no number is fixed, of the number in office immediately before the meeting begins, if a range for the size of the board is established pursuant to section 7-108-103 (2).

(2) The bylaws may authorize a quorum of a board of directors to consist of:

(a) No fewer than a majority of the number of directors fixed if the corporation has a fixed board size; or

(b) No fewer than a majority of the number of directors fixed or, if no number is fixed, of the number in office immediately before the meeting begins, if a range for the size of the board is established pursuant to section 7-108-103 (2).

(3) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the vote of a greater number of directors is required by articles 101 to 117 of this title or the bylaws.

(4) A director who is present at a meeting of the board of directors when corporate action is taken is deemed to have assented to all action taken at the meeting unless:

(a) The director objects at the beginning of the meeting, or promptly upon the director's arrival, to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to any action taken at the meeting;

(b) The director contemporaneously requests that the director's dissent or abstention as to any specific action taken be entered in the minutes of the meeting; or

(c) The director causes written notice of the director's dissent or abstention as to any specific action to be received by the presiding officer of the meeting before adjournment of the meeting or by the corporation promptly after adjournment of the meeting.

(5) The right of dissent or abstention pursuant to subsection (4) of this section as to a specific action is not available to a director who votes in favor of the action taken.

**Source:** L. 93: Entire article added, p. 783, § 1, effective July 1, 1994. L. 96: (1) amended, p. 1318, § 22, effective June 1. L. 2004: (4) amended, p. 1498, § 258, effective July 1.

**7-108-206. Committees.** (1) Except as otherwise provided in the bylaws and subject to the provisions of section 7-109-106, the board of directors may create one or more committees and appoint one or more members of the board of directors to serve on them.

(2) The creation of a committee and appointment of members to it shall be approved by the greater of a majority of all the directors in office when the action is taken or the number of directors required by the bylaws to take action under section 7-108-205.

(3) Sections 7-108-201 to 7-108-205, which govern meetings, action without meeting, notice, waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

(4) To the extent stated in the bylaws or by the board of directors, each committee shall have the authority of the board of directors under section 7-108-101; except that a committee shall not:

(a) Authorize distributions;

(b) Approve or propose to shareholders action that articles 101 to 117 of this title require to be approved by shareholders;

(c) Fill vacancies on the board of directors or on any of its committees;

(d) Amend articles of incorporation pursuant to section 7-110-102;

(e) Adopt, amend, or repeal bylaws;

(f) Approve a plan of conversion or plan of merger not requiring shareholder approval;

(g) Authorize or approve reacquisition of shares, except according to a formula or method prescribed by the board of directors; or

(h) Authorize or approve the issuance or sale of shares, or a contract for the sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares; except that the board of directors may authorize a committee or an officer to do so within limits specifically prescribed by the board of directors.

(5) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section 7-108-401.

**Source:** **L. 93:** Entire article added, p. 784, § 1, effective July 1, 1994. **L. 96:** IP(4) amended, p. 1318, § 23, effective June 1. **L. 2003:** IP(4) amended, p. 2320, § 243, effective July 1, 2004. **L. 2007:** (4)(f) amended, p. 245, § 42, effective May 29.

### PART 3

## OFFICERS

**7-108-301. Officers.** (1) A corporation shall have the officers designated in its bylaws or by the board of directors. An officer shall be an individual who is eighteen years of age or older.

(2) Officers may be appointed by the board of directors or in such other manner as the board of directors or bylaws may provide. A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(3) The bylaws or the board of directors shall delegate to one or more of the officers responsibility for the preparation and maintenance of minutes of the directors' and shareholders' meetings and other records and information required to be kept by the corporation under section 7-116-101 and for authenticating records of the corporation.

(4) The same individual may simultaneously hold more than one office in the corporation.

**Source:** **L. 93:** Entire article added, p. 785, § 1, effective July 1, 1994. **L. 2004:** (1) amended, p. 1499, § 259, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983).

**Annotator's note.** Since § 7-108-301 is similar to § 7-5-115 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Contract which gives individual power to elect officers is void.** A contract executed by a corporation which surrenders to an individual the power and duty of stockholders or directors to elect officers and select employees is against public policy and void. *Borland v. Sass Printing Co.*, 95 Colo. 53, 32 P.2d 827 (1934) (decided under repealed C.L. 21, §§ 2243, 2250, 2251, and 2263).

**Officers may be held personally liable.** Under certain circumstances the corporate form may be disregarded where justice requires such action, and personal liability will then be imposed upon those officers of a corporation who stand behind the corporate form as a shield. *Contractors Heating & Supply Co. v. Scherb*, 163 Colo. 584, 432 P.2d 237 (1967).

**The corporate form, however, will not be disregarded** to hold an officer of a corporation

personally liable unless a clear showing is made that it was used to perpetuate a fraud or defeat a rightful claim. *Contractors Heating & Supply Co. v. Scherb*, 163 Colo. 584, 432 P.2d 237 (1967).

**Informal conduct of business not enough to hold officer personally liable.** Standing alone, informalities in the conduct of a corporate business by one of its officers does not form a basis for piercing the corporate form to hold an officer personally liable for debts incurred by the corporation. *Contractors Heating & Supply Co. v. Scherb*, 163 Colo. 584, 432 P.2d 237 (1967).

**Treasurer's intentional misrepresentations sufficient to sustain punitive damages against corporation.** A finding that the treasurer of a corporation, acting within the scope of his employment, intentionally made material misrepresentations is sufficient, in and of itself, to sustain an award of punitive damages against the corporation. *Fitzgerald v. Edelen*, 623 P.2d 418 (Colo. App. 1980).

**Where the president of a corporation acts in a representative capacity** for the corporation and the plaintiff knows that he is dealing with an entity other than the president acting in his individual capacity, the president cannot be held personally liable. *Bidwell v. Jolly*, 716 P.2d 481 (Colo. App. 1986).

**Applied** in *Masinton v. Dean*, 659 P.2d 50 (Colo. App. 1982).

**7-108-302. Duties of officers.** Each officer shall have the authority and shall perform the duties stated with respect to the officer's office in the bylaws or, to the extent not



inconsistent with the bylaws, prescribed with respect to that office by the board of directors or by an officer authorized by the board of directors.

**Source:** **L. 93:** Entire article added, p. 785, § 1, effective July 1, 1994. **L. 2003:** Entire section amended, p. 2320, § 244, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1499, § 260, effective July 1.

### ANNOTATION

**Law reviews.** For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983).

**Annotator's note.** Since § 7-108-302 is similar to § 7-5-115 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Contract which gives individual power to elect officers is void.** A contract executed by a corporation which surrenders to an individual the power and duty of stockholders or directors to elect officers and select employees is against public policy and void. *Borland v. Sass Printing Co.*, 95 Colo. 53, 32 P.2d 827 (1934) (decided under repealed C.L. 21, §§ 2243, 2250, 2251, and 2263).

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**Where the president of a corporation acts in a representative capacity** for the corporation and the plaintiff knows that he is dealing with an entity other than the president acting in his individual capacity, the president cannot be held personally liable. *Bidwell v. Jolly*, 716 P.2d 481 (Colo. App. 1986).

**Applied in** *Masinton v. Dean*, 659 P.2d 50 (Colo. App. 1982).

**7-108-303. Resignation and removal of officers.** (1) An officer may resign at any time by giving written notice of resignation to the corporation.

(2) A resignation of an officer is effective when the notice is received by the corporation unless the notice states a later effective date.

(3) If a resignation is made effective at a later date, the board of directors may permit the officer to remain in office until the effective date and may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date, or the board of directors may remove the officer at any time before the effective date and may fill the resulting vacancy.

(4) Unless otherwise provided in the bylaws, the board of directors may remove any officer at any time with or without cause. The bylaws or the board of directors may make provision for the removal of officers by other officers or by the shareholders.

(5) Repealed.

**Source:** **L. 93:** Entire article added, p. 785, § 1, effective July 1, 1994. **L. 2000:** (5) amended, p. 978, § 59, effective July 1. **L. 2002:** (5) amended, p. 1848, § 114, effective July 1; (5) amended, p. 1713, § 114, effective October 1. **L. 2003:** (2) amended, p. 2320, § 245, effective July 1, 2004. **L. 2004:** (5) repealed, p. 1499, § 261, effective July 1.

**7-108-304. Contract rights with respect to officers.** (1) The appointment of an officer does not itself create contract rights.

(2) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer.

**Source: L. 93:** Entire article added, p. 786, § 1, effective July 1, 1994.

## PART 4

### STANDARDS OF CONDUCT

**7-108-401. General standards of conduct for directors and officers.** (1) Each director shall discharge the director's duties as a director, including the director's duties as a member of a committee, and each officer with discretionary authority shall discharge the officer's duties under that authority:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director or officer reasonably believes to be in the best interests of the corporation.

(2) In discharging duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(a) One or more officers or employees of the corporation whom the director or officer reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, a public accountant, or another person as to matters the director or officer reasonably believes are within such person's professional or expert competence; or

(c) In the case of a director, a committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(3) A director or officer is not acting in good faith if the director or officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) A director or officer is not liable as such to the corporation or its shareholders for any action the director or officer takes or omits to take as a director or officer, as the case may be, if, in connection with such action or omission, the director or officer performed the duties of the position in compliance with this section.

(5) A director or officer of a corporation, in the performance of duties in that capacity, shall not have any fiduciary duty to any creditor of the corporation arising only from the status as a creditor.

**Source: L. 93:** Entire article added, p. 786, § 1, effective July 1, 1994. **L. 2004:** IP(1), (1)(c), IP(2), (3), and (4) amended, p. 1499, § 262, effective July 1. **L. 2006:** (5) added, p. 880, § 71, effective July 1.

## ANNOTATION

To prevail under the safe harbor affirmative defense, a defendant is required to prove each element of the defense. *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo. App. 2007).

Effect of corporation's insolvency on directors' and officers' duty to creditors is not clear

under the 2006 amendment to subsection (5), but where plaintiff showed only that corporation was "never successful financially", insolvency was not proven and an action for individual liability on corporate debt could not be sustained. *McCallum Family L.L.C. v. Winger*, 221 P.3d 69 (Colo. App. 2009).

**7-108-402. Limitation of certain liabilities of directors and officers.** (1) If so provided in the articles of incorporation, the corporation shall eliminate or limit the personal



liability of a director to the corporation or to its shareholders for monetary damages for breach of fiduciary duty as a director; except that any such provision shall not eliminate or limit the liability of a director to the corporation or to its shareholders for monetary damages for any breach of the director's duty of loyalty to the corporation or to its shareholders, acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, acts specified in section 7-108-403, or any transaction from which the director directly or indirectly derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director to the corporation or to its shareholders for monetary damages for any act or omission occurring before the date when such provision becomes effective.

(2) No director or officer shall be personally liable for any injury to person or property arising out of a tort committed by an employee unless such director or officer was personally involved in the situation giving rise to the litigation or unless such director or officer committed a criminal offense in connection with such situation. The protection afforded in this subsection (2) shall not restrict other common-law protections and rights that a director or officer may have. This subsection (2) shall not restrict the corporation's right to eliminate or limit the personal liability of a director to the corporation or to its shareholders for monetary damages for breach of fiduciary duty as a director as provided in subsection (1) of this section.

**Source: L. 93:** Entire article added, p. 787, § 1, effective July 1, 1994.

**7-108-403. Liability of directors for unlawful distributions.** (1) A director who votes for or assents to a distribution made in violation of section 7-106-401 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating said section or the articles of incorporation if it is established that the director did not perform the director's duties in compliance with section 7-108-401. In any proceeding commenced under this section, a director shall have all of the defenses ordinarily available to a director.

(2) A director held liable under subsection (1) of this section for an unlawful distribution is entitled to contribution:

(a) From every other director who could be held liable under subsection (1) of this section for the unlawful distribution; and

(b) From each shareholder who accepted the distribution knowing the distribution was made in violation of section 7-106-401 or the articles of incorporation, the amount of the contribution from such shareholder being the amount of the distribution to that shareholder that exceeds what could have been distributed to that shareholder without violating said section or the articles of incorporation.

**Source: L. 93:** Entire article added, p. 787, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "Phases of the Revenue Act of 1936", see 12 Dicta 29 (1936). For article, "Corporate Dividend Limitations", see 27 Dicta 99 (1950). For article, "One Year Review of Agency, Partnerships, and Corporations", see 39 Dicta 61 (1962). For article, "Continuing Liability for Unpaid Corporate Debts After a Corporation Ceases Business", see 14 Colo. Law. 40 (1985). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Corporate Director Liability", see 65 Den. U. L. Rev. 59 (1988). For article, "Conflicts of Interest and the Director's Duty of Loyalty", see 17 Colo. Law. 1969 (1988).

**Annotator's note.** Since § 7-108-403 is similar to § 7-5-114 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Purpose behind subsection (1)(c) is the protection of creditors.** *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982).

Since the corporate existence is terminated, the only reason to permit recovery by the corporation is so that it may utilize the moneys to satisfy the unpaid creditors. *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982).

**Subsections (1) and (2) (now subsections (1)(a) and (1)(b)) are not penal in nature,** and the one-year statute of limitations imposed by § 13-80-104 does not apply thereto. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Where liability is created under this section, any creditor within its terms has a cause of action** against the enumerated individuals. *Fitzgerald v. Marshall*, 161 F. Supp. 470 (D. Colo. 1958).

**And the liability so created under this section is personal to the creditors** and cannot be invoked by the corporation, does not become an asset of its estate in bankruptcy, and is not enforceable by its trustee. *Fitzgerald v. Marshall*, 161 F. Supp. 470 (D. Colo. 1958).

**Stockholder's liability for breach of duty to corporation.** Although it is generally the corporate officers and directors, and not the shareholders, who are charged with the duty of exercising the powers of a corporation and, thus, are the ones who usually incur personal liability for breach of that duty, a stockholder may subject himself to similar liability if, because of his actions as an individual, made possible by reason of his being a stockholder, the corporation acts improperly. *McHugh v. Ficor, Inc.*, 43 Colo. App. 409, 611 P.2d 578 (1979), *aff'd*, 639 P.2d 385 (Colo. 1982).

**Stockholder liability does not arise from mere knowledge of and acquiescence in corporate wrongdoing** by a stockholder, but must be accompanied by an overt exercise of power, authority, or influence in directing, controlling, or managing the company. *McHugh v. Ficor, Inc.*, 43 Colo. App. 409, 611 P.2d 578 (1979), *aff'd*, 639 P.2d 385 (Colo. 1982).

**This section imposes civil liability on directors for payment of a dividend while insolvent.** *Guarantee Reserve Life Ins. Co. v. Holzwarth*, 148 Colo. 366, 366 P.2d 377 (1961).

**Section not inconsistent with provisions governing insurance companies.** The provision of this section that directors who declare a dividend while corporation is insolvent shall be liable for debts of corporation and § 10-3-204 making it unlawful for directors of an insurance company to declare dividends except from surplus or profits and providing penalties therefor are not inconsistent; rather § 10-3-204 does not purport to afford any relief from the burdens imposed by this section but declares similar acts of directors of insurance companies to be "unlawful" and fixes the punishment of one "found guilty". *Guarantee Reserve Life Ins. Co. v. Holzworth*, 148 Colo. 366, 366 P.2d 377 (1961).

**Thus insurance company directors are also answerable under this section.** The fact that a director of a corporation might be tried and punished for unlawful acts under § 10-3-204, providing for punishment for unlawful issuance of dividends by insurance companies, does not

preclude his being answerable in a civil action under this section for the same acts though not designated as "unlawful". *Guarantee Reserve Life Ins. Co. v. Holzwarth*, 148 Colo. 366, 366 P.2d 377 (1961).

**Corporation's directors cannot be assessed the interest** paid by the corporation upon money borrowed to purchase its own stock where such purchase is not illegal. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Circumstances at time of wrongful dissolution determine directors' obligations.** Where corporate assets are distributed following a dissolution in violation of the law, circumstances at the time the cause of action accrued determine the obligations of corporation's directors. *McHugh v. Ficor, Inc.*, 43 Colo. App. 409, 611 P.2d 578 (1979), *aff'd*, 639 P.2d 385 (Colo. 1982).

**Directors of liquidated corporation are trustees for creditors.** The directors of a corporation which is being liquidated are trustees for the creditors of the corporation, and are personally liable to those creditors if they take corporate property for their own benefit rather than making provision for the payment of creditors. *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982).

**Directors are jointly and severally liable following wrongful dissolution.** Where the directors of a corporation distributed the corporation's assets without making adequate provision for the satisfaction of corporate obligations, and where creditors were able to assert the rights that the corporation had even though the corporation was dissolved, directors of corporation were jointly and severally liable. *McHugh v. Ficor, Inc.*, 43 Colo. App. 409, 611 P.2d 578 (1979), *aff'd*, 639 P.2d 385 (Colo. 1982); *1629 Joint Venture v. Dahlquist*, 770 P.2d 1352 (Colo. App. 1989), *cert. denied*, 777 P.2d 1182 (Colo. 1989).

**No recovery allowed against directors for attorney fees properly authorized in behalf of corporation.** *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Acceptance of indemnifying note not making of "loan".** Where the corporation had settled a claim on which it was primarily liable, and, pursuant to company policy, the corporate officer had indemnified the corporation, part of which indemnification was in the form of a note, this acceptance of the note did not constitute the making of a "loan" within the meaning of the statute. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Accommodation loan to corporation officer found to be proper.** *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972).

**Damages are based directly upon injuries suffered by the corporation,** as opposed to a liquidated measure without regard to injury. Se-



curity Nat'l Bank v. Peters, Writer & Christensen, Inc., 39 Colo. App. 344, 569 P.2d 875 (1977).

**Value of assets to be considered in determining amount of judgment against corporate directors** for wrongfully distributing corporate assets upon dissolution is the market value of the assets less the amount of the liens against them. *McHugh v. Ficor, Inc.*, 43 Colo. App. 409, 611 P.2d 578 (1979), *aff'd*, 639 P.2d 385 (Colo. 1982).

**When claim against directors must be commenced.** Under § 13-80-114, a claim under this section must be commenced within five years of the improper purchase. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

Any claim against directors based upon an improper dividend payment must be commenced within five years of such payment. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Only the corporation may sue under subsection (3) (now subsection (1)(c)).** *Rosebud Corp. v. Boggio*, 39 Colo. App. 84, 561 P.2d 367 (1977).

**But remedy may be asserted by creditors as a group.** All creditors of a corporation, as a group, may assert the remedy in subsection (1)(c) on behalf of the corporation for their own benefit. *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982).

**Creditors may not sue directors personally under subsection (1)(c).** By the express terms of subsection (3)(now subsection (1)(c)) the directors' liability runs only to the corporation itself. It therefore follows that creditors may not sue directors personally under the statute. *Rosebud Corp. v. Boggio*, 39 Colo. App. 84, 561 P.2d 367 (1977).

**But may sue them personally in appropriate cases.** Creditors are not precluded from suing directors and having them held personally liable for corporation obligations in appropriate cases. Former subsection (9) stated that the liabilities imposed on directors by virtue of this section were in addition to "any other liabilities imposed by law on directors of a corporation", and it follows that if a creditor establishes the breach of a common-law duty owed to him, for which directors may be held personally liable, dismissal of the claim would be improper. *Rosebud Corp. v. Boggio*, 39 Colo. App. 84, 561 P.2d 367 (1977).

Corporate entity may be disregarded and directors held personally liable if equity so requires, i.e. adherence to the corporate fiction would promote injustice, protect fraud, defeat a legitimate claim, or defend crime. *La Fond v. Basham*, 683 P.2d 367 (Colo. App. 1984); *Ward v. Cooper*, 685 P.2d 1382 (Colo. App. 1984); *Micicche v. Billings*, 727 P.2d 367 (Colo. 1986).

Since directors of an insolvent corporation are deemed to be trustees for it and its creditors, they owe a duty to the corporate creditors not to divest corporate property for their own benefit and thus defeat a creditor's claim. If the duty is breached, the creditors may sue the directors and hold them personally liable. *Collie v. Becknell*, 762 P.2d 727 (Colo. App. 1988).

**A director is personally liable** to the corporation only for that portion of the distribution that makes the corporation insolvent. *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo. App. 2007).

**Judgment creditors may enforce any cause of action belonging to corporation.** Although only the damaged corporation has a cause of action under subsection (3)(now subsection (1)(c)), judgment creditors of a corporation are entitled to enforce their judgments by enforcing any cause of action belonging to the corporation notwithstanding the fact that the corporation has been dissolved. *McHugh v. Ficor, Inc.*, 43 Colo. App. 409, 611 P.2d 578 (1979), *aff'd*, 639 P.2d 385 (Colo. 1982).

**Liability imposed by subsection (1)(d).** Subsection (4)(now subsection (1)(d)) and §§ 7-3-102 and 7-5-110 expressly make directors personally liable to the corporation. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Such liability is absolute.** Liability under subsection (4)(now subsection (1)(d)) and §§ 7-3-102 and 7-5-110 is absolute save for the statutory defenses set forth in subsection (6)(now § 7-5-101 (2)). *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**A showing of fraud is not required** to impose liability under subsection (4)(now subsection (1)(d)) and §§ 7-3-102 and 7-5-110. *Security Nat'l Bank v. Peters, Writer & Christensen, Inc.*, 39 Colo. App. 344, 569 P.2d 875 (1977).

**Subsection (1)(c) does not impose a fiduciary duty within the meaning of 11 U.S.C.A. § 523 (a)(4) of the bankruptcy code.** In *re Anzman*, 73 Bankr. 156 (Bankr. D. Colo. 1986).

**Although a director owes no general duty to use or pledge his personal funds** to enable the corporation to take advantage of a business opportunity, he owes a duty to refrain from intentional activity aimed at allowing the corporation to become insolvent and thereby usurp a corporate opportunity for his own benefit. *Collie v. Becknell*, 762 P.2d 727 (Colo. App. 1988).

If a director usurps a corporate opportunity, he will be deemed to hold the usurped property in constructive trust for the corporation and he will be required to account to the corporation for any profit made on the transaction. *Collie v. Becknell*, 762 P.2d 727 (Colo. App. 1988).

**Satisfaction by one releases all.** Where obligation is joint and several, payment by one obligor discharges obligations of others who

might have been jointly liable on the same claim. 1629 Joint Venture v. Dahlquist, 770 P.2d 1352 (Colo. App.), cert. denied, 777 P.2d 1182 (Colo. 1989).

**A cause of action under this section runs to the corporation itself for its own benefit or for**

**the benefit of creditors.** Thus, a garnishment is an appropriate proceeding in which to litigate issues arising under this section. Walk-In Medical Centers, Inc. v. Breuer Capital Corp., 778 F. Supp. 1116 (D. Colo. 1991).

## PART 5

### DIRECTOR - CONFLICTS OF INTEREST

**7-108-501. Conflicting interest transaction - repeal.** (1) (a) As used in this section, “conflicting interest transaction” means any of the following:

(I) A loan or other assistance by a corporation to a director of the corporation or to an entity in which a director of the corporation is a director or officer or has a financial interest;

(II) A guaranty by a corporation of an obligation of a director of the corporation or of an obligation of an entity in which a director of the corporation is a director or officer or has a financial interest; or

(III) A contract or transaction between a corporation and a director of the corporation or between the corporation and an entity in which a director of the corporation is a director or officer or has a financial interest.

(b) “Conflicting interest transaction” shall not include any transaction between a corporation and another entity that owns, directly or indirectly, all of the outstanding shares of the corporation or all of the outstanding shares or other equity interests of which are owned, directly or indirectly, by the corporation.

(2) No conflicting interest transaction shall be void or voidable or be enjoined, set aside, or give rise to an award of damages or other sanctions in a proceeding by a shareholder or by or in the right of the corporation, solely because the conflicting interest transaction involves a director of the corporation or an entity in which a director of the corporation is a director or officer or has a financial interest or solely because the director is present at or participates in the meeting of the corporation’s board of directors or of the committee of the board of directors which authorizes, approves, or ratifies the conflicting interest transaction or solely because the director’s vote is counted for such purpose if:

(a) The material facts as to the director’s relationship or interest and as to the conflicting interest transaction are disclosed or are known to the board of directors or the committee, and the board of directors or committee in good faith authorizes, approves, or ratifies the conflicting interest transaction by the affirmative vote of a majority of the disinterested directors, even though the disinterested directors are less than a quorum; or

(b) The material facts as to the director’s relationship or interest and as to the conflicting interest transaction are disclosed or are known to the shareholders entitled to vote thereon, and the conflicting interest transaction is specifically authorized, approved, or ratified in good faith by a vote of the shareholders; or

(c) The conflicting interest transaction is fair as to the corporation.

(3) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes, approves, or ratifies the conflicting interest transaction.

(4) (a) Neither a board of directors nor a committee thereof shall authorize a loan, by the corporation to a director of the corporation or to an entity in which a director of the corporation is a director or officer or has a financial interest, or a guaranty, by the corporation of an obligation of a director of the corporation or of an obligation of an entity in which a director of the corporation is a director or officer or has a financial interest, pursuant to paragraph (a) of subsection (2) of this section, until at least ten days after written notice of the proposed authorization of the loan or guaranty has been given to the shareholders who would be entitled to vote thereon if the issue of the loan or guaranty were submitted to a vote of the shareholders.

(b) (I) Notwithstanding any provision of paragraph (a) of this subsection (4) to the contrary, a board of directors or a subsidiary of the corporation shall not authorize the



corporation or subsidiary of the corporation to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit in the form of a personal loan to or for a director of the corporation pursuant to paragraph (a) of subsection (2) of this section. For the purposes of this paragraph (b), a corporation or entity is limited to an issuer as defined in section 2 of the federal "Sarbanes-Oxley Act of 2002", 15 U.S.C. sec. 7201.

(II) The provisions of this paragraph (b) shall not apply to:

(A) An extension of credit or guaranty maintained by a corporation or entity on August 6, 2003, so long as there is no material modification made to the extension of credit or guaranty or the extension of credit or guaranty is not renewed;

(B) An extension of credit or guaranty for a home improvement loan or manufactured home loan under section 5 of the federal "Home Owner's Loan Act", 12 U.S.C. sec. 1464;

(C) An extension of credit or guaranty for a consumer credit loan as defined in the federal "Truth in Lending Act", 15 U.S.C. sec. 1602;

(D) An extension of credit under an open end credit plan pursuant to section 103 of the federal "Truth in Lending Act", 15 U.S.C. sec. 1602;

(E) An extension of credit from a charge card pursuant to the federal "Truth in Lending Act", 15 U.S.C. sec. 1637 (c) (4) (e);

(F) An extension of credit by a broker or dealer that buys, trades, or carries securities permitted under rules of the board of governors of the federal reserve system to an employee to buy, trade, or carry securities; except that such extension of credit shall not include an extension of credit that would be used to purchase stock of the corporation or entity employing such employee; or

(G) An extension of credit that is subject to 12 CFR 215 or 12 CFR 223, as amended, or any rule promulgated by the division of banking.

(III) An extension of credit pursuant to subparagraph (II) of this paragraph (b) shall be issued in terms no more favorable than terms offered to a member of the public for an extension of credit generally made available to a member of the public, and made in the ordinary course of business.

(IV) Subparagraphs (I) to (III) of this paragraph (b) are repealed as of the effective date of any federal law that would permit any activity described in this paragraph (b).

**Source:** L. 93: Entire article added, p. 788, § 1, effective July 1, 1994. L. 96: (1) and (2)(c) amended, p. 1319, § 24, effective June 1. L. 2003: (4) amended, p. 2527, § 1, effective August 6. L. 2004: (4)(a) amended, p. 1500, § 263, effective July 1.

ANNOTATION

**Law reviews.** For article, "Conflict of Interest Transactions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders", see 57 Den. L.J. 609 (1980). For article, "The Dual Role of Corporate Counsel Serving on the Board of Directors", see 13 Colo. Law. 792 (1984). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Corporate Director Liability", see 65 Den. U. L. Rev. 59 (1988).

**Annotator's note.** Since § 7-108-501 is similar to § 7-5-114.5 as it existed prior to the 1993

recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**The test for whether a transaction is fair** is whether under all the circumstances it carries the earmarks of an arm's length bargain. *Kim v. Grover C. Coors Trust*, 179 P.3d 86 (Colo. App. 2007).

**Applied** in *O'Malley v. Casey*, 42 Colo. App. 85, 589 P.2d 1388 (1979).

ARTICLE 109

Indemnification

7-109-101.	Definitions.	directors.
7-109-102.	Authority to indemnify directors.	7-109-104. Advance of expenses to directors.
7-109-103.	Mandatory indemnification of	7-109-105. Court-ordered indemnification of

	directors.	7-109-108.	Insurance.
7-109-106.	Determination and authorization of indemnification of directors.	7-109-109.	Limitation of indemnification of directors.
7-109-107.	Indemnification of officers, employees, fiduciaries, and agents.	7-109-110.	Notice to shareholders of indemnification of director.

**7-109-101. Definitions.** As used in this article:

(1) “Corporation” includes any domestic or foreign entity that is a predecessor of a corporation by reason of a merger or other transaction in which the predecessor’s existence ceased upon consummation of the transaction.

(2) “Director” means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation’s request as a director, an officer, an agent, an associate, an employee, a fiduciary, a manager, a member, a partner, a promoter, or a trustee of, or to hold any similar position with, another domestic or foreign entity or of an employee benefit plan. A director is considered to be serving an employee benefit plan at the corporation’s request if the director’s duties to the corporation also impose duties on, or otherwise involve services by, the director to the plan or to participants in or beneficiaries of the plan. “Director” includes, unless the context requires otherwise, the estate or personal representative of a deceased director.

(3) “Expenses” includes counsel fees.

(4) “Liability” means the obligation incurred with respect to a proceeding to pay a judgment, settlement, penalty, fine, including an excise tax assessed with respect to an employee benefit plan, or reasonable expenses.

(5) “Official capacity” means, when used with respect to a director, the office of director in a corporation and, when used with respect to a person other than a director as contemplated in section 7-109-107, the office in a corporation held by the officer or the employment, fiduciary, or agency relationship undertaken by the employee, fiduciary, or agent on behalf of the corporation. “Official capacity” does not include service for any other domestic or foreign corporation or other person or employee benefit plan.

(6) “Party” includes a person who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) “Proceeding” means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

**Source:** L. 93: Entire article added, p. 789, § 1, effective July 1, 1994. L. 96: (2) amended, p. 1319, § 25, effective June 1. L. 2003: (2) amended, p. 2320, § 246, effective July 1, 2004. L. 2004: (2) amended, p. 1500, § 264, effective July 1.

**Cross references:** For additional definitions applicable to this title, see §§ 7-90-102 and 7-101-401.

### ANNOTATION

A defense is “wholly successful” if an entire proceeding is disposed of on a basis that does not involve a finding of “liability”; thus, indemnification is mandated when jury found former director, officer, and employee breached a duty to the corporation but refused to award

the corporation damages due to lack of causation. *Waskel v. Guaranty Nat’l Corp.*, 23 P.3d 1214 (Colo. App. 2000) (declining to follow *Quark, Inc. v. Harley*, 141 F.3d 1185 (10th Cir. 1998)).

**7-109-102. Authority to indemnify directors.** (1) Except as provided in subsection (4) of this section, a corporation may indemnify a person made a party to a proceeding because the person is or was a director against liability incurred in the proceeding if:

- (a) The person’s conduct was in good faith; and
- (b) The person reasonably believed:



(I) In the case of conduct in an official capacity with the corporation, that such conduct was in the corporation's best interests; and

(II) In all other cases, that such conduct was at least not opposed to the corporation's best interests; and

(c) In the case of any criminal proceeding, the person had no reasonable cause to believe the person's conduct was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in or beneficiaries of the plan is conduct that satisfies the requirement of subparagraph (II) of paragraph (b) of subsection (1) of this section. A director's conduct with respect to an employee benefit plan for a purpose that the director did not reasonably believe to be in the interests of the participants in or beneficiaries of the plan shall be deemed not to satisfy the requirements of paragraph (a) of subsection (1) of this section.

(3) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(4) A corporation may not indemnify a director under this section:

(a) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(b) In connection with any other proceeding charging that the director derived an improper personal benefit, whether or not involving action in an official capacity, in which proceeding the director was adjudged liable on the basis that the director derived an improper personal benefit.

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

**Source:** L. 93: Entire article added, p. 790, § 1, effective July 1, 1994. L. 2004: (1) and (4) amended, p. 1500, § 265, effective July 1.

#### ANNOTATION

**Directors qualify for corporate indemnification if they are sued at least in part because, or by reason of the fact that, they are or were directors of a corporation.** Weisbart v. Agri Tech, Inc., 22 P.3d 954 (Colo. App. 2001).

**Corporation is prohibited from indemnifying a director only when the director has been found "liable" to the corporation;** when jury

found former director breached a duty to the corporation but refused to award the corporation damages because of a lack of causation, indemnification was not prohibited. Waskel v. Guaranty Nat'l Corp., 23 P.3d 1214 (Colo. App. 2000) (declining to follow Quark, Inc. v. Harley, 141 F.3d 1185 (10th Cir. 1998)).

**7-109-103. Mandatory indemnification of directors.** Unless limited by its articles of incorporation, a corporation shall indemnify a person who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the person was a party because the person is or was a director, against reasonable expenses incurred by the person in connection with the proceeding.

**Source:** L. 93: Entire article added, p. 791, § 1, effective July 1, 1994. L. 2004: Entire section amended, p. 1501, § 266, effective July 1.

#### ANNOTATION

**Indemnification not mandated** where former director was not "wholly successful" since the jury found him liable for breaching his fiduciary duty to the corporation and the mere fact that the jury refused to award the corporation

damages does not negate that finding. Quark, Inc. v. Harley, 141 F.3d 1185 (10th Cir. 1998).

**Indemnification is mandated** when jury found former director breached a duty to the corporation but refused to award the corporation

damages because of a lack of causation, since the defense was “wholly successful”. Waskel v. Guaranty Nat’l Corp., 23 P.3d 1214 (Colo. App.

2000) (declining to follow Quark, Inc. v. Harley, 141 F.3d 1185 (10th Cir. 1998)).

**7-109-104. Advance of expenses to directors.** (1) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(a) The director furnishes to the corporation a written affirmation of the director’s good faith belief that the director has met the standard of conduct described in section 7-109-102;

(b) The director furnishes to the corporation a written undertaking, executed personally or on the director’s behalf, to repay the advance if it is ultimately determined that the director did not meet the standard of conduct; and

(c) A determination is made that the facts then known to those making the determination would not preclude indemnification under this article.

(2) The undertaking required by paragraph (b) of subsection (1) of this section shall be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) Determinations and authorizations of payments under this section shall be made in the manner specified in section 7-109-106.

**Source:** L. 93: Entire article added, p. 791, § 1, effective July 1, 1994. L. 2004: (1) amended, p. 1501, § 267, effective July 1.

**7-109-105. Court-ordered indemnification of directors.** (1) Unless otherwise provided in the articles of incorporation, a director who is or was a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification in the following manner:

(a) If it determines that the director is entitled to mandatory indemnification under section 7-109-103, the court shall order indemnification, in which case the court shall also order the corporation to pay the director’s reasonable expenses incurred to obtain court-ordered indemnification.

(b) If it determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in section 7-109-102 (1) or was adjudged liable in the circumstances described in section 7-109-102 (4), the court may order such indemnification as the court deems proper; except that the indemnification with respect to any proceeding in which liability shall have been adjudged in the circumstances described in section 7-109-102 (4) is limited to reasonable expenses incurred in connection with the proceeding and reasonable expenses incurred to obtain court-ordered indemnification.

**Source:** L. 93: Entire article added, p. 792, § 1, effective July 1, 1994.

**7-109-106. Determination and authorization of indemnification of directors.** (1) A corporation may not indemnify a director under section 7-109-102 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in section 7-109-102. A corporation shall not advance expenses to a director under section 7-109-104 unless authorized in the specific case after the written affirmation and undertaking required by section 7-109-104 (1) (a) and (1) (b) are received and the determination required by section 7-109-104 (1) (c) has been made.

(2) The determinations required by subsection (1) of this section shall be made:

(a) By the board of directors by a majority vote of those present at a meeting at which a quorum is present, and only those directors not parties to the proceeding shall be counted in satisfying the quorum; or



(b) If a quorum cannot be obtained, by a majority vote of a committee of the board of directors designated by the board of directors, which committee shall consist of two or more directors not parties to the proceeding; except that directors who are parties to the proceeding may participate in the designation of directors for the committee.

(3) If a quorum cannot be obtained as contemplated in paragraph (a) of subsection (2) of this section, and a committee cannot be established under paragraph (b) of subsection (2) of this section, or, even if a quorum is obtained or a committee is designated, if a majority of the directors constituting such quorum or such committee so directs, the determination required to be made by subsection (1) of this section shall be made:

(a) By independent legal counsel selected by a vote of the board of directors or the committee in the manner specified in paragraph (a) or (b) of subsection (2) of this section or, if a quorum of the full board cannot be obtained and a committee cannot be established, by independent legal counsel selected by a majority vote of the full board of directors; or

(b) By the shareholders.

(4) Authorization of indemnification and advance of expenses shall be made in the same manner as the determination that indemnification or advance of expenses is permissible; except that, if the determination that indemnification or advance of expenses is permissible is made by independent legal counsel, authorization of indemnification and advance of expenses shall be made by the body that selected such counsel.

**Source: L. 93:** Entire article added, p. 792, § 1, effective July 1, 1994.

**7-109-107. Indemnification of officers, employees, fiduciaries, and agents.** (1) Unless otherwise provided in the articles of incorporation:

(a) An officer is entitled to mandatory indemnification under section 7-109-103, and is entitled to apply for court-ordered indemnification under section 7-109-105, in each case to the same extent as a director;

(b) A corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent of the corporation to the same extent as to a director; and

(c) A corporation may also indemnify and advance expenses to an officer, employee, fiduciary, or agent who is not a director to a greater extent, if not inconsistent with public policy, and if provided for by its bylaws, general or specific action of its board of directors or shareholders, or contract.

**Source: L. 93:** Entire article added, p. 793, § 1, effective July 1, 1994.

#### ANNOTATION

**Officers qualify for corporate indemnification if they are sued at least in part because, or by reason of the fact that, they are or were officers of a corporation.** *Weisbart v. Agri Tech, Inc.*, 22 P.3d 954 (Colo. App. 2001).

**Indemnification is mandated** when jury found former officers and employees breached a duty to the corporation but refused to award the

corporation damages because of a lack of causation, since the defense was "wholly successful" and corporate bylaws indemnified employees to the same extent as directors. *Waskel v. Guaranty Nat'l Corp.*, 23 P.3d 1214 (Colo. App. 2000) (declining to follow *Quark, Inc. v. Harley*, 141 F.3d 1185 (10th Cir. 1998)).

**7-109-108. Insurance.** A corporation may purchase and maintain insurance on behalf of a person who is or was a director, officer, employee, fiduciary, or agent of the corporation, or who, while a director, officer, employee, fiduciary, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, fiduciary, or agent of another domestic or foreign entity or of an employee benefit plan, against liability asserted against or incurred by the person in that capacity or arising from the person's status as a director, officer, employee, fiduciary, or agent, whether or not the corporation would have power to indemnify the person against the same liability under section 7-109-102, 7-109-103, or 7-109-107. Any such insurance may be procured from any insurance company designated by the board of directors, whether such insurance company

is formed under the law of this state or any other jurisdiction of the United States or elsewhere, including any insurance company in which the corporation has an equity or any other interest through stock ownership or otherwise.

**Source:** **L. 93:** Entire article added, p. 793, § 1, effective July 1, 1994. **L. 2003:** Entire section amended, p. 2320, § 247, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1501, § 268, effective July 1.

**7-109-109. Limitation of indemnification of directors.** (1) A provision treating a corporation’s indemnification of, or advance of expenses to, directors that is contained in its articles of incorporation or bylaws, in a resolution of its shareholders or board of directors, or in a contract, except an insurance policy, or otherwise, is valid only to the extent the provision is not inconsistent with sections 7-109-101 to 7-109-108. If the articles of incorporation limit indemnification or advance of expenses, indemnification and advance of expenses are valid only to the extent not inconsistent with the articles of incorporation.

(2) Sections 7-109-101 to 7-109-108 do not limit a corporation’s power to pay or reimburse expenses incurred by a director in connection with an appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent in the proceeding.

**Source:** **L. 93:** Entire article added, p. 794, § 1, effective July 1, 1994. **L. 2004:** (2) amended, p. 1502, § 269, effective July 1.

**7-109-110. Notice to shareholders of indemnification of director.** If a corporation indemnifies or advances expenses to a director under this article in connection with a proceeding by or in the right of the corporation, the corporation shall give written notice of the indemnification or advance to the shareholders with or before the notice of the next shareholders’ meeting. If the next shareholder action is taken without a meeting at the instigation of the board of directors, such notice shall be given to the shareholders at or before the time the first shareholder signs a writing consenting to such action.

**Source:** **L. 93:** Entire article added, p. 794, § 1, effective July 1, 1994.

ARTICLE 110

Amendment of Articles of  
Incorporation and Bylaws

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

PART 1		of shares.	
AMENDMENT OF ARTICLES OF INCORPORATION		7-110-106.	Articles of amendment to articles of incorporation.
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7-110-105.	Amendment of articles of incorporation before issuance	7-110-201.	Amendment of bylaws by board of directors or shareholders.



7-110-202.

Bylaw changing quorum or  
voting requirement for share-  
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7-110-203.

Bylaw changing quorum or  
voting requirement for direc-  
tors.

## PART 1

## AMENDMENT OF ARTICLES OF INCORPORATION

**7-110-101. Authority to amend articles of incorporation.** (1) A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

(2) A shareholder does not have a vested property right resulting from any provision in the articles of incorporation, including any provision relating to management, control, capital structure, dividend entitlement, purpose, or duration of the corporation.

**Source: L. 93:** Entire article added, p. 794, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For article, "Corporate Organization: A Manual of Colorado Procedure", see 1 Rocky Mt. L. Rev. 3 (1928). For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950). For note, "Elimination of Preferred Dividend Arrearages", see 23 Rocky Mt. L. Rev. 317 (1951).

**Annotator's note.** Since § 7-110-101 is similar to § 7-2-106 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Any corporation organized under the laws of Colorado may amend its articles of incorporation** by complying with the provisions of this section. *Clough v. Rocky Mt. Oil Co.*, 25 Colo. 520, 55 P. 809 (1898).

**However, no corporation, by amendment, shall change its articles as to work a change in the object** or purpose for which it was originally organized. *Clough v. Rocky Mt. Oil Co.*, 25 Colo. 520, 55 P. 809 (1898).

**A corporation may change its name** only in the manner provided by this section. *Bullion Milling Co. v. Gates Iron Works*, 18 Colo. App. 472, 72 P. 603 (1903).

**7-110-102. Amendment of articles of incorporation by board of directors.** (1) Unless otherwise provided in the articles of incorporation, the board of directors may adopt, without shareholder action, one or more amendments to the articles of incorporation to:

(a) Delete the statement of the names and addresses of the incorporators or of the initial directors;

(b) Delete the statement of the registered agent name and registered agent address of the initial registered agent, if a statement of change changing the registered agent name and registered agent address of the registered agent is on file in the records of the secretary of state;

(b.3) Delete the statement of the principal office address of the initial principal office, if a statement of change changing the principal office address is on file in the records of the secretary of state;

(b.5) Delete the statement of the names and addresses of any or all of the individuals named in the articles of incorporation, pursuant to section 7-90-301 (6), as being individuals who caused the articles of incorporation to be delivered for filing;

(c) Repealed.

(d) Change the domestic entity name of the corporation by substituting the word "corporation", "incorporated", "company", or "limited", or an abbreviation of any thereof for a similar word or abbreviation in the domestic entity name, or by adding, deleting, or changing a geographical attribution; or

(e) Make any other change expressly permitted by articles 101 to 117 of this title to be made without shareholder action.

(2) The board of directors may adopt, without shareholder action, one or more amendments to the articles of incorporation to change the domestic entity name of the corporation, if necessary, in connection with the reinstatement of a corporation pursuant to part 10 of article 90 of this title.

**Source:** **L. 93:** Entire article added, p. 795, § 1, effective July 1, 1994. **L. 96:** (1)(c) repealed, p. 1320, § 26, effective June 1. **L. 2000:** (1)(d) and (2) amended, p. 978, § 60, effective July 1. **L. 2003:** (1)(a), (1)(b), (1)(d), and (2) amended and (1)(b.5) added, p. 2321, § 248, effective July 1, 2004. **L. 2004:** (1)(b) and (1)(d) amended and (1)(b.3) added, p. 1502, § 270, effective July 1.

**7-110-103. Amendment of articles of incorporation by board of directors and shareholders.** (1) The board of directors or the holders of shares representing at least ten percent of all of the votes entitled to be cast on the amendment may propose an amendment to the articles of incorporation for submission to the shareholders.

(2) For an amendment to the articles of incorporation to be adopted pursuant to subsection (1) of this section:

(a) The board of directors shall recommend the amendment to the shareholders unless the amendment is proposed by shareholders or unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders with the amendment; and

(b) The shareholders entitled to vote on the amendment shall approve the amendment as provided in subsection (5) of this section.

(3) The proposing board of directors or the proposing shareholders may condition the effectiveness of the amendment on any basis.

(4) The corporation shall give notice, in accordance with section 7-107-105, to each shareholder entitled to vote on the amendment of the shareholders' meeting at which the amendment will be voted upon. The notice of the meeting shall state that the purpose, or one of the purposes, of the meeting is to consider the amendment, and the notice shall contain or be accompanied by a copy or a summary of the amendment.

(5) Unless articles 101 to 117 of this title (including the provisions of section 7-117-101 (7)), the articles of incorporation, bylaws adopted by the shareholders, or the proposing board of directors or the proposing shareholders acting pursuant to subsection (3) of this section require a greater vote, the amendment shall be approved by the votes required by sections 7-107-206 and 7-107-207 by the voting groups entitled to vote on the amendment.

**Source:** **L. 93:** Entire article added, p. 795, § 1, effective July 1, 1994. **L. 96:** (5) amended, p. 1320, § 27, effective June 1.

#### ANNOTATION

**Law reviews.** For article, "Conversion of Entities in Colorado", see 33 Colo. Law. 11 (November 2004).

#### **7-110-104. Voting on amendments of articles of incorporation by voting groups.**

(1) If shareholder voting is otherwise required by articles 101 to 117 of this title, the holders of the shares of a class are entitled to vote as a separate voting group on an amendment if the amendment would:

(a) Increase or decrease the aggregate number of authorized shares of the class;

(b) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(c) Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(d) Change the designation, preferences, limitations, or relative rights of all or part of the shares of the class;



(e) Change the shares of all or part of the class into a different number of shares of the same class;

(f) Create a new class of shares having rights or preferences with respect to distributions or dissolution that are prior, superior, or substantially equal to the shares of the class;

(g) Increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(h) Limit or deny an existing preemptive right of all or part of the shares of the class; or

(i) Cancel or otherwise affect rights to distributions or dividends that have accumulated but have not yet been declared on all or part of the shares of the class.

(2) If an amendment would affect a series of a class of shares in one or more of the ways described in subsection (1) of this section, the shares of that series are entitled to vote as a separate voting group on the amendment.

(3) If an amendment that entitles two or more series of a class of shares to vote as separate voting groups under this section would affect those two or more series in the same or a substantially similar way, the shares of all the series so affected shall, instead, vote together as a single voting group on the amendment.

(4) A class or series of shares is entitled to the voting rights granted by this section notwithstanding any provision in the articles of incorporation that the shares are nonvoting shares.

**Source:** L. 93: Entire article added, p. 796, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, “1959 Amendments to the Colorado Corporation Code”, see 36 Dicta 489 (1959). For article, “The 1985 Proposed Revisions to the Colorado Corporation Code”, see 14 Colo. Law. 34 (1985).

**Annotator’s note.** Since § 7-110-104 is similar to § 7-2-108 as it existed prior to the 1993 recodification of the “Colorado Business Corporation Act”, articles 101 to 117 of title 7,

cases construing that provision and its predecessors have been included in the annotations to this section.

**This section prescribes one of those instances where it is mandatory that all stockholders vote** despite restrictions contained in the articles of incorporation. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**7-110-105. Amendment of articles of incorporation before issuance of shares.** If a corporation has not yet issued shares, its board of directors or, if no directors have been elected, its incorporators may adopt one or more amendments to the articles of incorporation.

**Source:** L. 93: Entire article added, p. 797, § 1, effective July 1, 1994.

**7-110-106. Articles of amendment to articles of incorporation.** (1) A corporation amending its articles of incorporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment stating:

(a) The domestic entity name of the corporation;

(b) The text of each amendment adopted; and

(c) If the amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself.

(d) to (f) Repealed.

**Source:** L. 93: Entire article added, p. 797, § 1, effective July 1, 1994. L. 2002: IP(1) amended, p. 1848, § 115, effective July 1; IP(1) amended, p. 1713, § 115, effective October 1. L. 2003: IP(1) and (1)(a) amended, p. 2321, § 249, effective July 1, 2004. L. 2004: (1)(d), (1)(e), and (1)(f) repealed, p. 1502, § 271, effective July 1.

**7-110-107. Restated articles of incorporation.** (1) The board of directors may restate the articles of incorporation at any time with or without shareholder action. If the corporation has not yet issued shares and no directors have been elected, its incorporators may restate the articles of incorporation at any time.

(2) The restatement may include one or more amendments to the articles of incorporation. If the restatement includes an amendment requiring shareholder approval, it shall be adopted as provided in section 7-110-103.

(3) If the board of directors submits a restatement for shareholder action, the corporation shall give notice, in accordance with section 7-107-105, to each shareholder entitled to vote on the restatement of the shareholders' meeting at which the restatement will be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the restatement, and the notice shall contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles of incorporation.

(4) A corporation restating its articles of incorporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of restatement stating:

- (a) The domestic entity name of the corporation;
- (b) The text of the restated articles of incorporation;
- (c) Repealed.

(d) If the restatement was adopted by the board of directors or incorporators without shareholder action, a statement to that effect and that shareholder action was not required.

(5) Upon filing by the secretary of state or at any later effective date determined pursuant to section 7-90-304, restated articles of incorporation supersede the original articles of incorporation and all prior amendments to them.

**Source:** L. 93: Entire article added, p. 798, § 1, effective July 1, 1994. L. 2002: IP(4) and (5) amended, p. 1848, § 116, effective July 1; IP(4) and (5) amended, p. 1713, § 116, effective October 1. L. 2003: IP(4) and (4)(a) amended, p. 2322, § 250, effective July 1, 2004. L. 2004: (4)(c) repealed, p. 1503, § 272, effective July 1.

**7-110-108. Amendment of articles of incorporation pursuant to reorganization.**

(1) Articles of incorporation may be amended, without action by the board of directors or shareholders, to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under a statute of the United States if the articles of incorporation after amendment contain only provisions required or permitted by section 7-102-102.

(2) For an amendment to the articles of incorporation to be made pursuant to subsection (1) of this section, an individual or individuals designated by the court shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment stating:

- (a) The domestic entity name of the corporation;
- (b) The text of each amendment approved by the court;
- (c) The date of the court's order or decree approving the articles of amendment;
- (d) The title of the reorganization proceeding in which the order or decree was entered;

and

- (e) A statement that the court had jurisdiction of the proceeding under a specified statute of the United States.

(3) Shareholders of a corporation undergoing reorganization do not have dissenters' rights except as provided in the reorganization plan.

(4) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

**Source:** L. 93: Entire article added, p. 799, § 1, effective July 1, 1994. L. 2002: IP(2) amended, p. 1849, § 117, effective July 1; IP(2) amended, p. 1713, § 117, effective October 1. L. 2003: IP(2) and (2)(a) amended, p. 2322, § 251, effective July 1, 2004.



**7-110-109. Effect of amendment of articles of incorporation.** An amendment to the articles of incorporation does not affect any existing right of persons other than shareholders, any cause of action existing against or in favor of the corporation, or any proceeding to which the corporation is a party. An amendment changing a corporation's domestic entity name does not abate a proceeding brought by or against a corporation in its former entity name.

**Source:** L. 93: Entire article added, p. 799, § 1, effective July 1, 1994. L. 2000: Entire section amended, p. 979, § 61, effective July 1. L. 2003: Entire section amended, p. 2322, § 252, effective July 1, 2004.

## PART 2

### AMENDMENT OF BYLAWS

**7-110-201. Amendment of bylaws by board of directors or shareholders.** (1) The board of directors may amend the bylaws at any time to add, change, or delete a provision, unless:

(a) Articles 101 to 117 of this title or the articles of incorporation reserve such power exclusively to the shareholders in whole or part; or

(b) A particular bylaw expressly prohibits the board of directors from doing so.

(2) The shareholders may amend the bylaws even though the bylaws may also be amended by the board of directors.

**Source:** L. 93: Entire article added, p. 800, § 1, effective July 1, 1994.

### ANNOTATION

**Law reviews.** For article, "Organizational Problems of the Small Business Corporation", see 27 Dicta 79 (1950).

**Annotator's note.** Since § 7-110-201 is similar to § 7-5-109 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Directors may make bylaws if certificate so provides.** This section expressly authorizes the directors, if the certificate of incorporation so provides, to make such prudential bylaws as they deem proper for the management of the affairs of the company not inconsistent with the

laws of the state. *Mitchell v. Colo. Fuel & Iron Co.*, 117 F. 723 (D. Colo. 1902).

**And courts will interfere only in case of abuse.** The matter of adopting bylaws for the government of corporations, and the manner in which their business shall be transacted, is a matter so much of discretion that a court should interfere only in a plain case of abuse. *Mitchell v. Colo. Fuel & Iron Co.*, 117 F. 723 (D. Colo. 1902).

**Where bylaws conflict with the articles of incorporation,** the articles of incorporation control and the bylaws in conflict are void. *Paulek v. Isgar*, 38 Colo. App. 29, 551 P.2d 213 (1976).

**7-110-202. Bylaw changing quorum or voting requirement for shareholders.** (1) If authorized by the articles of incorporation, the shareholders may amend the bylaws to fix a greater quorum or voting requirement for shareholders, or voting groups of shareholders, than is required by articles 101 to 117 of this title. An amendment to the bylaws to add, change, or delete a greater quorum or voting requirement for shareholders shall meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever are greater.

(2) A bylaw that fixes a greater quorum or voting requirement for shareholders under subsection (1) of this section shall not be amended by the board of directors.

**Source:** L. 93: Entire article added, p. 800, § 1, effective July 1, 1994.

### ANNOTATION

**An amendment to the bylaws to increase a shareholder voting requirement is invalid unless authorized by the articles of incorporation** irrespective of the fact that the amendment

was adopted unanimously by both the shareholders and the board of directors. *Harding v. Heritage Health Prods. Co.*, 98 P.3d 945 (Colo. App. 2004).

**7-110-203. Bylaw changing quorum or voting requirement for directors.** (1) A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended:

(a) If adopted by the shareholders, only by the shareholders; or

(b) If adopted by the board of directors, either by the shareholders or by the board of directors.

(2) A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended only by a stated vote of either the shareholders or the board of directors.

(3) Action by the board of directors under paragraph (b) of subsection (1) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors shall meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

**Source:** **L. 93:** Entire article added, p. 800, § 1, effective July 1, 1994. **L. 2003:** (2) amended, p. 2322, § 253, effective July 1, 2004.

### ARTICLE 111

#### Merger, Share Exchange, and Redomestication

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

**Law reviews:** For article, “Mergers and Acquisitions in Colorado: A Practitioner’s Roadmap”, see 16 Colo. Law. 769 (1987); for article, “Disclosure of Merger Negotiations: Formulating a Proper Response Under the Federal Securities Laws”, see 17 Colo. Law. 835 (1988); for article, “Corporate Successor Liability for Environmental and Toxic Tort Claims — Parts I and II”, see 19 Colo. Law. 867 and 1085 (1990).

7-111-101. Merger.

7-111-101.5. Conversion.

7-111-102. Share exchange.

7-111-103. Action on plan.

7-111-104. Merger of parent and subsidiary.

7-111-104.5. Statement of merger or conversion.

7-111-105. Statement of share exchange.

7-111-106. Effect of merger, conversion, or share exchange.

7-111-106.5. Merger with foreign entity.

7-111-107. Share exchange with foreign corporation.

7-111-108. Redomestication as a domestic insurer.

**7-111-101. Merger.** (1) One or more domestic corporations may merge into another domestic entity if the board of directors of each domestic corporation that is a party to the merger and each other entity that is a party to the merger adopts a plan of merger complying with section 7-90-203.3 and the shareholders of each such corporation, if required by section 7-111-103, approve the plan of merger.

(2) and (3) (Deleted by amendment, L. 2007, p. 245, § 43, effective May 29, 2007.)

**Source:** **L. 93:** Entire article added, p. 801, § 1, effective July 1, 1994. **L. 2003:** IP(2), (2)(a), (2)(b), (2)(c), and (3) amended, p. 2322, § 254, effective July 1, 2004. **L. 2007:** Entire section amended, p. 245, § 43, effective May 29.



## ANNOTATION

**Law reviews.** For article, "The New Colorado Corporation Act", see 35 Dicta 317 (1958). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985).

**Annotator's note.** Since § 7-111-101 is similar to § 7-7-101 as it existed prior to the 1993

recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**A corporate merger may be proved** by one who of his own knowledge is acquainted with the facts. *Martinez v. People*, 177 Colo. 272, 493 P.2d 1350 (1972).

**7-111-101.5. Conversion.** A domestic corporation may convert into any form of entity permitted by section 7-90-201 if the board of directors of the corporation adopts a plan of conversion that complies with section 7-90-201.3 and the shareholders of the corporation, if required by section 7-111-103, approve the plan of conversion.

**Source: L. 2007:** Entire section added, p. 245, § 44, effective May 29.

**7-111-102. Share exchange.** (1) A domestic corporation may acquire all of the outstanding shares of one or more classes or series of one or more domestic corporations if the board of directors of each corporation adopts a plan of share exchange and the shareholders of each corporation approve the plan of share exchange.

(2) The plan of share exchange required by subsection (1) of this section shall state:

(a) The domestic entity name of each corporation whose shares will be acquired and the name of the acquiring corporation;

(b) The terms and conditions of the share exchange;

(c) The manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for money or other property in whole or part.

(3) The plan of share exchange may state other provisions relating to the share exchange.

(4) This section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange of shares or otherwise.

**Source: L. 93:** Entire article added, p. 801, § 1, effective July 1, 1994. **L. 2003:** IP(2), (2)(a), and (3) amended, p. 2323, § 255, effective July 1, 2004. **L. 2004:** (1) amended, p. 1503, § 273, effective July 1.

**7-111-103. Action on plan.** (1) After adopting a plan of conversion complying with section 7-90-201.3, a plan of merger complying with section 7-90-203.3, or a plan of share exchange complying with section 7-111-102, the board of directors of the converting corporation, the board of directors of each corporation party to the merger, and the board of directors of each corporation whose shares will be acquired in the share exchange, shall submit the plan of conversion, plan of merger, except as provided in subsection (7) of this section or in section 7-111-104, or the plan of share exchange to its shareholders for approval.

(2) For a plan of conversion, a plan of merger, or a plan of share exchange to be approved by the shareholders:

(a) The board of directors shall recommend the plan of conversion, plan of merger, or plan of share exchange to the shareholders unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders with the plan; and

(b) The shareholders entitled to vote on the plan of conversion, plan of merger, or plan of share exchange shall approve the plan as provided in subsection (5) of this section.

(3) The board of directors may condition the effectiveness of the plan of conversion, plan of merger, or plan of share exchange on any basis.

(4) The corporation shall give notice, in accordance with section 7-107-105, to each shareholder entitled to vote on the plan of conversion, plan of merger, or plan of share exchange of the shareholders' meeting at which the plan will be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the plan of conversion, plan of merger, or plan of share exchange, and the notice shall contain or be accompanied by a copy of the plan or a summary thereof.

(5) Unless articles 101 to 117 of this title, including the provisions of section 7-117-101 (8), the articles of incorporation, bylaws adopted by the shareholders, or the board of directors acting pursuant to subsection (3) of this section require a greater vote, the plan of conversion, plan of merger, or plan of share exchange shall be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group.

(6) Separate voting by voting groups is required:

(a) On a plan of merger or a plan of conversion if the plan contains a provision that, if contained in an amendment to the articles of incorporation, would require action by one or more separate voting groups on the amendment under section 7-110-104;

(b) On a plan of share exchange by each class or series of shares included in the share exchange, with each class or series constituting a separate voting group.

(7) Action by the shareholders of the surviving corporation on a plan of merger is not required if:

(a) The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in section 7-110-102, from its articles of incorporation before the merger;

(b) Each shareholder of the surviving corporation whose shares were outstanding immediately before the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the merger;

(c) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger either by the conversion of securities issued pursuant to the merger or by the exercise of rights and warrants issued pursuant to the merger, will not exceed by more than twenty percent the total number of voting shares of the surviving corporation outstanding immediately before the merger; and

(d) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger either by the conversion of securities issued pursuant to the merger or by the exercise of rights and warrants issued pursuant to the merger, will not exceed by more than twenty percent the total number of participating shares outstanding immediately before the merger.

(8) As used in subsection (7) of this section:

(a) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(b) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(9) After a plan of merger, a plan of conversion, or a plan of share exchange is authorized, and at any time before the merger, conversion, or share exchange becomes effective, the merger, conversion, or share exchange may be abandoned, subject to any contractual rights, without further shareholder action, in accordance with the procedure stated in the plan of merger, conversion, or share exchange or, if none is stated, in the manner determined by the board of directors. If a merger, conversion, or share exchange is abandoned after a statement of merger has been filed by the secretary of state pursuant to section 7-90-203.7, a statement of conversion has been filed by the secretary of state pursuant to section 7-90-201.7, or a plan of share exchange has been filed by the secretary of state pursuant to section 7-111-105 stating a delayed effective date, the merger, conversion, or share exchange may be prevented from becoming effective by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, before the date



the merger or share exchange becomes effective pursuant to section 7-90-304, a statement of change that states that, by appropriate corporate action, the merger, conversion, or share exchange has been abandoned.

**Source:** **L. 93:** Entire article added, p. 802, § 1, effective July 1, 1994. **L. 2002:** (9) amended, p. 1849, § 118, effective July 1; (9) amended, p. 1714, § 118, effective October 1. **L. 2003:** (9) amended, p. 2323, § 256, effective July 1, 2004. **L. 2006:** (9) amended, p. 880, § 72, effective July 1. **L. 2007:** (1) to (5), (6)(a), and (9) amended, p. 246, § 45, effective May 29.

#### ANNOTATION

**Law reviews.** For article, “1959 Amendments to the Colorado Corporation Code”, see 36 Dicta 489 (1959). For article, “The 1985 Proposed Revisions to the Colorado Corporation Code”, see 14 Colo. Law. 34 (1985). For article, “1985 Amendments to the Colorado Corporation Code”, see 14 Colo. Law. 2173 (1985). For article, “Dissenter’s Rights in Colorado”, see 18 Colo. Law. 1101 (1989).

**Annotator’s note.** Since § 7-111-103 is similar to § 7-7-103 as it existed prior to the 1993

recodification of the “Colorado Business Corporation Act”, articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**This section prescribes one of those instances where it is mandatory that all stockholders vote** despite restrictions contained in the articles of incorporation. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**7-111-104. Merger of parent and subsidiary.** (1) By complying with the provisions of this section, a parent corporation owning at least ninety percent of the outstanding shares of each class of a subsidiary corporation may either merge such subsidiary into itself or merge itself into such subsidiary.

(2) The board of directors of such parent corporation shall adopt, and its shareholders, if required by subsection (3) of this section, shall approve, a plan of merger that states:

(a) The entity names of such parent corporation and subsidiary and the entity name of the surviving corporation;

(b) The terms and conditions of the merger;

(c) The manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into money or other property in whole or part;

(d) Any amendments to the articles of incorporation of the surviving corporation to be effected by the merger; and

(e) Any other provisions relating to the merger as are deemed necessary or desirable.

(3) No vote of the shareholders of such subsidiary shall be required with respect to the merger. If the subsidiary will be the surviving corporation, the approval of the shareholders of the parent corporation shall be sought in the manner provided in section 7-111-103 (1) to (6). If the parent will be the surviving corporation, no vote of its shareholders shall be required if all of the provisions of section 7-111-103 (7) are met with respect to the merger. If all of such provisions are not met, the approval of the shareholders of the parent shall be sought in the manner provided in subsections (1) to (6) of section 7-111-103.

(4) The parent corporation shall mail a copy or summary of the plan of merger to each shareholder of the subsidiary, other than the parent corporation, who does not waive this mailing requirement in writing.

(5) The effective date of the merger shall be no earlier than:

(a) The date on which all shareholders of the subsidiary waived the mailing requirement of subsection (4) of this section; or

(b) Ten days after the date the parent mailed a copy or summary of the plan of merger to each shareholder of the subsidiary who did not waive the mailing requirement.

**Source:** **L. 93:** Entire article added, p. 804, § 1, effective July 1, 1994. **L. 2003:** IP(2) and (2)(a) amended, p. 2323, § 257, effective July 1, 2004.

## ANNOTATION

**Asserted noncompliance with this section in a merger plan does not preclude an action under § 7-4-124 for valuation of dissenters' shares.** *Santa's Workshop v. A.B. Hirschfeld Press, Inc.*, 851 P.2d 264 (Colo. App. 1993)

(decided under former §§ 7-4-124 and 7-7-106 as they existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7).

**7-111-104.5. Statement of merger or conversion.** (1) After a plan of merger is approved, the surviving corporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of merger pursuant to section 7-90-203.7. If the plan of merger provides for amendments to the articles of incorporation of the surviving corporation, articles of amendment effecting the amendments shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title.

(2) After a plan of conversion is approved, the converting corporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of conversion pursuant to section 7-90-201.7.

**Source: L. 2004:** Entire section added, p. 1503, § 274, effective July 1. **L. 2007:** Entire section amended, p. 247, § 46, effective May 29.

**7-111-105. Statement of share exchange.** (1) After a plan of share exchange is approved by the shareholders, the acquiring corporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of share exchange stating:

(a) The entity name of each corporation whose shares will be acquired, and the principal office address of its principal office;

(b) The entity name of the acquiring corporation, and the principal office address of its principal office; and

(c) A statement that the acquiring corporation acquires shares of the other corporations.

(d) and (e) (Deleted by amendment, L. 2004, p. 1503, § 275, effective July 1, 2004.)

(2) and (3) (Deleted by amendment, L. 2003, p. 2324, § 258, effective July 1, 2004.)

**Source: L. 93:** Entire article added, p. 805, § 1, effective July 1, 1994. **L. 2002:** IP(1) amended, p. 1849, § 119, effective July 1; IP(1) amended, p. 1714, § 119, effective October 1. **L. 2003:** (1), (2), and (3) amended, p. 2324, § 258, effective July 1, 2004. **L. 2004:** (1) amended, p. 1503, § 275, effective July 1. **L. 2006:** (1)(b) amended, p. 880, § 73, effective July 1.

**7-111-106. Effect of merger, conversion, or share exchange.** (1) The effect of a merger shall be as provided in section 7-90-204.

(1.5) The effect of a conversion shall be as provided in section 7-90-202.

(2) When a share exchange takes effect, the shares of each acquired corporation are exchanged as provided in the plan, and the former holders of the shares are entitled only to the exchange rights provided in the articles of share exchange or to their rights under article 113 of this title.

**Source: L. 93:** Entire article added, p. 805, § 1, effective July 1, 1994. **L. 2004:** (1) amended, p. 1504, § 276, effective July 1. **L. 2007:** (1) amended and (1.5) added, p. 247, § 47, effective May 29.

## ANNOTATION

**Law reviews.** For note, "Consolidations, Mergers, Sales of Assets Under the New Colorado Corporation Act", see 31 Rocky Mt. L.

Rev. 66 (1958). For article, "Groman- or Namorg-Revisited; The Persisting Problem of Remote Continuity of Interest", see 61 Den. L.J.



469 (1984). For article, "The Short Form Merger in Colorado", see 13 Colo. Law. 2228 (1984).

**Annotator's note.** Since § 7-111-106 is similar to § 7-7-105 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**These provisions completely and effectively destroy the consolidating concerns,** and by the consolidation of the old companies into the new, the old companies cease to exist. *Solmonovich v. Denver Consol. Tramway Co.*, 39 Colo. 282, 89 P. 57 (1907).

**And provisions that consolidated company shall be responsible for all the just debts and liabilities of the consolidated companies** strengthen the position that the consolidated companies are defunct after consolidation. *Solmonovich v. Denver Consol. Tramway Co.*, 39 Colo. 282, 89 P. 57 (1907).

**Proof required in action against consolidated company.** In an action against a consolidated company organized by the consolidation of two companies for damages occasioned by one of them the plaintiff must prove in order to maintain his action which branch of the consolidated company occasioned the injury. *Colo. Consol. Land & Water Co. v. Morris*, 1 Colo. App. 401, 29 P. 302 (1892).

**7-111-106.5. Merger with foreign entity.** (1) One or more domestic corporations may merge with one or more foreign entities if:

- (a) The merger is permitted by section 7-90-203 (2);
  - (b) The foreign entity complies with section 7-90-203.7 if it is the surviving entity of the merger; and
  - (c) Each domestic corporation complies with the applicable provisions of sections 7-111-101 to 7-111-104 and, if it is the surviving corporation of the merger, with section 7-111-104.5.
- (2) Upon the merger taking effect, the surviving foreign entity of a merger shall comply with section 7-90-204.5.

**Source: L. 2007:** Entire section added, p. 247, § 48, effective May 29.

**7-111-107. Share exchange with foreign corporation.** (1) One or more domestic corporations may enter into a share exchange with one or more foreign corporations if:

- (a) (Deleted by amendment, L. 2007, p. 248, § 49, effective May 29, 2007.)
  - (b) In a share exchange, the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the jurisdiction under the law of which the acquiring corporation is incorporated;
  - (c) The foreign corporation complies with section 7-111-105 if it is the acquiring corporation of the share exchange; and
  - (d) Each domestic corporation complies with the applicable provisions of sections 7-111-101 to 7-111-104 and, if it is the acquiring corporation of the share exchange, with section 7-111-105.
- (1.5) (Deleted by amendment, L. 2007, p. 248, § 49, effective May 29, 2007.)
- (2) Upon the share exchange taking effect, the acquiring foreign corporation of a share exchange:

- (a) Shall either:
    - (I) Appoint a registered agent if the foreign corporation has no registered agent and maintain a registered agent pursuant to part 7 of article 90 of this title, whether or not the foreign corporation is otherwise subject to that part, to accept service in any proceeding to enforce any obligation or rights of dissenting shareholders of each domestic corporation party to the share exchange; or
    - (II) Be deemed to have authorized service of process on it in connection with any such proceeding by mailing in accordance with section 7-90-704 (2);
  - (b) Shall promptly pay to the dissenting shareholders of each domestic corporation party to the share exchange the amount, if any, to which they are entitled under article 113 of this title; and
  - (c) Shall comply with part 8 of article 90 of this title if it is to transact business or conduct activities in this state.
- (3) (Deleted by amendment, L. 2004, p. 1505, § 277, effective July 1, 2004.)

(4) Subsection (2) of this section does not prescribe the only means, or necessarily the required means, of serving an acquiring foreign corporation of a share exchange.

(5) This section does not limit the power of a foreign corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange of shares or otherwise.

**Source: L. 93:** Entire article added, p. 806, § 1, effective July 1, 1994. **L. 96:** (2)(a)(I) amended, p. 1320, § 28, effective June 1. **L. 2003:** (1)(a), (1)(b), (2)(a), and (2)(c) amended, p. 2324, § 259, effective July 1, 2004. **L. 2004:** (1)(c), (1)(d), IP(2), (2)(a), (2)(b), (3), and (4) amended and (1.5) added, p. 1505, § 277, effective July 1. **L. 2007:** IP(1), (1)(a), (1)(c), (1)(d), (1.5), and (2)(a)(I) amended, p. 248, § 49, effective May 29.

**7-111-108. Redomestication as a domestic insurer.** (1) A foreign or alien insurer which seeks to change its domicile under section 10-3-125 or 10-3-126, C.R.S., shall submit articles of redomestication in triplicate to the commissioner of insurance and the attorney general for examination. After being approved by them, the articles of redomestication shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title. A copy of such articles, certified by the secretary of state, shall be filed with the commissioner of insurance.

(2) The articles of redomestication shall state:

(a) The domestic entity name for the corporation, which domestic entity name shall comply with the requirements of sections 7-90-601 and 10-3-103, C.R.S.;

(b) The state in which the corporation was originally incorporated, the name under which it was so incorporated, the date of such incorporation, and the date the corporation was authorized to transact business or conduct activities as an insurance company in the state of its original incorporation;

(c) If the state in which the corporation was last incorporated is different from the state in which it was originally incorporated, the state in which the corporation was last incorporated, the entity name under which it was so incorporated, the date of such incorporation, and the date the corporation was authorized to transact business or conduct activities as an insurance company in the state of its last incorporation;

(d) The information regarding shares required by section 7-106-101;

(e) The registered agent name and registered agent address of the corporation's registered agent;

(f) The principal office address of the corporation's principal office;

(g) The names and mailing addresses of the persons serving as the directors and officers of such corporation; and

(h) A statement that, upon redomestication, the corporation accepts and will be subject to the law of this state.

(3) The articles of incorporation may but need not state:

(a) Provisions not inconsistent with law regarding:

(I) The current purpose or purposes of the corporation and the purpose or purposes which it intends to pursue after redomestication;

(II) Managing the business of the corporation and regulating its affairs;

(III) Defining, limiting, and regulating the powers of the corporation, its board of directors, and its shareholders;

(IV) A par value for authorized shares or classes of shares; and

(V) The imposition of personal liability on shareholders for the debts of the corporation to a stated extent and upon stated conditions; and

(b) Any provision that, under articles 101 to 117 of this title, is required or permitted to be stated in the bylaws.

(4) It shall not be necessary to state in the articles of redomestication any of the corporate powers enumerated in articles 101 to 117 of this title.

(5) In its articles of redomestication, the corporation may amend, restate, or revise its articles of incorporation or charter to the same extent, subject to the same limitations, and by the same procedures as those provisions governing the amendment, restatement, and revision of articles of incorporation as provided in articles 101 to 117 of this title.



(6) The corporation shall attach to the articles of redomestication:

(a) Its articles of incorporation or charter, as amended or restated, as in effect immediately before the filing of its articles of redomestication, duly authenticated by the proper officer in the jurisdiction of its last incorporation;

(b) A certificate to the effect that the corporation is in good standing in the jurisdiction of its last incorporation, duly authenticated by the proper officer in the jurisdiction of its last incorporation. The certificate shall be dated within ninety days before the filing of the articles of redomestication.

(c) A resolution, duly certified by the secretary of the corporation, adopted by the affirmative vote of the shareholders entitled to cast at least a majority of the votes which all shareholders are entitled to cast thereon, and, if any class of shares is entitled to vote thereon as a class, the affirmative vote of the holders of at least a majority of the outstanding shares in each class of shares entitled to vote as a class thereon, consenting to the filing of the articles of redomestication and the renunciation, conditioned upon its redomestication as a domestic insurer, of its last articles of incorporation or charter.

(7) Upon the issuance by the secretary of state of a certificate of redomestication, a corporation shall be deemed to be domiciled in and incorporated under the law of this state; except that an insurer that has redomesticated in this state pursuant to section 10-3-125 or 10-3-126, C.R.S., shall be considered to be the same corporation as that corporation that existed under the law of the jurisdiction in which it was formerly domiciled and shall be considered as having been an operating insurer from the date that the corporation was authorized to transact business or conduct activities as an insurer in such jurisdiction.

(8) The certificate of redomestication shall serve the same purpose as articles of incorporation under articles 101 to 117 of this title.

(9) The certificate of redomestication, subject to the provisions of the law of this state relating to insurance, shall entitle the redomesticated corporation to all the powers, rights, and privileges granted to corporations incorporated in this state and shall subject the redomesticated corporation to all of the duties, liabilities, and limitations imposed upon domestic corporations but shall continue the corporation as if it had been originally incorporated under the law of this state. Upon the issuance of the certificate of redomestication by the secretary of state, the articles of redomestication shall constitute the articles of incorporation of the corporation.

(10) Any domestic insurer, subject to and in compliance with section 10-3-125 (2), C.R.S., may change its domicile from this state to any other state in which it is authorized to transact business or conduct activities and, in connection therewith, shall submit to the commissioner of insurance a copy of the articles of redomestication or their equivalent, duly authenticated by the proper officer of its new state of domicile, and a certificate of good standing or its equivalent from that state. Upon approval by the commissioner of insurance, the copy of the articles of redomestication and certificate of good standing, or their equivalents, from the new state of domicile shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title. Upon the filing of such documents by the secretary of state, the domestic insurer shall cease to be a domestic corporation and a domestic insurer and, if otherwise qualified, shall become a foreign corporation and foreign insurer authorized to transact business or conduct activities in this state effective as of the date of its redomestication by the new state of domicile as stated in its articles of redomestication.

(11) All certificates of redomestication issued by the secretary of state shall state the date on which the articles of redomestication were filed and, based upon the information submitted to the secretary of state pursuant to this section, the date from which the corporation existed and operated as an insurer, which shall be the date the insurer was incorporated in the jurisdiction of its original incorporation.

**Source:** L. 93: Entire article added, p. 808, § 1, effective July 1, 1994. L. 2000: (2)(a) amended, p. 979, § 62, effective July 1. L. 2002: (2)(a) amended, p. 1012, § 3, effective June 1; (1), (2)(e), and (10) amended, p. 1849, § 120, effective July 1; (1), (2)(e), and (10) amended, p. 1714, § 120, effective October 1. L. 2003: IP(2), (2)(a), (2)(b), (2)(c), (2)(e), (2)(f), (2)(h), IP(3), (3)(a)(V), (3)(b), (4), (7), (9), (10), and (11) amended, p. 2325, § 260,

effective July 1, 2004. **L. 2004:** (2)(c) and (2)(g) amended, p. 1506, § 278, effective July 1. **L. 2008:** (8) amended, p. 24, § 19, effective August 5.

## ARTICLE 112

### Sale of Property

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

**Law reviews:** For article, "Commercial and Corporate Law", which discusses a recent Tenth Circuit decision dealing with parent company liability for breaching subsidiary-employee contract, see 65 Den. U.L. Rev. 492 (1988).

7-112-101. Sale or mortgage of property  
without shareholder approval.

7-112-102. Sale of property requiring share-  
holder approval.

**7-112-101. Sale or mortgage of property without shareholder approval.** (1) A corporation may, as authorized by its bylaws or by the board of directors:

(a) Sell, lease, exchange, or otherwise dispose of any or all of its property in the usual and regular course of business;

(b) Mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in the usual and regular course of business; or

(c) Transfer any or all of its property to a domestic corporation all the shares of which are owned, directly or indirectly, by the corporation.

(2) Unless otherwise provided in the articles of incorporation, approval by the shareholders of a transaction described in subsection (1) of this section is not required.

**Source:** **L. 93:** Entire article added, p. 811, § 1, effective July 1, 1994. **L. 96:** IP(1) amended, p. 1321, § 29, effective June 1.

**7-112-102. Sale of property requiring shareholder approval.** (1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, with or without its good will, other than in the usual and regular course of business on the terms and conditions and for the consideration determined by the board of directors, if the board of directors proposes and the shareholders approve the transaction. A sale, lease, exchange, or other disposition of all, or substantially all, of the property of a corporation, with or without its good will, in connection with its dissolution, other than in the usual and regular course of business, and other than pursuant to a court order, shall be subject to the requirements of this section; but a sale, lease, exchange, or other disposition of all, or substantially all, of the property of a corporation, with or without its good will, pursuant to a court order shall not be subject to the requirements of this section.

(2) If a corporation is entitled to vote or otherwise consent, other than in the usual and regular course of its business, with respect to the sale, lease, exchange, or other disposition of all, or substantially all, of the property with or without the good will of another entity which it controls, and if the shares or other interests held by the corporation in such other entity constitute all, or substantially all, of the property of the corporation, then the corporation shall consent to such transaction only if the board of directors proposes and the shareholders approve the giving of consent.

(3) For a transaction described in subsection (1) of this section or a consent described in subsection (2) of this section to be approved by the shareholders:

(a) The board of directors shall recommend the transaction or the consent to the shareholders unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the transaction; and

(b) The shareholders entitled to vote on the transaction or the consent shall approve the transaction or the consent as provided in subsection (6) of this section.



(4) The board of directors may condition the effectiveness of the transaction or the consent on any basis.

(5) The corporation shall give notice, in accordance with section 7-107-105, to each shareholder entitled to vote on the transaction described in subsection (1) of this section or the consent described in subsection (2) of this section, of the shareholders' meeting at which the transaction or the consent will be voted upon. The notice shall:

(a) State that the purpose, or one of the purposes, of the meeting is to consider:

(I) In the case of action pursuant to subsection (1) of this section, the sale, lease, exchange, or other disposition of all, or substantially all, of the property of the corporation; or

(II) In the case of action pursuant to subsection (2) of this section, the corporation's consent to the sale, lease, exchange, or other disposition of all, or substantially all, of the property of another entity (which entity shall be identified in the notice), shares or other interests of which are held by the corporation and constitute all, or substantially all, of the property of the corporation; and

(b) Contain or be accompanied by a description of the transaction, in the case of action pursuant to subsection (1) of this section, or by a description of the transaction underlying the consent, in the case of action pursuant to subsection (2) of this section.

(6) Unless articles 101 to 117 of this title (including the provisions of section 7-117-101 (9)), the articles of incorporation, bylaws adopted by the shareholders, or the board of directors acting pursuant to subsection (4) of this section require a greater vote, the transaction described in subsection (1) of this section or the consent described in subsection (2) of this section shall be approved by each voting group entitled to vote separately on the transaction or consent by a majority of all the votes entitled to be cast on the transaction or the consent by that voting group.

(7) After a transaction described in subsection (1) of this section or a consent described in subsection (2) of this section is authorized, the transaction may be abandoned or the consent withheld or revoked, subject to any contractual rights or other limitations on such abandonment, withholding, or revocation, without further shareholder action.

(8) A transaction that constitutes a distribution is governed by section 7-106-401 and not by this section.

**Source:** L. 93: Entire article added, p. 811, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For note, "Consolidations, Mergers, Sales of Assets Under the New Colorado Corporation Act", see 31 Rocky Mt. L. Rev. 66 (1958). For comment on shareholder approval of substantial asset sales in the multisubsidiary context, see 45 U. Colo. L. Rev. 339 (1974). For article, "Conflict of Interest Transactions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders", see 57 Den. L.J. 609 (1980). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Continuing Liability for Unpaid Corporate Debts After a Corporation Ceases Business", see 14 Colo. Law 40 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985). For article, "Sale of Substantially All Corporate Assets", see 16 Colo. Law. 455 (1987). For article,

"Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-112-102 is similar to § 7-5-112 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**This section prescribes one of those instances where it is mandatory that all stockholders vote** despite restrictions contained in the articles of incorporation. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**Section held not applicable to nonprofit corporations.** *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**To legally effect a change in the two-thirds approval requirement of an asset sale in this section, a provision must be added to the articles of incorporation.** *Dominick v.*

Marcove, 809 F. Supp. 805 (D. Colo. 1992) (decided under former § 7-5-112 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7).

**Applied** in *People v. Cameron*, 197 Colo. 330, 595 P.2d 677 (1979).

## ARTICLE 113

### Dissenters' Rights

**Law reviews:** For article, "Valuation of Stock in Closely Held Corporations", see 18 Colo. Law. 1731 (1989).

#### PART 1

#### RIGHT OF DISSENT - PAYMENT FOR SHARES

- 7-113-101. Definitions.
- 7-113-102. Right to dissent.
- 7-113-103. Dissent by nominees and beneficial owners.

#### PART 2

#### PROCEDURE FOR EXERCISE OF DISSENTERS' RIGHTS

- 7-113-201. Notice of dissenters' rights.
- 7-113-202. Notice of intent to demand payment.

- 7-113-203. Dissenters' notice.
- 7-113-204. Procedure to demand payment.
- 7-113-205. Uncertificated shares.
- 7-113-206. Payment.
- 7-113-207. Failure to take action.
- 7-113-208. Special provisions relating to shares acquired after announcement of proposed corporate action.
- 7-113-209. Procedure if dissenter is dissatisfied with payment or offer.

#### PART 3

#### JUDICIAL APPRAISAL OF SHARES

- 7-113-301. Court action.
- 7-113-302. Court costs and counsel fees.

#### PART 1

#### RIGHT OF DISSENT - PAYMENT FOR SHARES

**7-113-101. Definitions.** For purposes of this article:

(1) "Beneficial shareholder" means the beneficial owner of shares held in a voting trust or by a nominee as the record shareholder.

(2) "Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring domestic or foreign corporation, by merger or share exchange of that issuer.

(3) "Dissenter" means a shareholder who is entitled to dissent from corporate action under section 7-113-102 and who exercises that right at the time and in the manner required by part 2 of this article.

(4) "Fair value", with respect to a dissenter's shares, means the value of the shares immediately before the effective date of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action except to the extent that exclusion would be inequitable.

(5) "Interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at the legal rate as specified in section 5-12-101, C.R.S.

(6) "Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares that are registered in the name of a nominee to the extent such owner is recognized by the corporation as the shareholder as provided in section 7-107-204.

(7) "Shareholder" means either a record shareholder or a beneficial shareholder.

**Source: L. 93:** Entire article added, p. 813, § 1, effective July 1, 1994.



**Cross references:** For additional definitions applicable to this title, see §§ 7-90-102 and 7-101-401.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-101 is similar to § 7-7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Purpose of dissenters' rights statutes** is to protect the property rights of dissenting shareholders from actions by majority shareholders that alter the character of their investment. *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**Statutes, not bylaws of corporation, control valuation of shares.** However, the unique structure of the corporation, as expressed in its bylaws, is a relevant factor. *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988); *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**"Fair value"** connotes a broader approach to valuation than "fair market value". In determining fair value, the court must consider all relevant value factors, the most important of which are market value, investment or earnings value, and net asset value. *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**A marketability discount may, in appropriate circumstances, be applied in situations in which a closely held corporation's shares are valued under this section**, but such a determination is a factual one that must be made on an ad hoc basis. *WCM Indus. v. Trustees of Wilson Trust*, 948 P.2d 36 (Colo. App. 1997) (decided under law as it existed prior to the 1994 repeal of § 7-4-124).

**7-113-102. Right to dissent.** (1) A shareholder, whether or not entitled to vote, is entitled to dissent and obtain payment of the fair value of the shareholder's shares in the event of any of the following corporate actions:

(a) Consummation of a plan of merger to which the corporation is a party if:

**Distinction between marketability discount and minority discount.** A minority discount adjusts for lack of control over the business entity on the theory that non-controlling shares of stock are not worth their proportionate share of the firm's value because they lack voting power to control corporate actions. A marketability discount adjusts for a lack of liquidity in one's interest in an entity, on the theory that there is a limited supply of potential buyers for stock in a closely held corporation. *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**Finding of fair value is a factual determination.** As such, it will not be disturbed on appeal unless clearly erroneous. *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the thirty-day period specified in subsection (7)** and did not qualify as a demand letter, but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Applied** in *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

(I) Approval by the shareholders of that corporation is required for the merger by section 7-111-103 or 7-111-104 or by the articles of incorporation; or

(II) The corporation is a subsidiary that is merged with its parent corporation under section 7-111-104;

(b) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired;

(c) Consummation of a sale, lease, exchange, or other disposition of all, or substantially all, of the property of the corporation for which a shareholder vote is required under section 7-112-102 (1);

(d) Consummation of a sale, lease, exchange, or other disposition of all, or substantially all, of the property of an entity controlled by the corporation if the shareholders of the corporation were entitled to vote upon the consent of the corporation to the disposition pursuant to section 7-112-102 (2); and

(e) Consummation of a conversion in which the corporation is the converting entity as provided in section 7-90-206 (2).

(1.3) A shareholder is not entitled to dissent and obtain payment, under subsection (1) of this section, of the fair value of the shares of any class or series of shares that either were listed on a national securities exchange registered under the federal "Securities Exchange Act of 1934", as amended, or were held of record by more than two thousand shareholders, at the time of:

(a) The record date fixed under section 7-107-107 to determine the shareholders entitled to receive notice of the shareholders' meeting at which the corporate action is submitted to a vote;

(b) The record date fixed under section 7-107-104 to determine shareholders entitled to sign writings consenting to the corporate action; or

(c) The effective date of the corporate action if the corporate action is authorized other than by a vote of shareholders.

(1.8) The limitation set forth in subsection (1.3) of this section shall not apply if the shareholder will receive for the shareholder's shares, pursuant to the corporate action, anything except:

(a) Shares of the corporation surviving the consummation of the plan of merger or share exchange;

(b) Shares of any other corporation which, at the effective date of the plan of merger or share exchange, either will be listed on a national securities exchange registered under the federal "Securities Exchange Act of 1934", as amended, or will be held of record by more than two thousand shareholders;

(c) Cash in lieu of fractional shares; or

(d) Any combination of the foregoing described shares or cash in lieu of fractional shares.

(2) (Deleted by amendment, L. 96, p. 1321, § 30, effective June 1, 1996.)

(2.5) A shareholder, whether or not entitled to vote, is entitled to dissent and obtain payment of the fair value of the shareholder's shares in the event of a reverse split that reduces the number of shares owned by the shareholder to a fraction of a share or to scrip if the fractional share or scrip so created is to be acquired for cash or the scrip is to be voided under section 7-106-104.

(3) A shareholder is entitled to dissent and obtain payment of the fair value of the shareholder's shares in the event of any corporate action to the extent provided by the bylaws or a resolution of the board of directors.

(4) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this article may not challenge the corporate action creating such entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

**Source:** L. 93: Entire article added, p. 814, § 1, effective July 1, 1994. L. 96: Entire section amended, p. 1321, § 30, effective June 1. L. 2006: (1)(e) added, p. 881, § 74, effective July 1. L. 2008: IP(1.3) and (1.8)(b) amended, p. 21, § 8, effective August 5.

**Cross references:** For the federal "Securities Exchange Act of 1934", see 15 U.S.C. 78a et seq.



## ANNOTATION

**Law reviews.** For article, "Sale of Substantially All Corporate Assets", see 16 Colo. Law. 455 (1987). For article, "Mergers and Acquisitions in Colorado: A Practitioner's Roadmap", see 16 Colo. Law. 769 (1987). For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989). For article, "Dissenters' Rights: Business Valuation Issues Post-Pueblo and Szaloczi", see 35 Colo. Law. 25 (June 2006).

**Annotator's note.** Since § 7-113-102 is similar to § 7-4-123 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Issuance of stock contrary to a dissenting shareholder's preemptive rights** does not fall within the purview of this section. *Breniman v. Agricultural Consultants, Inc.*, 648 P.2d 165 (Colo. App. 1982) (decided under former § 7-5-113).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair

value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemption value if the redemption value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**An action by a minority shareholder for compensatory damages based on breach of fiduciary duty and conspiracy is not within the statutory exception to exclusivity**, as it is not an action for equitable relief challenging the corporate action that created the right to dissent and obtain payment for the minority owner's shares, and actions against the officers and directors rather than the corporation are subject to the exclusivity requirement. *Szaloczi v. Behrmann Revocable Trust*, 90 P.3d 835 (Colo. 2004).

**7-113-103. Dissent by nominees and beneficial owners.** (1) A record shareholder may assert dissenters' rights as to fewer than all the shares registered in the record shareholder's name only if the record shareholder dissents with respect to all shares beneficially owned by any one person and causes the corporation to receive written notice which states such dissent and the name, address, and federal taxpayer identification number, if any, of each person on whose behalf the record shareholder asserts dissenters' rights. The rights of a record shareholder under this subsection (1) are determined as if the shares as to which the record shareholder dissents and the other shares of the record shareholder were registered in the names of different shareholders.

(2) A beneficial shareholder may assert dissenters' rights as to the shares held on the beneficial shareholder's behalf only if:

(a) The beneficial shareholder causes the corporation to receive the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights; and

(b) The beneficial shareholder dissents with respect to all shares beneficially owned by the beneficial shareholder.

(3) The corporation may require that, when a record shareholder dissents with respect to the shares held by any one or more beneficial shareholders, each such beneficial shareholder must certify to the corporation that the beneficial shareholder and the record shareholder or record shareholders of all shares owned beneficially by the beneficial shareholder have asserted, or will timely assert, dissenters' rights as to all such shares as to which there is no limitation on the ability to exercise dissenters' rights. Any such requirement shall be stated in the dissenters' notice given pursuant to section 7-113-203.

**Source:** L. 93: Entire article added, p. 815, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For article, "Sale of Substantially All Corporate Assets", see 16 Colo. Law.

455 (1987). For article, "Mergers and Acquisitions in Colorado: A Practitioner's Roadmap",

see 16 Colo. Law. 769 (1987). For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-103 is similar to § 7-4-123 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Issuance of stock contrary to a dissenting shareholder's preemptive rights** does not fall within the purview of this section. *Breniman v. Agricultural Consultants, Inc.*, 648 P.2d 165 (Colo. App. 1982) (decided under former § 7-5-113).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemption value if the redemption value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

## PART 2

### PROCEDURE FOR EXERCISE OF DISSENTERS' RIGHTS

**7-113-201. Notice of dissenters' rights.** (1) If a proposed corporate action creating dissenters' rights under section 7-113-102 is submitted to a vote at a shareholders' meeting, the notice of the meeting shall be given to all shareholders, whether or not entitled to vote. The notice shall state that shareholders are or may be entitled to assert dissenters' rights under this article and shall be accompanied by a copy of this article and the materials, if any, that, under articles 101 to 117 of this title, are required to be given to shareholders entitled to vote on the proposed action at the meeting. Failure to give notice as provided by this subsection (1) shall not affect any action taken at the shareholders' meeting for which the notice was to have been given, but any shareholder who was entitled to dissent but who was not given such notice shall not be precluded from demanding payment for the shareholder's shares under this article by reason of the shareholder's failure to comply with the provisions of section 7-113-202 (1).

(2) If a proposed corporate action creating dissenters' rights under section 7-113-102 is authorized without a meeting of shareholders pursuant to section 7-107-104, any written or oral solicitation of a shareholder to execute a writing consenting to such action contemplated in section 7-107-104 shall be accompanied or preceded by a written notice stating that shareholders are or may be entitled to assert dissenters' rights under this article, by a copy of this article, and by the materials, if any, that, under articles 101 to 117 of this title, would have been required to be given to shareholders entitled to vote on the proposed action if the proposed action were submitted to a vote at a shareholders' meeting. Failure to give notice as provided by this subsection (2) shall not affect any action taken pursuant to section 7-107-104 for which the notice was to have been given, but any shareholder who was entitled to dissent but who was not given such notice shall not be precluded from demanding payment for the shareholder's shares under this article by reason of the shareholder's failure to comply with the provisions of section 7-113-202 (2).

**Source:** **L. 93:** Entire article added, p. 816, § 1, effective July 1, 1994. **L. 96:** Entire section amended, p. 1323, § 31, effective June 1.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989). For article, "Fiduciary Duties of Corporate Directors: Recent Case Law Developments", see 32 Colo. Law. 65 (December 2003).

**Annotator's note.** Since § 7-113-201 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors



sors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7) and did not qualify as a demand letter,** but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Applied in** *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

**7-113-202. Notice of intent to demand payment.** (1) If a proposed corporate action creating dissenters' rights under section 7-113-102 is submitted to a vote at a shareholders' meeting and if notice of dissenters' rights has been given to such shareholder in connection with the action pursuant to section 7-113-201 (1), a shareholder who wishes to assert dissenters' rights shall:

(a) Cause the corporation to receive, before the vote is taken, written notice of the shareholder's intention to demand payment for the shareholder's shares if the proposed corporate action is effectuated; and

(b) Not vote the shares in favor of the proposed corporate action.

(2) If a proposed corporate action creating dissenters' rights under section 7-113-102 is authorized without a meeting of shareholders pursuant to section 7-107-104 and if notice of dissenters' rights has been given to such shareholder in connection with the action pursuant to section 7-113-201 (2), a shareholder who wishes to assert dissenters' rights shall not execute a writing consenting to the proposed corporate action.

(3) A shareholder who does not satisfy the requirements of subsection (1) or (2) of this section is not entitled to demand payment for the shareholder's shares under this article.

**Source:** **L. 93:** Entire article added, p. 816, § 1, effective July 1, 1994. **L. 96:** IP(1) and (2) amended, p. 1323, § 32, effective June 1.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-202 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the partic-

ular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the thirty-day period specified in subsection (7) and did not qualify as a demand letter,** but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** Egret Energy Corp. v. Peierls, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. Egret Energy Corp. v. Peierls, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length

transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. Breniman v. Agricultural Consultants, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. Breniman v. Agricultural Consultants, 829 P.2d 493 (Colo. App. 1992).

**Applied in** Walter S. Cheesman Realty Co. v. Moore, 770 P.2d 1308 (Colo. App. 1988).

**7-113-203. Dissenters' notice.** (1) If a proposed corporate action creating dissenters' rights under section 7-113-102 is authorized, the corporation shall give a written dissenters' notice to all shareholders who are entitled to demand payment for their shares under this article.

(2) The dissenters' notice required by subsection (1) of this section shall be given no later than ten days after the effective date of the corporate action creating dissenters' rights under section 7-113-102 and shall:

(a) State that the corporate action was authorized and state the effective date or proposed effective date of the corporate action;

(b) State an address at which the corporation will receive payment demands and the address of a place where certificates for certificated shares must be deposited;

(c) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(d) Supply a form for demanding payment, which form shall request a dissenter to state an address to which payment is to be made;

(e) Set the date by which the corporation must receive the payment demand and certificates for certificated shares, which date shall not be less than thirty days after the date the notice required by subsection (1) of this section is given;

(f) State the requirement contemplated in section 7-113-103 (3), if such requirement is imposed; and

(g) Be accompanied by a copy of this article.

**Source:** L. 93: Entire article added, p. 817, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-203 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. Pioneer Bancorporation, Inc. v. Waters, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** Egret Energy Corp. v. Peierls, 796 P.2d 25 (Colo. App. 1990).

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**Dissenter entitled to amount demanded with interest.** Egret Energy Corp. v. Peierls, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. Egret Energy Corp. v. Peierls, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemp-**



**tion value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting

shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Applied** in *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

**7-113-204. Procedure to demand payment.** (1) A shareholder who is given a dissenters' notice pursuant to section 7-113-203 and who wishes to assert dissenters' rights shall, in accordance with the terms of the dissenters' notice:

(a) Cause the corporation to receive a payment demand, which may be the payment demand form contemplated in section 7-113-203 (2) (d), duly completed, or may be stated in another writing; and

(b) Deposit the shareholder's certificates for certificated shares.

(2) A shareholder who demands payment in accordance with subsection (1) of this section retains all rights of a shareholder, except the right to transfer the shares, until the effective date of the proposed corporate action giving rise to the shareholder's exercise of dissenters' rights and has only the right to receive payment for the shares after the effective date of such corporate action.

(3) Except as provided in section 7-113-207 or 7-113-209 (1) (b), the demand for payment and deposit of certificates are irrevocable.

(4) A shareholder who does not demand payment and deposit the shareholder's share certificates as required by the date or dates set in the dissenters' notice is not entitled to payment for the shares under this article.

**Source:** L. 93: Entire article added, p. 817, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-204 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7) and did not qualify as a demand letter,** but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Even though a minority shareholder may have an action for compensatory damages as recognized by this section before the effective date of an action giving rise to the dissenter's rights, after the effective date of the action**

**such pre-existing claims must be dismissed** unless they fall within the narrow exception to the exclusivity requirement of § 7-113-102 (4). *Szaloczi v. Behrmann Revocable Trust*, 90 P.3d 835 (Colo. 2004).

**Applied** in *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

**7-113-205. Uncertificated shares.** (1) Upon receipt of a demand for payment under section 7-113-204 from a shareholder holding uncertificated shares, and in lieu of the deposit of certificates representing the shares, the corporation may restrict the transfer thereof.

(2) In all other respects, the provisions of section 7-113-204 shall be applicable to shareholders who own uncertificated shares.

**Source:** L. 93: Entire article added, p. 818, § 1, effective July 1, 1994.

**7-113-206. Payment.** (1) Except as provided in section 7-113-208, upon the effective date of the corporate action creating dissenters' rights under section 7-113-102 or upon receipt of a payment demand pursuant to section 7-113-204, whichever is later, the corporation shall pay each dissenter who complied with section 7-113-204, at the address stated in the payment demand, or if no such address is stated in the payment demand, at the address shown on the corporation's current record of shareholders for the record shareholder holding the dissenter's shares, the amount the corporation estimates to be the fair value of the dissenter's shares, plus accrued interest.

(2) The payment made pursuant to subsection (1) of this section shall be accompanied by:

(a) The corporation's balance sheet as of the end of its most recent fiscal year or, if that is not available, the corporation's balance sheet as of the end of a fiscal year ending not more than sixteen months before the date of payment, an income statement for that year, and, if the corporation customarily provides such statements to shareholders, a statement of changes in shareholders' equity for that year and a statement of cash flow for that year, which balance sheet and statements shall have been audited if the corporation customarily provides audited financial statements to shareholders, as well as the latest available financial statements, if any, for the interim or full-year period, which financial statements need not be audited;

(b) A statement of the corporation's estimate of the fair value of the shares;

(c) An explanation of how the interest was calculated;

(d) A statement of the dissenter's right to demand payment under section 7-113-209; and

(e) A copy of this article.

**Source:** L. 93: Entire article added, p. 818, § 1, effective July 1, 1994.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-206 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the partic-

ular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7)** and did not qualify as a demand letter, but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).



**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length

transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Applied in** *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

**7-113-207. Failure to take action.** (1) If the effective date of the corporate action creating dissenters' rights under section 7-113-102 does not occur within sixty days after the date set by the corporation by which the corporation must receive the payment demand as provided in section 7-113-203, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.

(2) If the effective date of the corporate action creating dissenters' rights under section 7-113-102 occurs more than sixty days after the date set by the corporation by which the corporation must receive the payment demand as provided in section 7-113-203, then the corporation shall send a new dissenters' notice, as provided in section 7-113-203, and the provisions of sections 7-113-204 to 7-113-209 shall again be applicable.

**Source:** L. 93: Entire article added, p. 819, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-207 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7) and did not qualify as a demand letter,** but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Applied in** *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

**7-113-208. Special provisions relating to shares acquired after announcement of proposed corporate action.** (1) The corporation may, in or with the dissenters' notice given pursuant to section 7-113-203, state the date of the first announcement to news media

or to shareholders of the terms of the proposed corporate action creating dissenters' rights under section 7-113-102 and state that the dissenter shall certify in writing, in or with the dissenter's payment demand under section 7-113-204, whether or not the dissenter (or the person on whose behalf dissenters' rights are asserted) acquired beneficial ownership of the shares before that date. With respect to any dissenter who does not so certify in writing, in or with the payment demand, that the dissenter or the person on whose behalf the dissenter asserts dissenters' rights acquired beneficial ownership of the shares before such date, the corporation may, in lieu of making the payment provided in section 7-113-206, offer to make such payment if the dissenter agrees to accept it in full satisfaction of the demand.

(2) An offer to make payment under subsection (1) of this section shall include or be accompanied by the information required by section 7-113-206 (2).

**Source:** L. 93: Entire article added, p. 819, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-208 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7) and did not qualify as a demand letter,** but was only evidence that dissenter's demand

remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Applied in** *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

**7-113-209. Procedure if dissenter is dissatisfied with payment or offer.** (1) A dissenter may give notice to the corporation in writing of the dissenter's estimate of the fair value of the dissenter's shares and of the amount of interest due and may demand payment of such estimate, less any payment made under section 7-113-206, or reject the corporation's offer under section 7-113-208 and demand payment of the fair value of the shares and interest due, if:

(a) The dissenter believes that the amount paid under section 7-113-206 or offered under section 7-113-208 is less than the fair value of the shares or that the interest due was incorrectly calculated;

(b) The corporation fails to make payment under section 7-113-206 within sixty days after the date set by the corporation by which the corporation must receive the payment demand; or

(c) The corporation does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares as required by section 7-113-207 (1).

(2) A dissenter waives the right to demand payment under this section unless the



dissenter causes the corporation to receive the notice required by subsection (1) of this section within thirty days after the corporation made or offered payment for the dissenter's shares.

**Source:** L. 93: Entire article added, p. 820, § 1, effective July 1, 1994.

### ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-209 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7) and did not qualify as a demand letter,** but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter delivered to post office box designated as place where corporation would re-**

**ceive payment demands and other communications considered received within 30-day period.** *M Life Ins. Co. v. S & W*, 962 P.2d 335 (Colo. App. 1998).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arms-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Applied in** *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

### PART 3

### JUDICIAL APPRAISAL OF SHARES

**7-113-301. Court action.** (1) If a demand for payment under section 7-113-209 remains unresolved, the corporation may, within sixty days after receiving the payment demand, commence a proceeding and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty-day period, it shall pay to each dissenter whose demand remains unresolved the amount demanded.

(2) The corporation shall commence the proceeding described in subsection (1) of this section in the district court for the county in this state in which the street address of the corporation's principal office is located, or, if the corporation has no principal office in this state, in the district court for the county in which the street address of its registered agent is located, or, if the corporation has no registered agent, in the district court for the city and county of Denver. If the corporation is a foreign corporation without a registered agent, it shall commence the proceeding in the county in which the domestic corporation merged into, or whose shares were acquired by, the foreign corporation would have commenced the action if that corporation were subject to the first sentence of this subsection (2).

(3) The corporation shall make all dissenters, whether or not residents of this state, whose demands remain unresolved parties to the proceeding commenced under subsection

(2) of this section as in an action against their shares, and all parties shall be served with a copy of the petition. Service on each dissenter shall be by registered or certified mail, to the address stated in such dissenter's payment demand, or if no such address is stated in the payment demand, at the address shown on the corporation's current record of shareholders for the record shareholder holding the dissenter's shares, or as provided by law.

(4) The jurisdiction of the court in which the proceeding is commenced under subsection (2) of this section is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to such order. The parties to the proceeding are entitled to the same discovery rights as parties in other civil proceedings.

(5) Each dissenter made a party to the proceeding commenced under subsection (2) of this section is entitled to judgment for the amount, if any, by which the court finds the fair value of the dissenter's shares, plus interest, exceeds the amount paid by the corporation, or for the fair value, plus interest, of the dissenter's shares for which the corporation elected to withhold payment under section 7-113-208.

**Source:** **L. 93:** Entire article added, p. 820, § 1, effective July 1, 1994. **L. 96:** (2) amended, p. 1324, § 33, effective June 1. **L. 2003:** (2) amended, p. 2327, § 261, effective July 1, 2004. **L. 2004:** (2) amended, p. 1506, § 279, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annator's note.** Since § 7-113-301 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7) and did not qualify as a demand letter, but was only evidence that dissenter's demand remained unsettled.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of statutory rights and not an arbitrary and vexatious action pursued in bad faith. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissenting stockholder the fair value, not the redemp-**

**tion value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arm's-length transaction, and not necessarily an existent redemptive value if the redemptive value is lower than fair market value. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. *Breniman v. Agricultural Consultants*, 829 P.2d 493 (Colo. App. 1992).

**Minority discount should not, as a matter of law, be applied in valuing dissenting shareholder's stock.** *Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492 (Colo. App. 2001), *aff'd* on other grounds, 63 P.3d 353 (Colo. 2003).

**Marketability discount should not be applied absent extraordinary circumstances in valuing dissenting shareholder's stock; the conversion to an S corporation by merger is not such an extraordinary circumstance.** *Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492 (Colo. App. 2001) (declining to follow *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001)) (supreme court in *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353 (Colo. 2003), annotated below, disagreed with the reasoning of the court of appeals).

**Marketability discount should not be applied; fair value means neither fair market value nor that value determined on a case-by-case approach, but rather the shareholder's proportionate ownership interest in the value of the corporation.** *Pueblo Bancorporation v. Lindoe*,



Inc., 63 P.3d 353 (Colo. 2003) (disagreeing with the reasoning of the court of appeals in *Pueblo Bancorporation v. Lindoe, Inc.*, annotated above).

**Interest on the judgment that is available does not include interest under § 5-12-102 (1)(a)** in an amount that recognizes the gain or

benefit realized by the person wrongfully withholding such money. *Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492 (Colo. App. 2001), aff'd on other grounds, 63 P.3d 353 (Colo. 2003).

**Applied** in *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988).

**7-113-302. Court costs and counsel fees.** (1) The court in an appraisal proceeding commenced under section 7-113-301 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation; except that the court may assess costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under section 7-113-209.

(2) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the corporation and in favor of any dissenters if the court finds the corporation did not substantially comply with part 2 of this article; or

(b) Against either the corporation or one or more dissenters, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

(3) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to said counsel reasonable fees to be paid out of the amounts awarded to the dissenters who were benefited.

**Source:** L. 93: Entire article added, p. 821, § 1, effective July 1, 1994. L. 2003: (2)(a) amended, p. 2327, § 262, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-113-302 is similar to § 7-4-124 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Award under this section granting attorney fees, but not determining the amount, is not a final and appealable order.** *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**Interpretation of "fair value".** Relying on case law interpreting "fair value" within the context of dissenters' rights statutes in other states, a determination of fair value is based on all relevant value factors considering the particular circumstances of the corporation involved. Such a determination is not premised upon any precise mathematical formula. *Pioneer Bancorporation, Inc. v. Waters*, 765 P.2d 597 (Colo. App. 1988); *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. App. 2001).

**"Shall" as used in subsection (8)(f) is mandatory.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Court should not have treated the costs of computer-aided legal research as within the discretionary award of attorney fees;** rather, they should have been treated as a mandatory award of costs, to be awarded if: (1) The client was billed for the research expenses separately from the attorney fees; (2) the research was necessary for trial preparation; and (3) the amount requested was reasonable. *Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492 (Colo. App. 2001), aff'd on other grounds, 63 P.3d 353 (Colo. 2003).

**Letter mailed by dissenter was not mailed within the 30-day period specified in subsection (7)** and did not qualify as a demand letter, but was only evidence that dissenter's demand remained unsettled. *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Dissenter entitled to amount demanded with interest.** *Egret Energy Corp. v. Peierls*, 796 P.2d 25 (Colo. App. 1990).

**Costs not properly assessed against dissenter.** Dissenter's suit was an exercise of stat-

utory rights and not an arbitrary and vexatious action pursued in bad faith. Egret Energy Corp. v. Peierls, 796 P.2d 25 (Colo. App. 1990).

**Defendant corporation owed dissolving stockholder the fair value, not the redemption value, for plaintiff's preferred stock.** Fair value is akin to fair market value, the value a shareholder would receive in an arm's-length transaction, and not necessarily an existent redemption value if the redemption value is lower

than fair market value. Breniman v. Agricultural Consultants, 829 P.2d 493 (Colo. App. 1992).

Extraordinary actions of the corporation in selling off its property permit the dissenting shareholder to invoke this section to obtain fair value payment for his shares. Breniman v. Agricultural Consultants, 829 P.2d 493 (Colo. App. 1992).

**Applied in** Walter S. Cheesman Realty Co. v. Moore, 770 P.2d 1308 (Colo. App. 1988).

ARTICLE 114

Dissolution

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

**Law reviews:** For article, "Commercial and Corporate Law", which discusses a Tenth Circuit decision dealing with criminal liability of corporations and partnerships for acts committed prior to dissolution, see 64 Den. U. L. Rev. 176 (1987).

PART 1

VOLUNTARY DISSOLUTION

- 7-114-101. Authorization of dissolution before issuance of shares.
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PART 2

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- 7-114-202. solution. (Repealed)  
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PART 3

JUDICIAL DISSOLUTION

- 7-114-301. Grounds for judicial dissolution.
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PART 4

MISCELLANEOUS

- 7-114-401. Deposit with state treasurer.

PART 1

VOLUNTARY DISSOLUTION

**7-114-101. Authorization of dissolution before issuance of shares.** If a corporation has not yet issued shares, a majority of its directors or, if no directors have been elected, a majority of its incorporators may authorize the dissolution of the corporation.

**Source:** L. 93: Entire article added, p. 822, § 1, effective July 1, 1994. .



**7-114-102. Authorization of dissolution after issuance of shares.** (1) After shares have been issued, dissolution of a corporation may be authorized in the manner provided in subsection (2) of this section.

(2) For a proposal to dissolve the corporation to be authorized:

(a) The board of directors shall adopt the proposal to dissolve;

(b) The board of directors shall recommend the proposal to dissolve to the shareholders unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the shareholders; and

(c) The shareholders entitled to vote on the proposal to dissolve shall approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition the effectiveness of the dissolution on any basis.

(4) The corporation shall give notice, in accordance with section 7-107-105, to each shareholder entitled to vote on the proposal of the shareholders' meeting at which the proposal to dissolve will be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposal to dissolve the corporation, and the notice shall contain or be accompanied by a copy of the proposal or a summary thereof.

(5) Unless articles 101 to 117 of this title (including the provisions of section 7-117-101 (10)), the articles of incorporation, bylaws adopted by the shareholders, or the board of directors acting pursuant to subsection (3) of this section require a greater vote, the proposal to dissolve shall be approved by each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast on the proposal by that voting group.

**Source:** L. 93: Entire article added, p. 822, § 1, effective July 1, 1994.

#### ANNOTATION

**Law reviews.** For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985). For article, "Final Regulations on Substantial Economic Effect of Partnership Allocations", see 15 Colo. Law 1009 (1986).

**Annotation's note.** Since § 7-114-102 is similar to § 7-8-103 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors

have been included in the annotations to this section.

**This section prescribes one of those instances where it is mandatory that all stockholders vote** despite restrictions contained in the articles of incorporation. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**But section held not applicable to nonprofit corporations.** *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**7-114-102.5. Dissolution upon expiration of period of duration.** (1) A corporation shall be dissolved upon and by reason of the expiration of its period of duration, if any, stated in its articles of incorporation.

(2) A provision in the articles of incorporation to the effect that the corporation or its existence shall be terminated at a stated date or after a stated period of time or upon a contingency, or any similar provision, shall be deemed to be a provision for a period of duration within the meaning of this section, and the occurrence of such date, the expiration of the stated period of time, the occurrence of such contingency, or the satisfaction of such provision shall be deemed to be the expiration of the corporation's period of duration for purposes of this section.

**Source:** L. 96: Entire section added, p. 1324, § 34, effective June 1. L. 2003: (2) amended, p. 2327, § 263, effective July 1, 2004.

**7-114-103. Articles of dissolution.** (1) At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of dissolution stating:

- (a) The domestic entity name of the corporation;
- (b) The principal office address of the corporation's principal office; and
- (c) That the corporation is dissolved.
- (d) to (f) (Deleted by amendment, L. 2004, p. 1506, § 280, effective July 1, 2004.)
- (2) A corporation is dissolved upon the effective date of its articles of dissolution.
- (3) Repealed.
- (4) Articles of dissolution need not be filed by a corporation that is dissolved pursuant to section 7-114-102.5.

**Source:** L. 93: Entire article added, p. 823, § 1, effective July 1, 1994. L. 96: (3) repealed and (4) added, pp. 1324, 1325, §§ 35, 36, effective June 1. L. 2002: IP(1) amended, p. 1850, § 121, effective July 1; IP(1) amended, p. 1715, § 121, effective October 1. L. 2003: IP(1), (1)(a), and (1)(b) amended, p. 2328, § 264, effective July 1, 2004. L. 2004: (1)(c), (1)(d), (1)(e), and (1)(f) amended, p. 1506, § 280, effective July 1.

#### **7-114-103.5. Name of dissolved corporation - repeal. (Repealed)**

**Source:** L. 96: Entire section added, p. 1324, § 34, effective June 1. L. 2000: Entire section amended, p. 979, § 63, effective July 1. L. 2003: (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

#### **7-114-104. Revocation of dissolution. (Repealed)**

**Source:** L. 93: Entire article added, p. 823, § 1, effective July 1, 1994. L. 2000: (3)(a) and (5) amended, p. 979, § 64, effective July 1. L. 2002: IP(3) and (4) amended, p. 1850, § 122, effective July 1; IP(3) and (4) amended, p. 1715, § 122, effective October 1. L. 2003: IP(3), (3)(a), (4), and (5) amended, p. 2328, § 265, effective July 1, 2004. L. 2004: Entire section repealed, p. 1507, § 281, effective July 1.

**7-114-105. Effect of dissolution.** (1) A dissolved corporation continues its corporate existence but may not carry on any business except as is appropriate to wind up and liquidate its business and affairs, including:

- (a) Collecting its assets;
- (b) Disposing of its properties that will not be distributed in kind to its shareholders;
- (c) Discharging or making provision for discharging its liabilities;
- (d) Distributing its remaining property among its shareholders according to their interests; and
- (e) Doing every other act necessary to wind up and liquidate its business and affairs.
- (2) Dissolution of a corporation does not:
  - (a) Transfer title to the corporation's property;
  - (b) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;
  - (c) Subject its directors or officers to standards of conduct different from those prescribed in article 108 of this title;
  - (d) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws or its articles of incorporation;
  - (e) Prevent commencement of a proceeding by or against the corporation in its name; or
  - (f) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution.
- (3) A dissolved corporation may dispose of claims against it pursuant to sections 7-90-911 and 7-90-912.



**Source:** **L. 93:** Entire article added, p. 824, § 1, effective July 1, 1994. **L. 2004:** (2)(e) amended, p. 1508, § 282, effective July 1. **L. 2006:** (3) added, p. 881, § 75, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Suits Against a Dissolved Corporation.
- III. Suits by a Dissolved Corporation.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959).

**Annotator's note.** Since § 7-114-105 is similar to § 7-8-122 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Statute of limitations applicable to dissolved foreign corporations.** Since this state has by subsection (1) adopted a two-year statute of limitations applicable to dissolved domestic corporations, it would be both illogical and unconstitutional to apply to a foreign corporation, which has been dissolved pursuant to the laws under which it is governed by its state of incorporation and which has received a certificate of withdrawal from this state, a statute of limitations which would subject it to liability for a period longer than that which this state would apply to a dissolved domestic corporation. *Casselman v. Denver Tramway Corp.*, 39 Colo. App. 306, 568 P.2d 84 (1977), rev'd on other grounds, 195 Colo. 241, 577 P.2d 293 (1978).

**Applied in** *Kuehn v. Kuehn*, 642 P.2d 524 (Colo. App. 1981); *Graham, Inc. v. Mountain States Telephone and Telegraph Co.*, 680 P.2d 1334 (Colo. App. 1984).

### II. SUITS AGAINST A DISSOLVED CORPORATION.

**Dissolution does not affect remedies against a corporation.** *Dutton Hotel Co. v. Fitzpatrick*, 69 Colo. 229, 193 P. 549 (1920); *Dick v. Petersen*, 90 Colo. 83, 6 P.2d 923 (1931).

**And dissolution does not bar an action against a corporation upon a precedent cause of action.** *Kipp v. Miller*, 47 Colo. 598, 108 P. 164 (1910).

**However, this section, although conferring capacity to sue and to be sued in certain cases, does not confer the dissolved corporation with federal standing under either the Sherman Act or the Clayton Act.** *Western Sys., Inc. v. Dynatech Corp.*, 610 F. Supp. 585 (D. Colo. 1985).

**For this section continues the corporate capacity of a company to be sued for liabilities**

**which accrued before its dissolution.** *Lucifer Coal Co. v. Buster*, 64 Colo. 179, 171 P. 61 (1918); *Hazard v. Park*, 294 F. 40 (8th Cir. 1923).

**The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (CERCLA), preempts former § 7-8-122, which provided that a corporation could be sued only within two years of its dissolution. The plain language of CERCLA leads to the conclusion that Congress intended to create liability notwithstanding any other law. Because the Colorado statute actually conflicts with CERCLA, CERCLA preempts the statute. The statute stands as an obstacle to the accomplishment and execution of the full purposes of CERCLA and under the supremacy clause must yield to federal law.** *Burlington Northern & Santa Fe Ry. Co. v. Consolidated Fibers, Inc.*, 7 F. Supp.2d 822 (N.D. Tex. 1998) (decided under law in effect before the 1993 recodification of the Colorado Business Corporation Act).

**CERCLA preempts state laws that might limit the liability of dissolved corporations to be sued under CERCLA.** CERCLA's preemption extends to "dead" corporations, which have lawfully dissolved under state law, but does not allow suit to be brought against corporations that are "dead and buried", meaning they have dissolved and distributed all of their assets. *Burlington Northern & Santa Fe Ry. Co. v. Consolidated Fibers, Inc.*, 7 F. Supp.2d 822 (N.D. Tex. 1998) (decided under law in effect before the 1993 recodification of the Colorado Business Corporation Act).

### III. SUITS BY A DISSOLVED CORPORATION.

**A corporation, although dissolved, is authorized to prosecute an action in its corporate name by this section.** *Northwest Dev., Inc. v. Dunn*, 29 Colo. App. 364, 483 P.2d 1361 (1971).

**A dissolved corporation was authorized to enter into a contract for sale of its corporate assets and sue to collect on a promissory note in connection with such sale.** *Awanderlust Travel, Inc. v. Kochevar*, 21 P.3d 876 (Colo. App. 2001).

**And a dissolved corporation may sue out writ of appeal.** A dissolved corporation against which a judgment has been obtained pursuant to this section may sue out a writ of appeal to review the judgment even though that is technically the institution of a new suit. *Bankers Trust Co. v. Hall*, 116 Colo. 566, 183 P.2d 986 (1947).

**And a dissolved corporation that obtains a judgment in an action commenced within the survival period may sue outside the two year survival period to enforce that judgment.**

Domino Media, Inc. v. Kranis, 9 F. Supp.2d 374 (S.D.N.Y. 1998) (decided under former § 7-8-122).

**7-114-106. Disposition of known claims by notification. (Repealed)**

**Source:** L. 93: Entire article added, p. 825, § 1, effective July 1, 1994. L. 96: (2) amended, p. 1325, § 37, effective June 1. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**7-114-107. Disposition of claims by publication. (Repealed)**

**Source:** L. 93: Entire article added, p. 826, § 1, effective July 1, 1994. L. 2003: (2)(a) amended, p. 2328, § 266, effective July 1, 2004. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**7-114-108. Enforcement of claims against dissolved corporation. (Repealed)**

**Source:** L. 93: Entire article added, p. 827, § 1, effective July 1, 1994. L. 2006: Entire section repealed, p. 884, § 87, effective July 1.

**7-114-109. Service on dissolved corporation - repeal. (Repealed)**

**Source:** L. 93: Entire article added, p. 827, § 1, effective July 1, 1994. L. 96: (1)(a) amended, p. 1325, § 38, effective June 1. L. 2003: (4) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (4) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

## PART 2

### ADMINISTRATIVE DISSOLUTION

**7-114-201. Grounds for administrative dissolution. (Repealed)**

**Source:** L. 93: Entire article added, p. 828, § 1, effective July 1, 1994. L. 96: (1)(c) amended, p. 1325, § 39, effective June 1. L. 2000: (1)(b) amended, p. 980, § 65, effective July 1. L. 2003: (1)(a), (1)(b), (1)(c), and (1)(d) amended, p. 2328, § 267, effective July 1, 2004. L. 2004: (1)(b) amended, p. 1508, § 283, effective July 1. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

**7-114-202. Procedure for and effect of administrative dissolution. (Repealed)**

**Source:** L. 93: Entire article added, p. 828, § 1, effective July 1, 1994. L. 94: (1) and (2) amended, p. 75, § 1, effective July 1. L. 2003: (2), (3), (4), and (5) amended, p. 2329, § 268, effective July 1, 2004. L. 2005: Entire section repealed, p. 1218, § 26, effective October 1.

**7-114-203. Reinstatement following administrative dissolution - repeal. (Repealed)**

**Source:** L. 93: Entire article added, p. 829, § 1, effective July 1, 1994. L. 94: (3) amended, p. 75, § 2, effective July 1. L. 96: (1)(e) amended, p. 1326, § 40, effective June 1. L. 2000: (1)(a) and (1)(c) amended, p. 980, § 66, effective July 1. L. 2002: IP(1), (2),



and (3) amended, p. 1850, § 123, effective July 1; IP(1), (2), and (3) amended, p. 1715, § 123, effective October 1. **L. 2003:** (5) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

#### **7-114-204. Appeal from denial of reinstatement - repeal. (Repealed)**

**Source:** **L. 93:** Entire article added, p. 830, § 1, effective July 1, 1994. **L. 94:** (1) and (2) amended, p. 76, § 3, effective July 1. **L. 96:** (2) amended, p. 1326, § 41, effective June 1. **L. 2003:** (5) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

### **PART 3**

### **JUDICIAL DISSOLUTION**

**7-114-301. Grounds for judicial dissolution.** (1) A corporation may be dissolved in a proceeding by the attorney general if it is established that:

- (a) The corporation obtained its articles of incorporation through fraud; or
- (b) The corporation has continued to exceed or abuse the authority conferred upon it by law.

(2) A corporation may be dissolved in a proceeding by a shareholder if it is established that:

(a) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;

(b) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;

(c) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or

(d) The corporate assets are being misapplied or wasted.

(3) A corporation may be dissolved in a proceeding by a creditor if it is established that:

(a) The creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied, and the corporation is insolvent; or

(b) The corporation is insolvent and the corporation has admitted in writing that the creditor's claim is due and owing.

(4) (a) If a corporation has been dissolved by voluntary action taken under part 1 of this article:

(I) The corporation may bring a proceeding to wind up and liquidate its business and affairs under judicial supervision in accordance with section 7-114-105; and

(II) The attorney general, a shareholder, or a creditor, as the case may be, may bring a proceeding to wind up and liquidate the business and affairs of the corporation under judicial supervision in accordance with section 7-114-105, upon establishing the grounds set forth for such person, respectively, in subsections (1) to (3) of this section.

(b) As used in sections 7-114-302 to 7-114-304, a "proceeding to dissolve a corporation" includes a proceeding brought under this subsection (4), and a "decree of dissolution" includes an order of court entered in a proceeding under this subsection (4) which directs that the business and affairs of a corporation shall be wound up and liquidated under judicial supervision.

**Source:** **L. 93:** Entire article added, p. 830, § 1, effective July 1, 1994. **L. 2004:** (4)(b) amended, p. 1508, § 284, effective July 1. **L. 2005:** IP(4)(a) amended, p. 1219, § 29, effective October 1.

## ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For article, "Corporate Insolvency — Liquidation or Rehabilitation", see 36 U. Colo. L. Rev. 117 (1963). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985).

**Annotator's note.** Since § 7-114-301 is similar to § 7-8-113 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Definition of "oppressive" conduct** is intended to be broad and flexible. In the context of a close corporation, oppressive conduct by those in control is closely related to breach of the fiduciary duty owed to minority shareholders. *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402 (Colo. App. 2000).

**Conduct constituting a breach of fiduciary duty can also amount to oppression** when there has been a consistent undercurrent of dealing corporate interests without notice to the shareholders and all directors that is sufficient to

defeat the reasonable expectations of the shareholders that were central to the decision to join the venture. *Colt v. Mt. Princeton Trout Club, Inc.*, 78 P.3d 1115 (Colo. App. 2003).

**After involuntary dissolution of corporation**, contract entered into by former officers, directors and stockholders in the name of the defunct corporation held to be an enforceable contract by individuals, and as such, their claims for breach of contract by other parties were not barred. *Paulson v. Dakolios*, 768 P.2d 750 (Colo. App. 1988).

**Section contemplates adversary proceeding.** This section, construed by the ordinary rules of interpretation, indicates plainly that an adversary, and not an ex parte, proceeding was contemplated by the general assembly in its enactment. *Jones v. Bank of Leadville*, 10 Colo. 464, 17 P. 272 (1887) (decided under repealed Gen. Stat. Colo. § 258).

**Three-year limitation period applies** where action under this section is predicated on breach of fiduciary duty. *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402 (Colo. App. 2000).

**Applied in** *Breniman v. Agricultural Consultants, Inc.*, 648 P.2d 165 (Colo. App. 1982); *In re Loughnane*, 28 Bankr. 940 (Bankr. D. Colo. 1983); *Van Schaack Holdings, Ltd. v. Fulenwider*, 768 P.2d 740 (Colo. App. 1988).

**7-114-302. Procedure for judicial dissolution.** (1) A proceeding by the attorney general to dissolve a corporation shall be brought in the district court for the county in this state in which the street address of the corporation's principal office or the street address of its registered agent is located or, if the corporation has no principal office in this state and no registered agent, in the district court for the city and county of Denver. A proceeding brought by any other party named in section 7-114-301 shall be brought in the district court for the county in this state in which the street address of the corporation's principal office is located or, if it has no principal office in this state, in the district court for the county in which the street address of its registered agent is located, or, if the corporation has no registered agent, in the district court for the city and county of Denver.

(2) It is not necessary to make shareholders parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(3) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held.

**Source: L. 93:** Entire article added, p. 831, § 1, effective July 1, 1994. **L. 96:** (1) amended, p. 1326, § 42, effective June 1. **L. 2003:** (1) amended, p. 2330, § 269, effective July 1, 2004.

## ANNOTATION

**Law reviews.** For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For article, "Corporate Insolvency — Liquidation or Rehabilitation", see 36 U. Colo. L. Rev. 117 (1963). For article,

"The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985).



**Annotator's note.** Since § 7-114-302 is similar to §§ 7-8-113 and 7-8-116 as they existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing those provisions and their predecessors have been included in the annotations to this section.

**After involuntary dissolution of corporation,** contract entered into by former officers, directors and stockholders in the name of the defunct corporation held to be an enforceable contract by individuals, and as such, their claims for breach of contract by other parties were not barred. *Paulson v. Dakolios*, 768 P.2d 750 (Colo. App. 1988).

**Payment of costs and fees** incidental to a receivership ordered upon the involuntary dis-

solution of a corporation lies within the sound discretion of the trial court. *Van Schaack Holdings, Ltd. v. Fulenwider*, 768 P.2d 740 (Colo. App. 1988).

**Section contemplates adversary proceeding.** This section, construed by the ordinary rules of interpretation, indicates plainly that an adversary, and not an ex parte, proceeding was contemplated by the general assembly in its enactment. *Jones v. Bank of Leadville*, 10 Colo. 464, 17 P. 272 (1887) (decided under repealed Gen. Stat. Colo. § 258).

**Applied in** *Breniman v. Agricultural Consultants, Inc.*, 648 P.2d 165 (Colo. App. 1982); *In re Loughnane*, 28 Bankr. 940 (Bankr. D. Colo. 1983); *Van Schaack Holdings, Ltd. v. Fulenwider*, 768 P.2d 740 (Colo. App. 1988).

**7-114-303. Receivership or custodianship.** (1) A court in a judicial proceeding to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after giving notice to all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all of its property, wherever located.

(2) The court may appoint an individual, a domestic entity, or a foreign entity authorized to transact business or conduct activities in this state as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(a) The receiver:

(I) May dispose of all or any part of the property of the corporation wherever located, at a public or private sale, if authorized by the court; and

(II) May sue and defend in the receiver's own name as receiver of the corporation in all courts; or

(b) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

(4) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation and its shareholders and creditors.

(5) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and such person's counsel from the assets of the corporation or proceeds from the sale of the assets.

**Source:** L. 93: Entire article added, p. 832, § 1, effective July 1, 1994. L. 2003: (2) amended, p. 2330, § 270, effective July 1, 2004. L. 2004: (1) amended, p. 1508, § 285, effective July 1.

## ANNOTATION

**Law reviews.** For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985).

**Annotator's note.** Since § 7-114-303 is similar to § 7-8-116 as it existed prior to the 1993 recodification of the "Colorado Business Cor-

poration Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**The office of receiver is in the nature of a trustee,** and those who have lawful claims

against the receivership estate are cestuis que trustent. *Rossi v. Colo. Pulp & Paper Co.*, 88 Colo. 461, 299 P. 19 (1931).

**And where creditors have repeatedly dealt with a receiver** in his official capacity and asked or obtained court orders that involved recognition of his appointment by the district court, they thereby acquiesced in such appointment and cannot later complain of it on the ground of mere irregularities. *Rossi v. Colo. Pulp & Paper Co.*, 88 Colo. 461, 299 P. 19 (1931).

**But a receiver has no power to carry on a corporation's business.** This section contemplates only the doing of those things which are necessary to the closing up of the affairs of an insolvent corporation; and consequently, that while by his appointment a receiver, becomes eo instanti vested with the legal title and right of possession of all the property of the corporation, both real and personal, for the purpose of subjecting it to the claims of creditors, he has no power, nor can the court clothe him with the power, to continue or carry on the business of the corporation. *Standley v. Hendrie & Boltoff Mfg. Co.*, 27 Colo. 331, 61 P. 600 (1900).

**Rather the court appointing a receiver assumes the administration of the affairs of the corporation** for which the receiver was appointed, and it is for that court in its discretion to decide whether it will determine for itself all claims for or against the receiver or will allow them to be litigated elsewhere. However, the receiver is not entitled to the application of this rule where he becomes a party by leave of court. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 P. 623 (1907).

**And the court itself has no greater authority than is conferred in other receivership cases.** While this section confers upon courts power and authority they would not otherwise possess to decree the dissolution of a corporation at the suit of an individual and to that end authorizes the taking charge of its property through a receiver for the purpose of closing up its affairs, it does not confer upon the court any other or greater powers in the administration of such trust than it can exercise in other cases where, in the exercise of its jurisdiction, it may appoint a receiver to administer the affairs of an insolvent private business corporation during pending litigation. *Standley v. Hendrie & Boltoff Mfg. Co.*, 27 Colo. 331, 61 P. 600 (1900).

**Consequently the appointment of a receiver for the property of a corporation only deprives a corporation of the exercise of its**

**powers to the extent that** the statute under which such appointment is made or the order of the court making the appointment recites; the corporation is not thereby dissolved but continues as a legal entity and neither are its officers ousted by such action. Hence it follows, that except so far as the control of its affairs is vested in the receiver, it continues to exist for all other purposes, and its officials, except as enjoined by the court appointing the receiver, continue to exercise their functions the same as though no such appointment had been made. *Jones v. Bank of Leadville*, 10 Colo. 464, 17 P. 272 (1887); *Paddock v. Staley*, 13 Colo. App. 363, 58 P. 363 (1899); *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 P. 623 (1907).

**Such prohibiting suits by corporate officers.** Where a corporation has been adjudged insolvent and placed in the hands of a receiver with full powers to control and manage its affairs, an officer of the corporation cannot use its name to prosecute a writ of appeal against the objection of the receiver. *Am. Water Works Co. v. Farmers' Loan & Trust Co.*, 20 Colo. 203, 37 P. 269 (1894).

**Receiver may be discharged.** By the payment of its debts, by an arrangement with its creditors, or in some other way, the receiver may be discharged, and the corporation may resume business. *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 P. 291 (1898).

**This section contains no regulations as to how a receiver's sale shall be conducted,** but such is a judicial sale, and must be fairly and impartially conducted by the officer who makes it as a representative of the court, and since there are no statutory restrictions as to time, manner, terms, and notice of sale, such matters are to be determined by the court. *Rossi v. Colo. Pulp & Paper Co.*, 88 Colo. 461, 299 P. 19 (1931).

**But the rights of claimants are to be determined** in accordance with their relative priorities after a receivership has commenced. *Rossi v. Colo. Pulp & Paper Co.*, 88 Colo. 461, 299 P. 19 (1931).

**And there is no right of redemption** from sales made under this "winding-up" statute. *Rossi v. Colo. Pulp & Paper Co.*, 88 Colo. 461, 299 P. 19 (1931).

**Payment of costs and fees incidental to a receivership** ordered upon the involuntary dissolution of a corporation lies within the sound discretion of the trial court. *Van Schaack Holdings, Ltd. v. Fulenwider*, 768 P.2d 740 (Colo. App. 1988).

**Applied in** *Hendrie Mfg. Co. v. Parry*, 37 Colo. 359, 86 P. 113 (1906).

**7-114-304. Decree of dissolution.** (1) If after a hearing the court determines that one or more grounds for judicial dissolution described in section 7-114-301 exist, it may enter a decree dissolving the corporation and stating the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the secretary of state for



filing pursuant to part 3 of article 90 of this title.

(2) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with section 7-114-105 and the giving of notice to claimants in accordance with sections 7-90-911 and 7-90-912.

(3) The court's order or decision may be appealed as in other civil proceedings.

**Source:** L. 93: Entire article added, p. 833, § 1, effective July 1, 1994. L. 2003: (1) and (2) amended, p. 2330, § 271, effective July 1, 2004. L. 2004: (2) amended, p. 1508, § 286, effective July 1. L. 2006: (2) amended, p. 881, § 76, effective July 1.

## PART 4

### MISCELLANEOUS

**7-114-401. Deposit with state treasurer.** Assets of a dissolved corporation that should be transferred to a creditor, claimant, or shareholder of the corporation who cannot be found or who is not legally competent to receive them shall be reduced to cash and deposited with the state treasurer as property presumed to be abandoned under the provisions of article 13 of title 38, C.R.S.

**Source:** L. 93: Entire article added, p. 833, § 1, effective July 1, 1994.

## ARTICLE 115

### Foreign Corporations

**Editor's note:** This article was added in 1993 and was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2004, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

7-115-101. Authority to transact business or conduct activities required.

**7-115-101. Authority to transact business or conduct activities required.** Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign corporations.

**Source:** L. 2003: Entire article R&RE, p. 2330, § 272, effective July 1, 2004.

## ARTICLE 116

### Records, Information, and Reports

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

**Law reviews:** For article, "Commercial and Corporate Law", which discusses a recent Tenth Circuit decision dealing with parent company liability for breaching subsidiary-employee contract, see 65 Den. U.L. Rev. 492 (1988).

7-116-101. Corporate records.

7-116-102. Inspection of corporate records by shareholder.

7-116-103. Scope of shareholder's inspection right.

7-116-104. Court-ordered inspection of cor-

porate records.

7-116-105. Financial statements.

7-116-106. Information respecting shares.

7-116-107. Periodic report to secretary of state.

7-116-108. Statement of person named as

director or officer. (Repealed)

7-116-109. Interrogatories by secretary of state. (Repealed)

**7-116-101. Corporate records.** (1) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation, and a record of all waivers of notices of meetings of shareholders and of the board of directors or any committee of the board of directors.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation or its agent shall maintain a record of the names and addresses of its shareholders, in a form that permits preparation of a list of shareholders that is arranged by voting group and within each voting group by class or series of shares, that is alphabetical within each class or series, and that shows the address of, and the number of shares of each class and series held by, each shareholder.

(4) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A corporation shall keep a copy of each of the following records at its principal office:

(a) Its articles of incorporation;

(b) Its bylaws;

(c) The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years;

(d) All written communications within the past three years to shareholders as a group or to the holders of any class or series of shares as a group;

(e) A list of the names and business addresses of its current directors and officers;

(f) A copy of its most recent periodic report pursuant to part 5 of article 90 of this title; and

(g) All financial statements prepared for periods ending during the last three years that a shareholder could have requested under section 7-116-105.

**Source:** **L. 93:** Entire article added, p. 843, § 1, effective July 1, 1994. **L. 2000:** (5)(f) amended, p. 981, § 72, effective July 1. **L. 2003:** (5)(f) amended, p. 2331, § 273, effective July 1, 2004. **L. 2010:** (5)(f) amended, (HB 10-1403), ch. 404, p. 2000, § 25, effective August 11.

## ANNOTATION

I. General Consideration.

II. Shareholders' Right to Inspect Corporate Records.

III. Penalties.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "The Right to Inspect Corporate Books", see 4 Rocky Mt. L. Rev. 64 (1931).

**Annotator's note.** Since § 7-116-101 is similar to § 7-5-117 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Legislature intended to require officers and directors to act responsibly.** This statute eluci-

dates the intent of the general assembly that officers and directors of corporations be required to act responsibly toward shareholders. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), *aff'd in part and rev'd in part sub nom. Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

**Shareholder should not be burdened by corporation's failure to produce records.** Although it is true that the burden of proving the value of stock is upon the shareholder [now shareholder or holder of voting trust certificates therefor], it is not reasonable that the general assembly intended that a shareholder [now shareholder or holder of voting trust certificates therefor] suing under this statute to compel production of records should be further burdened by the corporation's failure to produce the records. *Beebe v. Star-Stop, Inc.*, 32 Colo. App.



345, 513 P.2d 743 (1973), aff'd in part and rev'd in part sub nom. *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

## II. SHAREHOLDERS' RIGHT TO INSPECT CORPORATE RECORDS.

**This section gives stockholders a statutory right to inspect corporate records.** *Rulon v. Silverman*, 79 Colo. 525, 246 P. 788 (1926); *D.F. Blackmer Furn. & Carpet Co. v. Blackmer*, 92 Colo. 419, 21 P.2d 181 (1933); *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971).

**Which right was afford by prior statutes.** This section was adopted in the year 1929, and for many years prior thereto, there were statutory provisions authorizing the examination of corporate books and records by stockholders. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**This section is complete in itself**, and a party seeking to inspect corporate books was not obliged to conform to, or to seek relief, under any other statute. *Rulon v. Silverman*, 79 Colo. 525, 246 P. 788 (1926).

**And it should be liberally construed** in favor of stockholders, and their rights should be zealously guarded. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**But inspection is limited to "complete books and records"**. In 1958 significant changes were made in this section. Prior thereto it provided for examination by stockholders of "all the books, accounts and papers" of a corporation. The amendment of 1958, however, restricted the right of inspection to "complete books and records of account". *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**And a court may refuse inspection of corporate books** when the person is not acting in good faith. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**For the indiscriminate examination by stockholders of corporate records is not favored.** *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Burden of proving bad faith.** Mere allegations of improper motives or bad faith on the part of one seeking to inspect the corporate books are not enough, and the burden of proof is on those who desire to deny inspection. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**Shareholders lists are a part of corporate books and records.** *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971).

**And federal securities laws do not preempt access to shareholders lists.** The federal securities laws and proxy rules, which provide that management must mail the proxy materials of an opposing security holder or provide a shareholders list when making a solicitation, do not preempt the field of access to shareholders lists, and this section is properly available to share-

holders to allow their inspection and copying of the shareholders list of equity; they are not required to elect one of the procedures. *Wood, Walker & Co. v. Evans*, 300 F. Supp. 171 (D. Colo. 1969), aff'd, 461 F.2d 852 (10th Cir. 1972).

**But this section does not nullify statute protecting privileged communications.** The fact that this section provides that a corporation shall keep complete books and records of account, shall keep minutes of the proceedings of its shareholders and board of directors, shall keep a record of its shareholders, and the further fact that a qualified shareholder shall have the right to examine its books and records of account, minutes and record of shareholders, and make extracts therefrom does not operate to nullify the provisions of § 13-90-107, the witness statute, which protects privileged communications. Rather a waiver of the protection of the witness statute can only be brought about by those duly constituted officers who are charged with the responsibilities of managing the affairs of the corporate entity. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Officer, not corporation, is necessary party in mandamus for inspection.** In order to enforce the right of inspection by mandamus, it is not necessary to make the corporation a party respondent, but merely its officer upon whom the statutory duty is devolved. *Merrill v. Suffa*, 42 Colo. 195, 93 P. 1099 (1908).

## III. PENALTIES.

**The main purpose of this section** is to emphasize that the right to the list of shareholders is clear and unequivocal. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**However, as an aid in the enforcement of this section a penalty is authorized**, but this is a secondary and not a primary aspect and purpose. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Officers denying shareholder access to records properly held liable with corporation.** Under this statute enumerating those liable for refusing to allow a shareholder [now shareholder or holder of voting trust certificates therefor] to examine corporate records, and upon evidence showing that corporate officers acted independently, as well as jointly, in denying access to the records, officers who concurred in the denial of the statutory rights of the shareholder [now shareholder or holder of voting trust certificates therefor] could properly be held liable as well as the corporation even though written demand for the examination had been made only upon the corporation. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), aff'd in part and rev'd in part sub nom. *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

**“Shall” means only that liability, not amount, is mandatory.** Although this section declares that the corporation and/or its officers “shall” be liable for the penalty, the courts which have directly considered the issue have held that use of the word “shall” in this context does not mean that the amount is mandatory, but rather means that the corporation and its officers are thereby mandatorily subjected to liability. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Thus court does not have to automatically award full penalty.** Upon making a finding of the existence of the basic conditions required for corporate liability under this section, the court does not have to proceed automatically and mechanically to award the full penalty, for the courts have always been guarded about imposing liability based on failure to comply with a duty imposed by a statute such as this section where the amount of the damage is fixed on a

somewhat liquidated measure without regard to injury suffered and, consequently, to construe this section so that the full amount of the prescribed penalty is to be granted on a kind of push button basis would be irrational and inequitable. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**A court is at liberty to withhold the award of the penalty if** in view of all the circumstances the award of such damages would not serve the ends of justice. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Applicability of section to foreign corporations.** Since nothing in the language of this section indicates an intent by the general assembly to limit its effect to domestic corporations, this section also applies to foreign corporations as provided by § 7-9-104. *Jefferson Indus. Bank v. First Golden Bancorp.*, 762 P.2d 768 (Colo. App. 1988).

**7-116-102. Inspection of corporate records by shareholder.** (1) A shareholder is entitled to inspect and copy, during regular business hours at the corporation’s principal office, any of the records of the corporation described in section 7-116-101 (5) if the shareholder gives the corporation written demand at least five business days before the date on which the shareholder wishes to inspect and copy such records.

(2) In addition to the rights set forth in subsection (1) of this section, a shareholder is entitled to inspect and copy, during regular business hours at a reasonable location stated by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (3) of this section and gives the corporation written demand at least five business days before the date on which the shareholder wishes to inspect and copy such records:

(a) Excerpts from minutes of any meeting of the board of directors or from records of any action taken by the board of directors without a meeting, minutes of any meeting of the shareholders or records of any action taken by the shareholders without a meeting, excerpts of records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, and waivers of notices of any meeting of the shareholders or the board of directors or any committee of the board of directors;

(b) Accounting records of the corporation; and

(c) The record of shareholders described in section 7-116-101 (3).

(3) A shareholder may inspect and copy the records described in subsection (2) of this section only if:

(a) The shareholder has been a shareholder for at least three months immediately preceding the demand to inspect or copy or is a shareholder of at least five percent of all of the outstanding shares of any class of shares of the corporation as of the date the demand is made;

(b) The demand is made in good faith and for a proper purpose;

(c) The shareholder describes with reasonable particularity the purpose and the records the shareholder desires to inspect; and

(d) The records are directly connected with the described purpose.

(4) For purposes of this section:

(a) “Proper purpose” means a purpose reasonably related to the demanding shareholder’s interest as a shareholder; and

(b) “Shareholder” includes a beneficial owner whose shares are held in a voting trust and any other beneficial owner who establishes beneficial ownership.

(5) The right of inspection granted by this section may not be abolished or limited by the articles of incorporation or bylaws.

(6) This section does not affect:



- (a) The right of a shareholder to inspect records under section 7-107-201;
- (b) The right of a shareholder to inspect records to the same extent as any other litigant if the shareholder is in litigation with the corporation; or
- (c) The power of a court, independent of articles 101 to 117 of this title, to compel the production of corporate records for examination.

**Source:** **L. 93:** Entire article added, p. 844, § 1, effective July 1, 1994. **L. 2003:** IP(2) amended, p. 2331, § 274, effective July 1, 2004.

**7-116-103. Scope of shareholder's inspection right.** (1) A shareholder's agent or attorney has the same inspection and copying rights as the shareholder.

(2) The right to copy records under section 7-116-102 includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means.

(3) Except as provided in section 7-116-106, the corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the shareholder. The charge may not exceed the estimated cost of production and reproduction of the records.

(4) The corporation may comply with a shareholder's demand to inspect the record of shareholders under section 7-116-102 (2) (c) by furnishing to the shareholder a list of shareholders that complies with section 7-116-101 (3) and was compiled no earlier than the date of the shareholder's demand.

**Source:** **L. 93:** Entire article added, p. 846, § 1, effective July 1, 1994.

## ANNOTATION

- I. General Consideration.
- II. Shareholders' Right to Inspect Corporate Records.
- III. Penalties.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "The Right to Inspect Corporate Books", see 4 Rocky Mt. L. Rev. 64 (1931).

**Annotator's note.** Since § 7-116-103 is similar to § 7-5-117 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Legislature intended to require officers and directors to act responsibly.** This statute elucidates the intent of the general assembly that officers and directors of corporations be required to act responsibly toward shareholders. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), aff'd in part and rev'd in part sub nom. *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

**Applicability of section to foreign corporations.** Since nothing in the language of this section indicates an intent by the general assembly to limit its effect to domestic corporations, this section also applies to foreign corporations as provided by § 7-9-104. *Jefferson Indus. Bank v. First Golden Bancorp.*, 762 P.2d 768 (Colo. App. 1988).

**Shareholder should not be burdened by corporation's failure to produce records.** Although it is true that the burden of proving the value of stock is upon the shareholder [now shareholder or holder of voting trust certificates therefor], it is not reasonable that the general assembly intended that a shareholder [now shareholder or holder of voting trust certificates therefor] suing under this statute to compel production of records should be further burdened by the corporation's failure to produce the records. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), aff'd in part and rev'd in part sub nom. *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

**A mutual ditch company should not be treated differently from any other type of corporation in matters of general corporate governance.** *Hill v. Behrmann*, 911 P.2d 679 (Colo. App. 1995), aff'd on other grounds, 933 P.2d 1 (Colo. 1997).

### II. SHAREHOLDERS' RIGHT TO INSPECT CORPORATE RECORDS.

**This section gives stockholders a statutory right to inspect corporate records.** *Rulon v. Silverman*, 79 Colo. 525, 246 P. 788 (1926); *D.F. Blackmer Furn. & Carpet Co. v. Blackmer*, 92 Colo. 419, 21 P.2d 181 (1933); *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971).

**Which right was afforded by prior statutes.** This section was adopted in the year 1929, and

for many years prior thereto, there were statutory provisions authorizing the examination of corporate books and records by stockholders. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**This section is complete in itself**, and a party seeking to inspect corporate books was not obliged to conform to, or to seek relief, under any other statute. *Rulon v. Silverman*, 79 Colo. 525, 246 P. 788 (1926).

**And it should be liberally construed** in favor of stockholders, and their rights should be zealously guarded. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**But inspection is limited to "complete books and records"**. In 1958 significant changes were made in this section. Prior thereto it provided for examination by stockholders of "all the books, accounts and papers" of a corporation. The amendment of 1958, however, restricted the right of inspection to "complete books and records of account". *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**And a court may refuse inspection of corporate books** when the person is not acting in good faith. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**For the indiscriminate examination by stockholders of corporate records is not favored.** *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Burden of proving bad faith.** Mere allegations of improper motives or bad faith on the part of one seeking to inspect the corporate books are not enough, and the burden of proof is on those who desire to deny inspection. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**Shareholders lists are a part of corporate books and records.** *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971).

**And federal securities laws do not preempt access to shareholders lists.** The federal securities laws and proxy rules, which provide that management must mail the proxy materials of an opposing security holder or provide a shareholders list when making a solicitation, do not preempt the field of access to shareholders lists, and this section is properly available to shareholders to allow their inspection and copying of the shareholders list of equity; they are not required to elect one of the procedures. *Wood, Walker & Co. v. Evans*, 300 F. Supp. 171 (D. Colo. 1969), *aff'd*, 461 F.2d 852 (10th Cir. 1972).

**But this section does not nullify statute protecting privileged communications.** The fact that this section provides that a corporation shall keep complete books and records of account, shall keep minutes of the proceedings of its shareholders and board of directors, shall keep a record of its shareholders, and the further fact that a qualified shareholder shall have the right to examine its books and records of ac-

count, minutes and record of shareholders, and make extracts therefrom does not operate to nullify the provisions of § 13-90-107, the witness statute, which protects privileged communications. Rather a waiver of the protection of the witness statute can only be brought about by those duly constituted officers who are charged with the responsibilities of managing the affairs of the corporate entity. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Officer, not corporation, is necessary party in mandamus for inspection.** In order to enforce the right of inspection by mandamus, it is not necessary to make the corporation a party respondent, but merely its officer upon whom the statutory duty is devolved. *Merrill v. Suffa*, 42 Colo. 195, 93 P. 1099 (1908).

### III. PENALTIES.

**The main purpose of this section** is to emphasize that the right to the list of shareholders is clear and unequivocal. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**However, as an aid in the enforcement of this section a penalty is authorized**, but this is a secondary and not a primary aspect and purpose. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Officers denying shareholder access to records properly held liable with corporation.** Under this statute enumerating those liable for refusing to allow a shareholder [now shareholder or holder of voting trust certificates therefor] to examine corporate records, and upon evidence showing that corporate officers acted independently, as well as jointly, in denying access to the records, officers who concurred in the denial of the statutory rights of the shareholder [now shareholder or holder of voting trust certificates therefor] could properly be held liable as well as the corporation even though written demand for the examination had been made only upon the corporation. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), *aff'd* in part and *rev'd* in part sub nom. *Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

**"Shall" means only that liability, not amount, is mandatory.** Although this section declares that the corporation and/or its officers "shall" be liable for the penalty, the courts which have directly considered the issue have held that use of the word "shall" in this context does not mean that the amount is mandatory, but rather means that the corporation and its officers are thereby mandatorily subjected to liability. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Thus court does not have to automatically award full penalty.** Upon making a finding of the existence of the basic conditions required for corporate liability under this section, the court



does not have to proceed automatically and mechanically to award the full penalty, for the courts have always been guarded about imposing liability based on failure to comply with a duty imposed by a statute such as this section where the amount of the damage is fixed on a somewhat liquidated measure without regard to injury suffered and, consequently, to construe this section so that the full amount of the pre-

scribed penalty is to be granted on a kind of push button basis would be irrational and inequitable. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**A court is at liberty to withhold the award of the penalty** if in view of all the circumstances the award of such damages would not serve the ends of justice. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**7-116-104. Court-ordered inspection of corporate records.** (1) If a corporation refuses to allow a shareholder, or the shareholder's agent or attorney, who complies with section 7-116-102 (1) to inspect or copy any records that the shareholder is entitled to inspect or copy by said section, the district court for the county in this state in which the street address of the corporation's principal office is located or, if the corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located or, if the corporation has no registered agent, the district court for the city and county of Denver may, on application of the shareholder, summarily order the inspection or copying of the records demanded at the corporation's expense.

(2) If a corporation refuses to allow a shareholder, or the shareholder's agent or attorney, who complies with section 7-116-102 (2) and (3) to inspect or copy any records that the shareholder is entitled to inspect or copy by section 7-116-102 (2) and (3) within a reasonable time following the shareholder's demand, the district court for the county in this state in which the street address of the corporation's principal office is located or, if the corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located or, if the corporation has no registered agent, the district court for the city and county of Denver may, on application of the shareholder, summarily order the inspection or copying of the records demanded.

(3) If a court orders inspection or copying of the records demanded, unless the corporation proves that it refused inspection or copying in good faith because it had a reasonable basis for doubt about the right of the shareholder or the shareholder's agent or attorney to inspect or copy the records demanded:

(a) The court shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order;

(b) The court may order the corporation to pay the shareholder for any damages the shareholder incurred;

(c) If inspection or copying is ordered pursuant to subsection (2) of this section, the court may order the corporation to pay the shareholder's inspection and copying expenses; and

(d) The court may grant the shareholder any other remedy provided by law.

(4) If a court orders inspection or copying of records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder.

**Source:** **L. 93:** Entire article added, p. 846, § 1, effective July 1, 1994. **L. 96:** (1) and (2) amended, p. 1327, § 48, effective June 1. **L. 2003:** (1) and (2) amended, p. 2331, § 275, effective July 1, 2004.

#### ANNOTATION

**Annotator's note.** Since § 7-116-104 is similar to § 7-5-117 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to

this section.

**A court may refuse inspection of corporate books** when the person is not acting in good faith. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**For the indiscriminate examination by**

**stockholders of corporate records is not favored.** *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Burden of proving bad faith.** Mere allegations of improper motives or bad faith on the part of one seeking to inspect the corporate books are not enough, and the burden of proof is on those who desire to deny inspection. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**Officer, not corporation, is necessary party in mandamus for inspection.** In order to enforce the right of inspection by mandamus, it is

not necessary to make the corporation a party respondent, but merely its officer upon whom the statutory duty is devolved. *Merrill v. Suffa*, 42 Colo. 195, 93 P. 1099 (1908).

**Applicability of section to foreign corporations.** Since nothing in the language of this section indicates an intent by the general assembly to limit its effect to domestic corporations, this section also applies to foreign corporations as provided by § 7-9-104. *Jefferson Indus. Bank v. First Golden Bancorp.*, 762 P.2d 768 (Colo. App. 1988).

**7-116-105. Financial statements.** Upon the written request of any shareholder, a corporation shall mail to such shareholder its most recent annual financial statements, if any, and its most recently published financial statements, if any, showing in reasonable detail its assets and liabilities and results of its operations.

**Source: L. 93:** Entire article added, p. 847, § 1, effective July 1, 1994.

## ANNOTATION

- I. General Consideration.
- II. Shareholders' Right to Inspect Corporate Records.
- III. Penalties.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "The Right to Inspect Corporate Books", see 4 Rocky Mt. L. Rev. 64 (1931).

**Annotator's note.** Since § 7-116-105 is similar to § 7-5-117 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

**Legislature intended to require officers and directors to act responsibly.** This statute elucidates the intent of the general assembly that officers and directors of corporations be required to act responsibly toward shareholders. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), *aff'd in part and rev'd in part sub nom. Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

**Shareholder should not be burdened by corporation's failure to produce records.** Although it is true that the burden of proving the value of stock is upon the shareholder [now shareholder or holder of voting trust certificates therefor], it is not reasonable that the general assembly intended that a shareholder [now shareholder or holder of voting trust certificates therefor] suing under this statute to compel production of records should be further burdened by the corporation's failure to produce the records. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), *aff'd in part and rev'd*

*in part sub nom. Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

### II. SHAREHOLDERS' RIGHT TO INSPECT CORPORATE RECORDS.

**This section gives stockholders a statutory right to inspect corporate records.** *Rulon v. Silverman*, 79 Colo. 525, 246 P. 788 (1926); *D.F. Blackmer Furn. & Carpet Co. v. Blackmer*, 92 Colo. 419, 21 P.2d 181 (1933); *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971).

**Which right was afford by prior statutes.** This section was adopted in the year 1929, and for many years prior thereto, there were statutory provisions authorizing the examination of corporate books and records by stockholders. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**This section is complete in itself,** and a party seeking to inspect corporate books was not obliged to conform to, or to seek relief, under any other statute. *Rulon v. Silverman*, 79 Colo. 525, 246 P. 788 (1926).

**And it should be liberally construed** in favor of stockholders, and their rights should be zealously guarded. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**But inspection is limited to "complete books and records".** In 1958 significant changes were made in this section. Prior thereto it provided for examination by stockholders of "all the books, accounts and papers" of a corporation. The amendment of 1958, however, restricted the right of inspection to "complete books and records of account". *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**And a court may refuse inspection of corporate books** when the person is not acting in



good faith. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**For the indiscriminate examination by stockholders of corporate records is not favored.** *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Burden of proving bad faith.** Mere allegations of improper motives or bad faith on the part of one seeking to inspect the corporate books are not enough, and the burden of proof is on those who desire to deny inspection. *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 (1930).

**Shareholders lists are a part of corporate books and records.** *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971).

**And federal securities laws do not preempt access to shareholders lists.** The federal securities laws and proxy rules, which provide that management must mail the proxy materials of an opposing security holder or provide a shareholders list when making a solicitation, do not preempt the field of access to shareholders lists, and this section is properly available to shareholders to allow their inspection and copying of the shareholders list of equity; they are not required to elect one of the procedures. *Wood, Walker & Co. v. Evans*, 300 F. Supp. 171 (D. Colo. 1969), *aff'd*, 461 F.2d 852 (10th Cir. 1972).

**But this section does not nullify statute protecting privileged communications.** The fact that this section provides that a corporation shall keep complete books and records of account, shall keep minutes of the proceedings of its shareholders and board of directors, shall keep a record of its shareholders, and the further fact that a qualified shareholder shall have the right to examine its books and records of account, minutes and record of shareholders, and make extracts therefrom does not operate to nullify the provisions of § 13-90-107, the witness statute, which protects privileged communications. Rather a waiver of the protection of the witness statute can only be brought about by those duly constituted officers who are charged with the responsibilities of managing the affairs of the corporate entity. *Weck v. District Court*, 158 Colo. 521, 408 P.2d 987 (1965).

**Officer, not corporation, is necessary party in mandamus for inspection.** In order to enforce the right of inspection by mandamus, it is not necessary to make the corporation a party respondent, but merely its officer upon whom the statutory duty is devolved. *Merrill v. Suffa*, 42 Colo. 195, 93 P. 1099 (1908).

### III. PENALTIES.

**The main purpose of this section is to emphasize that the right to the list of shareholders is clear and unequivocal.** *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**However, as an aid in the enforcement of this section a penalty is authorized,** but this is a secondary and not a primary aspect and purpose. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Officers denying shareholder access to records properly held liable with corporation.** Under this statute enumerating those liable for refusing to allow a shareholder [now shareholder or holder of voting trust certificates therefor] to examine corporate records, and upon evidence showing that corporate officers acted independently, as well as jointly, in denying access to the records, officers who concurred in the denial of the statutory rights of the shareholder [now shareholder or holder of voting trust certificates therefor] could properly be held liable as well as the corporation even though written demand for the examination had been made only upon the corporation. *Beebe v. Star-Stop, Inc.*, 32 Colo. App. 345, 513 P.2d 743 (1973), *aff'd in part and rev'd in part sub nom. Beebe v. Pierce*, 185 Colo. 34, 521 P.2d 1263 (1974).

**"Shall" means only that liability, not amount, is mandatory.** Although this section declares that the corporation and/or its officers "shall" be liable for the penalty, the courts which have directly considered the issue have held that use of the word "shall" in this context does not mean that the amount is mandatory, but rather means that the corporation and its officers are thereby mandatorily subjected to liability. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Thus court does not have to automatically award full penalty.** Upon making a finding of the existence of the basic conditions required for corporate liability under this section, the court does not have to proceed automatically and mechanically to award the full penalty, for the courts have always been guarded about imposing liability based on failure to comply with a duty imposed by a statute such as this section where the amount of the damage is fixed on a somewhat liquidated measure without regard to injury suffered and, consequently, to construe this section so that the full amount of the prescribed penalty is to be granted on a kind of push button basis would be irrational and inequitable. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**A court is at liberty to withhold the award of the penalty if** in view of all the circumstances the award of such damages would not serve the ends of justice. *Wood, Walker & Co. v. Evans*, 461 F.2d 852 (10th Cir. 1972).

**Applicability of section to foreign corporations.** Since nothing in the language of this section indicates an intent by the general assembly to limit its effect to domestic corporations,

this section also applies to foreign corporations as provided by § 7-9-104. Jefferson Indus. Bank

v. First Golden Bancorp., 762 P.2d 768 (Colo. App. 1988).

**7-116-106. Information respecting shares.** Upon the written request of any shareholder, a corporation shall mail to such shareholder, at the corporation's expense, the information specified by section 7-106-206 (4), whether or not such information is also contained or summarized on any share certificate of the shareholder.

**Source: L. 93:** Entire article added, p. 847, § 1, effective July 1, 1994.

## ANNOTATION

- I. General Consideration.
- II. Signatures of Officers.
- III. Notice of Restrictions and Variations in Shares.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Discount, Bonus and Watered Stock in Colorado", see 33 Rocky Mt. L. Rev. 197 (1961). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985).

**Annotator's note.** Since § 7-116-106 is similar to § 7-4-108 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors have been included in the annotations to this section.

### II. SIGNATURES OF OFFICERS.

**Stock certificates which have been issued without authority and are not manually signed are nonetheless genuine**, and the statutory requirement of a transfer agent's counter-signature on stock certificates bearing facsimile signatures does not render them invalid or preclude bona fide purchase. *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.*, 293 F. Supp. 1383 (D. Colo. 1968).

**For noncompliance with this section does not render certificates nongenuine** or constitute an absolute defense effective against a purchaser for value and without notice under § 4-8-202 (3) of the commercial code, as certificates signed in facsimile are genuine under the uniform commercial code, "genuine" meaning free of forgery or counterfeiting. Thus even though certificates are issued without authority, it cannot be said that the signatures are either forged

or counterfeit, and so in this sense they are effective against the issuer. *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.*, 293 F. Supp. 1383 (D. Colo. 1968).

### III. NOTICE OF RESTRICTIONS AND VARIATIONS IN SHARES.

**The purpose of this section** is to ensure that a purchaser of stock has notice of voting restrictions at the time of purchase. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

The requirement of subsection (2) is aimed at avoiding shareholder misunderstandings. *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982).

**However, this section does not require that the certificate carry the exact restrictions on the certificate**, but only that the shareholder be informed by the certificate that upon request the corporation will furnish him with information as to classes of stock and their various restrictions. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**Yet this section makes no provision as to the consequences of a violation.** *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**But the stock contract is voidable.** Absent a showing of actual knowledge at the time of purchase, failure to follow the statute renders the stock contract voidable on the part of the stockholder. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**And rescission is the most appropriate remedy.** Where notice has not been given pursuant to the statute and where actual knowledge cannot be shown by the corporation, then, in the absence of fraud, rescission is the most appropriate remedy. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**7-116-107. Periodic report to secretary of state.** Part 5 of article 90 of this title, providing for periodic reports from reporting entities, applies to domestic corporations and applies to foreign corporations that are authorized to transact business or conduct activities in this state.

**Source: L. 93:** Entire article added, p. 847, § 1, effective July 1, 1994. **L. 96:** (1)(c) amended, p. 1328, § 49, effective June 1. **L. 2000:** Entire section R&RE, p. 981, § 73,



effective July 1. **L. 2003:** Entire section amended, p. 2331, § 276, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1508, § 287, effective July 1. **L. 2010:** Entire section amended, (HB 10-1403), ch. 404, p. 2000, § 26, effective August 11.

### ANNOTATION

**Law reviews.** For article, "The New Colorado Corporation Act", see 35 Dicta 317 (1958). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985).

**Annotator's note.** Since § 7-116-107 is similar to § 7-116-107 as it existed prior its 2000 repeal and reenactment and former § 7-116-107 is similar to § 7-10-101 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, relevant cases construing those provisions have been included in the annotations to this section.

**This section is mandatory.** Colo. Fuel Co. v. Lenhart, 6 Colo. App. 511, 41 P. 834 (1895).

**Thus a corporation whether it did any business during the year or not, must make the annual report** required by this section. Bradford v. Gulley, 10 Colo. App. 146, 50 P. 314 (1897).

**Report failing to give company's condition is insufficient.** The annual report of a corporation which fails to give the financial and other conditions of the company at the date of filing the report, as required by subsection (1), is wholly insufficient. Bergren v. Valentine Hdwe. Co., 88 Colo. 52, 291 P. 1038 (1930).

**Which invalidates the report.** The failure to state in the report the amount of the indebtedness of the corporation at the date of the report and whether or not it was engaged in the active operation of its business within the state invalidates the report. Int'l. State Bank v. McGlashan, 71 Colo. 72, 204 P. 480 (1922).

**And makes it a mere nullity.** The annual report of a corporation making no reference to the condition of its properties or finances as required by this section is a mere nullity. Moody v. Rhodes Ranch Egg Co., 61 Colo. 368, 157 P. 1167 (1916); Bergren v. Valentine Hdwe. Co., 88 Colo. 52, 291 P. 1038 (1930).

### 7-116-108. Statement of person named as director or officer. (Repealed)

**Source:** **L. 93:** Entire article added, p. 849, § 1, effective July 1, 1994. **L. 2000:** Entire section repealed, p. 990, § 109, effective July 1.

### 7-116-109. Interrogatories by secretary of state. (Repealed)

**Source:** **L. 93:** Entire article added, p. 849, § 1, effective July 1, 1994. **L. 96:** (5) amended, p. 1328, § 50, effective June 1. **L. 2002:** (4) amended, p. 1852, § 130, effective July 1; (4) amended, p. 1717, § 130, effective October 1. **L. 2003:** (4) and (5) amended, p. 2332, § 277, effective July 1, 2004. **L. 2004:** (1) amended, p. 1509, § 288, effective July 1. **L. 2006:** Entire section repealed, p. 884, § 87, effective July 1.

## ARTICLE 117

### Transition Provisions

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-101-401.

7-117-101. Application to existing corporations.

7-117-102. Application to foreign corporations.

7-117-103. Saving provisions.

7-117-104. Severability.

7-117-105. Effective date.

**7-117-101. Application to existing corporations.** (1) For purposes of this article, "existing corporation" means any domestic corporation that was in existence on June 30, 1994, and that was incorporated under any general statute of this state providing for incorporation of corporations for profit if the power to amend or repeal the statute under which the corporation was incorporated was reserved.

(2) Articles 101 to 117 of this title apply to all existing corporations.

(3) Except to the extent the articles of incorporation of an existing corporation limit or deny preemptive rights, shareholders of such corporation shall have a preemptive right to acquire unissued shares or securities convertible into such shares or carrying a right to subscribe to or acquire shares; except that, unless otherwise provided in the articles of incorporation, such preemptive rights shall not exist:

(a) To acquire any shares issued to directors, officers, or employees pursuant to approval by the affirmative vote of the holders of a majority of the shares entitled to vote thereon or when authorized by and not inconsistent with a plan theretofore approved by such a vote of shareholders; or

(b) To acquire any shares sold otherwise than for cash.

(4) Notwithstanding the provisions of subsection (3) of this section, unless the articles of incorporation of an existing corporation provide otherwise:

(a) Holders of shares of any class that is preferred or limited as to dividends or assets shall not be entitled to any preemptive right;

(b) Holders of shares of common stock shall not be entitled to any preemptive right to shares of any class that is preferred or limited as to dividends or assets or to any obligations unless such shares are convertible into shares of common stock or carry a right to subscribe to or acquire shares of common stock; and

(c) Holders of common stock without voting powers shall have no preemptive right to shares of common stock with voting power.

(5) To the extent that preemptive rights exist pursuant to subsections (3) and (4) of this section, the preemptive right shall be only an opportunity to acquire shares or other securities under such terms and conditions as the board of directors may fix for the purpose of providing a fair and reasonable opportunity for the exercise of such right.

(6) Nothing in subsections (3) and (4) of this section shall confer any preemptive right with respect to shares of a corporation incorporated before January 1, 1959, that have been or may be issued and subsequently acquired by such corporation and that have not been cancelled or restored to the status of authorized but unissued shares. Any such shares in existence on June 30, 1994, or acquired thereafter by any such corporation shall not be deemed to be restored to the status of authorized but unissued shares, for purposes of this subsection (6) only, notwithstanding the provisions of section 7-106-302.

(7) Unless the articles of incorporation of an existing corporation contain a provision establishing the vote of shareholders required to amend the articles of incorporation, as contemplated in section 7-110-103, such amendment shall be approved by each voting group entitled to vote separately on the amendment by two-thirds of all the votes entitled to be cast on the amendment by that voting group.

(8) Unless the articles of incorporation of an existing corporation contain a provision establishing the vote of shareholders required to approve a plan of merger or a plan of share exchange, as contemplated in section 7-111-103, such plan shall be approved by each voting group entitled to vote separately on the plan by two-thirds of all the votes entitled to be cast on the plan by that voting group. In the case of a corporation incorporated before July 1, 1978, each outstanding share of the corporation, other than a redeemable share that is not entitled to vote by reason of section 7-107-202 (4), shall be entitled to vote on the plan of merger or share exchange whether or not such share has voting rights under the provisions of the articles of incorporation, unless the articles of incorporation have been amended after June 30, 1978, by the same vote of shareholders which would have been necessary at the time of the amendment to approve the plan, so as to restrict or eliminate the right of such share to vote on such plan.

(9) Unless the articles of incorporation of an existing corporation contain a provision establishing the vote of shareholders required to approve a transaction involving a sale, lease, exchange, or other disposition of all, or substantially all, of its property, with or without its good will, otherwise than in the usual and regular course of business, as contemplated in section 7-112-102 (1), such transaction shall be approved by each voting group entitled to vote separately on the transaction by two-thirds of all the votes entitled to be cast on the transaction by that voting group.

(10) Unless the articles of incorporation of an existing corporation contain a provision establishing the vote of shareholders required to approve a proposal to dissolve the



corporation as contemplated in section 7-114-102, such proposal shall be approved by each voting group entitled to vote separately on the proposal by two-thirds of all the votes entitled to be cast on the proposal by that voting group. In the case of a corporation incorporated before July 1, 1978, each outstanding share of the corporation, other than a redeemable share that is not entitled to vote by reason of section 7-107-202 (4), shall be entitled to vote on a proposal to dissolve the corporation whether or not such share has voting rights under the provisions of the articles of incorporation, unless the articles of incorporation have been amended after June 30, 1978, by the same vote of shareholders which would have been necessary at the time of the amendment to approve the proposal, so as to restrict or eliminate the right of such share to vote on such proposal.

(11) An amendment to the articles of incorporation of an existing corporation to reduce the vote required to take any action specified in subsections (7) to (10) of this section, which amendment may not reduce the required vote to less than that which would be required to take the action if the action were to be taken by a corporation formed on or after July 1, 1994, shall be adopted by the same vote and voting groups required to take the action specified in said subsections (7) to (10).

**Source:** L. 93: Entire article added, p. 850, § 1, effective July 1, 1994. L. 96: (11) amended, p. 1328, § 51, effective June 1. L. 2004: (10) amended, p. 1509, § 289, effective July 1.

#### ANNOTATION

**Law reviews.** For note, "Consolidations, Mergers, Sales of Assets Under the New Colorado Corporation Act", see 31 Rocky Mt. L. Rev. 66 (1958). For article, "1959 Amendments to the Colorado Corporation Code", see 36 Dicta 489 (1959). For comment on shareholder approval of substantial asset sales in the multisubsidiary context, see 45 U. Colo. L. Rev. 339 (1974). For article, "Conflict of Interest Transactions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders", see 57 Den. L.J. 609 (1980). For article, "Signatures on Documents Affecting Title to Colorado Real Property — Part III", see 12 Colo. Law. 447 (1983). For article, "The 1985 Proposed Revisions to the Colorado Corporation Code", see 14 Colo. Law. 34 (1985). For article, "Continuing Liability for Unpaid Corporate Debts After a Corporation Ceases Business", see 14 Colo. Law. 40 (1985). For article, "1985 Amendments to the Colorado Corporation Code", see 14 Colo. Law. 2173 (1985). For article, "Final Regulations on Substantial Economic Effect of Partnership Allocations", see 15 Colo. Law. 1009 (1986). For article, "Sale of Substantially All Corporate Assets", see 16 Colo. Law. 455 (1987). For article, "Dissenter's Rights in Colorado", see 18 Colo. Law. 1101 (1989).

**Annotator's note.** Since § 7-117-101 is similar to §§ 7-5-112, 7-7-103, and 7-8-103 as they existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing those provisions and their predecessors have been included in the annotations to this section.

**This section prescribes one of those instances where it is mandatory that all stockholders vote** despite restrictions contained in the articles of incorporation. *Hampton v. Tri-State Fin. Corp.*, 30 Colo. App. 420, 495 P.2d 566 (1972).

**Section held not applicable to nonprofit corporations.** *Morris Alpert & Sons v. Kahler*, 31 Colo. App. 345, 502 P.2d 98 (1972).

**To legally effect a change in the two-thirds approval requirement of an asset sale in this section, a provision must be added to the articles of incorporation.** *Dominick v. Marcove*, 809 F. Supp. 805 (D. Colo. 1992) (decided under former § 7-5-112 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7).

**Applied** in *People v. Cameron*, 197 Colo. 330, 595 P.2d 677 (1979).

**7-117-102. Application to foreign corporations.** A foreign corporation authorized to transact business or conduct activities in this state on June 30, 1994, is subject to articles 101 to 117 of this title but is not required to obtain new authorization to transact business or conduct activities under said articles.

**Source:** L. 93: Entire article added, p. 852, § 1, effective July 1, 1994. L. 2003: Entire section amended, p. 2332, § 278, effective July 1, 2004.

### ANNOTATION

**Annotator's note.** Since § 7-117-102 is similar to § 7-9-102 as it existed prior to the 1993 recodification of the "Colorado Business Corporation Act", articles 101 to 117 of title 7, cases construing that provision and its predecessors

have been included in the annotations to this section.

**Applied** in *McHugh v. Ficor, Inc.*, 43 Colo. App. 409, 611 P.2d 578 (1979), *aff'd*, 639 P.2d 385 (Colo. 1982).

**7-117-103. Saving provisions.** (1) Except as provided in subsection (2) of this section, the repeal of any provision of the "Colorado Corporation Code", articles 1 to 10 of this title, does not affect:

- (a) The operation of the statute, or any action taken under it, before its repeal;
- (b) Any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the provision before its repeal;
- (c) Any violation of the provision, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal; or
- (d) Any proceeding, reorganization, or dissolution commenced under the provision before its repeal, and the proceeding, reorganization, or dissolution may be completed in accordance with the provision as if it had not been repealed.

(2) If a penalty or punishment imposed for violation of any provision of the "Colorado Corporation Code", articles 1 to 10 of this title, is reduced by articles 101 to 117 of this title, the penalty or punishment, if not already imposed, shall be imposed in accordance with said articles 101 to 117.

**Source: L. 93:** Entire article added, p. 853, § 1, effective July 1, 1994.

### ANNOTATION

**Claim for statutory penalty for refusal to permit stockholders to inspect corporate records was properly dismissed.** The Colorado

Business Corporations Act no longer has such a penalty. *Hill v. Behrmann*, 911 P.2d 679 (Colo. App. 1995).

**7-117-104. Severability.** If any provision of articles 101 to 117 of this title or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of said articles that can be given effect without the invalid provision or application, and to this end the provisions of said articles are severable.

**Source: L. 93:** Entire article added, p. 853, § 1, effective July 1, 1994.

**7-117-105. Effective date.** Articles 101 to 117 of this title are effective July 1, 1994.

**Source: L. 93:** Entire article added, p. 853, § 1, effective July 1, 1994.

## Nonprofit Corporations

### ARTICLE 121

#### General Provisions

**Cross references:** For definitions applicable to this article, see § 7-90-102.

**Law reviews:** For article, "An Overview of the Colorado Revised Nonprofit Corporation Act", see 26 Colo. Law. 5 (September 1997); for article, "A Survey of the Law of Colorado Nonprofit Entities", see 27 Colo. Law. 5 (April 1998); for article, "Colorado Choice of Entity 1998", see 27 Colo. Law. 5 (June 1998); for article, "Colorado LLCs as Nonprofit Organizations", see 27 Colo. Law. 57



(August 1998); for article, “Colorado Choice of Form of Organization and Structure 2001”, see 30 Colo. Law. 11 (October 2001); for article, “Entity and Trade Name Registration: 2001 Update”, see 30 Colo. Law. 81 (October 2001); for article, “No Paper Required: Business Entity Legislation Makes Life Easier for Business Lawyers”, see 33 Colo. Law. 6 (June 2004); for article, “Entity and Trade Name Registration: 2004 Update”, see 34 Colo. Law. 11 (January 2005).

## PART 1

SHORT TITLE AND  
RESERVATION OF POWER

- 7-121-101. Short title.  
7-121-102. Reservation of power to amend  
or repeal.

## PART 2

## FILING DOCUMENTS

- 7-121-201. Filing requirements.

## PART 3

## SECRETARY OF STATE

- 7-121-301. Powers - repeal. (Repealed)

## PART 4

## DEFINITIONS

- 7-121-401. General definitions.  
7-121-402. Notice.

## PART 5

## PRIVATE FOUNDATIONS

- 7-121-501. Private foundations.

## PART 6

## JUDICIAL RELIEF

- 7-121-601. Judicial relief.

## PART 1

## SHORT TITLE AND RESERVATION OF POWER

**7-121-101. Short title.** Articles 121 to 137 of this title shall be known and may be cited as the “Colorado Revised Nonprofit Corporation Act”.

**Source: L. 97:** Entire article added, p. 646, § 3, effective July 1, 1998.

## ANNOTATION

**Annotator’s note.** Since § 7-121-101 is similar to § 7-20-101 as it existed prior to the 1997 recodification of the “Colorado Revised Nonprofit Corporation Act”, articles 121 to 137 of title 7, a case construing that provision has been included in the annotations to this section.

**A school building authority created as a nonprofit pursuant to this section was not a governmental entity, nor did it possess the requisite authority to file a Chapter 9 petition in bankruptcy.** In Re Ellicott Sch. Bldg. Authority 150 Bankr. 261 (Bankr. D. Colo. 1992).

**7-121-102. Reservation of power to amend or repeal.** The general assembly has the power to amend or repeal all or part of articles 121 to 137 of this title at any time and all domestic and foreign nonprofit corporations subject to said articles shall be governed by the amendment or repeal.

**Source: L. 97:** Entire article added, p. 646, § 3, effective July 1, 1998.

## PART 2

## FILING DOCUMENTS

**Editor’s note:** This article was added in 1997, and this part 2 was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this part 2 prior to 2004, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**7-121-201. Filing requirements.** Part 3 of article 90 of this title, providing for the filing of documents, applies to any document filed or to be filed by the secretary of state pursuant to articles 121 to 137 of this title.

**Source: L. 2003:** Entire part R&RE, p. 2332, § 279, effective July 1, 2004.

### PART 3

### SECRETARY OF STATE

#### **7-121-301. Powers - repeal. (Repealed)**

**Source: L. 97:** Entire article added, p. 652, § 3, effective July 1, 1998. **L. 2003:** (2) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** (1) This article was added in 1997. This part 3 was subsequently repealed in 2003, effective July 1, 2004, and was not amended prior to its repeal. For the text of this part 3 prior to 2004, consult the 2003 Colorado Revised Statutes.

(2) Subsection (2) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

### PART 4

### DEFINITIONS

**7-121-401. General definitions.** As used in articles 121 to 137 of this title, unless the context otherwise requires:

(1) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(2) "Articles of incorporation" includes amended articles of incorporation, restated articles of incorporation, and other instruments, however designated, on file in the records of the secretary of state that have the effect of amending or supplementing in some respect the original or amended articles of incorporation, and shall also include:

(a) For a corporation created by special act of the general assembly or pursuant to general law, which corporation has elected to accept the provisions of articles 121 to 137 of this title, the special charter and any amendments thereto made by special act of the general assembly or pursuant to general law prior to the corporation's election to accept the provisions of said articles;

(b) For a corporation formed or incorporated under article 40, 50, or 51 of this title, which corporation has elected to accept the provisions of articles 121 to 137 of this title, the certificate of incorporation or affidavit and any amendments thereto made prior to the corporation's election to accept the provisions of said articles.

(3) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(4) "Board of directors" means the body authorized to manage the affairs of the domestic or foreign nonprofit corporation; except that no person or group of persons are the board of directors because of powers delegated to that person or group of persons pursuant to section 7-128-101 (2).

(5) "Bylaws" means the code or codes of rules, other than the articles of incorporation, adopted pursuant to articles 121 to 137 of this title for the regulation or management of the affairs of the domestic or foreign nonprofit corporation irrespective of the name or names by which such rules are designated, and includes amended bylaws and restated bylaws.

(6) "Cash" and "money" are used interchangeably in articles 121 to 137 of this title. Each of these terms includes:

(a) Legal tender;

(b) Negotiable instruments readily convertible into legal tender; and

(c) Other cash equivalents readily convertible into legal tender.

(7) "Class" refers to a group of memberships that have the same rights with respect to voting, dissolution, redemption, and transfer. For the purpose of this section, rights shall be



considered the same if they are determined by a formula applied uniformly to a group of memberships.

(8) (Deleted by amendment, L. 2000, p. 982, § 76, effective July 1, 2000.)

(9) "Corporation" or "domestic corporation" means a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of articles 101 to 117 of this title.

(10) "Delegate" means any person elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

(11) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(12) "Director" means a member of the board of directors.

(13) "Distribution" means the payment of a dividend or any part of the income or profit of a corporation to its members, directors, or officers.

(14) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(15) "Effective date of notice" has the meaning set forth in section 7-121-402.

(16) "Employee" includes an officer but not a director; except that a director may accept duties that make said director also an employee.

(16.5) "Entrance fee" means any fee or charge, including a damage deposit, paid by a person to a residential nonprofit corporation in order to become a resident member. "Entrance fee" does not include regular periodic payments for the purchase or lease of residential real estate or for the day-to-day use of facilities or services.

(17) to (20) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(21) "Internal revenue code" means the federal "Internal Revenue Code of 1986", as amended from time to time, or to corresponding provisions of subsequent internal revenue laws of the United States of America.

(22) and (23) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(24) "Member" means any person or persons identified as such in the articles of incorporation or bylaws pursuant to a procedure stated in the articles of incorporation or bylaws or by a resolution of the board of directors. The term "member" includes "voting member" and a stockholder in a cooperative housing corporation formed pursuant to section 38-33.5-101, C.R.S.

(25) "Membership" refers to the rights and obligations of a member or members.

(25.5) "Mutual ditch company" means a nonprofit corporation that complies with article 42 of this title.

(26) "Nonprofit corporation" or "domestic nonprofit corporation" means an entity, which is not a foreign nonprofit corporation, incorporated under or subject to the provisions of articles 121 to 137 of this title.

(27) to (29) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(30) "Receive", when used in reference to receipt of a writing or other document by a domestic or foreign nonprofit corporation, means that the writing or other document is actually received:

(a) By the domestic or foreign nonprofit corporation at its registered office or at its principal office;

(b) By the secretary of the domestic or foreign nonprofit corporation, wherever the secretary is found; or

(c) By any other person authorized by the bylaws or the board of directors to receive such writings, wherever such person is found.

(31) "Record date" means the date, established under article 127 of this title, on which a nonprofit corporation determines the identity of its members. The determination shall be made as of the close of business on the record date unless another time for doing so is stated when the record date is fixed.

(32) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(32.5) "Residential member" means a member of a residential nonprofit corporation whose status as a member is dependent upon, or whose membership is accorded voting rights as a result of, owning or leasing specified residential real estate.

(33) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(33.5) (a) Except as otherwise provided in paragraph (b) of this subsection (33.5), “residential nonprofit corporation” means a nonprofit corporation that has residential members.

(b) Notwithstanding paragraph (a) of this subsection (33.5), “residential nonprofit corporation” does not include:

(I) A unit owners’ association or any other entity subject to the “Colorado Common Interest Ownership Act”, article 33.3 of title 38, C.R.S., regardless of whether it was formed before, on, or after July 1, 1992;

(II) A nursing care facility licensed by the department of public health and environment under section 25-3-101, C.R.S.;

(III) An assisted living residence licensed under section 25-3-101, C.R.S.;

(IV) A life care institution regulated under article 13 of title 12, C.R.S.; or

(V) A continuing care retirement community, as described in section 25.5-6-203, C.R.S., operated by an entity that is licensed or otherwise subject to state regulation.

(34) “Secretary” means the corporate officer to whom the bylaws or the board of directors has delegated responsibility under section 7-128-301 (3) for the preparation and maintenance of minutes of the meetings of the board of directors and of the members and of the other records and information required to be kept by the nonprofit corporation under section 7-136-101 and for authenticating records of the nonprofit corporation.

(35) to (37) (Deleted by amendment, L. 2003, p. 2332, § 280, effective July 1, 2004.)

(38) “Vote” includes authorization by written ballot and written consent.

(39) “Voting group” means all the members of one or more classes of members or directors that, under articles 121 to 137 of this title or the articles of incorporation or bylaws, are entitled to vote and be counted together collectively on a matter. All members or directors entitled by articles 121 to 137 of this title or the articles of incorporation or bylaws to vote generally on the matter are for that purpose a single voting group.

(40) “Voting member” means any person or persons who on more than one occasion, pursuant to a provision of a nonprofit corporation’s articles of incorporation or bylaws, have the right to vote for the election of a director or directors. A person is not a voting member solely by virtue of any of the following:

(a) Any rights such person has as a delegate;

(b) Any rights such person has to designate a director or directors; or

(c) Any rights such person has as a director.

**Source:** L. 97: Entire article added, p. 652, § 3, effective July 1, 1998. L. 98: (24) amended, p. 622, § 24, effective July 1. L. 2000: (3) and (8) amended, p. 982, § 76, effective July 1. L. 2002: (14) amended, p. 1859, § 158, effective July 1; (14) amended, p. 1719, § 132, effective October 1. L. 2003: (1), (2)(b), (3), (11), (14), (17), (18), (19), (20), (22), (23), (24), (27), (28), (29), (31), (32), (33), (34), (35), (36), and (37) amended, p. 2332, § 280, effective July 1, 2004. L. 2004: IP(2) amended, p. 1509, § 290, effective July 1. L. 2006: IP(2) amended and (25.5) added, p. 881, §§ 77, 78, effective July 1. L. 2011: (16.5), (32.5), and (33.5) added, (HB 11-1110), ch. 22, p. 54, § 1, effective March 11.

**Cross references:** For additional definitions applicable to this title, see § 7-90-102.

## ANNOTATION

**Annotator’s note.** Since § 7-121-401 is similar to § 7-20-102 as it existed prior to the 1997 recodification of the “Colorado Revised Nonprofit Corporation Act”, articles 121 to 137 of title 7, a case construing that provision has been included in the annotations to this section.

**To determine whether a corporation is “nonprofit”,** the basic question to be answered is whether the corporation is being exploited for direct monetary gain. *People ex rel. Meiresonne v. Arnold*, 37 Colo. App. 414, 553 P.2d 79 (1976).

**7-121-402. Notice.** (1) Notice given pursuant to articles 121 to 137 of this title shall be in writing unless otherwise provided in the bylaws.



(2) Notice may be given in person; by telephone, telegraph, teletype, electronically transmitted, or other form of wire or wireless communication; or by mail or private carrier. The bylaws may provide that if these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published.

(3) Written notice by a nonprofit corporation to its members, if mailed, is correctly addressed if addressed to the member's address shown in the nonprofit corporation's current record of members. If three successive notices given to a member pursuant to subsection (5) of this section have been returned as undeliverable, no further notices to such member shall be necessary until another address for the member is made known to the nonprofit corporation.

(4) Written notice to a domestic nonprofit corporation or to a foreign nonprofit corporation authorized to transact business or conduct activities in this state, other than in its capacity as a member, is correctly addressed if addressed to the registered agent address of its registered agent or to the domestic or foreign nonprofit corporation or its secretary at its principal office.

(5) Written notice by a nonprofit corporation to its members, if in a comprehensible form, is effective at the earliest of:

- (a) The date received;
- (b) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed correctly addressed and with first class postage affixed;
- (c) The date shown on the return receipt, if mailed by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee;
- (d) Thirty days after its deposit in the United States mail, as evidenced by the postmark, if mailed correctly addressed and with other than first class, registered, or certified postage affixed.

(6) Oral notice is effective when communicated if communicated in a comprehensible manner.

(7) Notice by publication is effective on the date of first publication.

(8) If articles 121 to 137 of this title prescribe notice requirements for particular circumstances, those requirements govern. If the articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of articles 121 to 137 of this title, those requirements govern.

(9) A written notice or report delivered as part of a newsletter, magazine, or other publication regularly sent to members shall constitute a written notice or report if addressed or delivered to the member's address shown in the nonprofit corporation's current list of members, or in the case of members who are residents of the same household and who have the same address in the nonprofit corporation's current list of members, if addressed or delivered to one of such members, at the address appearing on the current list of members.

**Source:** L. 97: Entire article added, p. 657, § 3, effective July 1, 1998. L. 2000: (4) amended, p. 982, § 77, effective July 1. L. 2003: (4) amended, p. 2335, § 281, effective July 1, 2004.

## PART 5

### PRIVATE FOUNDATIONS

**7-121-501. Private foundations.** (1) Except where otherwise determined by a court of competent jurisdiction, a nonprofit corporation that is a private foundation as defined in section 509 (a) of the internal revenue code:

- (a) Shall distribute such amounts for each taxable year at such time and in such manner as not to subject the nonprofit corporation to tax under section 4942 of the internal revenue code;
- (b) Shall not engage in any act of self-dealing as defined in section 4941 (d) of the internal revenue code;
- (c) Shall not retain any excess business holdings as defined in section 4943 (c) of the internal revenue code;

(d) Shall not make any investments that would subject the nonprofit corporation to taxation under section 4944 of the internal revenue code;

(e) Shall not make any taxable expenditures as defined in section 4945 (d) of the internal revenue code.

**Source: L. 97:** Entire article added, p. 658, § 3, effective July 1, 1998. **L. 98:** (1)(d) amended, p. 623, § 25, effective July 1.

## PART 6

### JUDICIAL RELIEF

**7-121-601. Judicial relief.** (1) If for any reason it is impractical or impossible for any nonprofit corporation to call or conduct a meeting of its members, delegates, or directors, or otherwise obtain their consent, in the manner prescribed by articles 121 to 137 of this title, its articles of incorporation, or bylaws, then upon petition of a director, officer, delegate, or member the district court for the county in this state in which the street address of the nonprofit corporation's principal office is located, or if the nonprofit corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located, or if the nonprofit corporation has no registered agent, the district court for the city and county of Denver, may order that such a meeting be called or that a written consent or other form of obtaining the vote of members, delegates, or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.

(2) The court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to articles 121 to 137 of this title, the articles of incorporation, or bylaws and whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section, the court may determine who the members or directors are.

(3) The order issued pursuant to this section may dispense with any requirement relating to the holding of or voting at meetings or obtaining votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by articles 121 to 137 of this title, the articles of incorporation, or bylaws.

(4) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles of incorporation or bylaws, the resolution of which will or may enable the nonprofit corporation to continue managing its affairs without further resort to this section; except that an order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger, or sale of assets.

(5) Any meeting or other method of obtaining the vote of members, delegates, or directors conducted pursuant to an order issued under this section and that complies with all the provisions of such order is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by articles 121 to 137 of this title, the articles of incorporation, or bylaws.

(6) Court ordered meetings may also be held pursuant to section 7-127-103.

**Source: L. 97:** Entire article added, p. 659, § 3, effective July 1, 1998. **L. 2003:** (1) amended, p. 2335, § 282, effective July 1, 2004.

### ANNOTATION

**This section is not a substitute for a declaratory judgment.** The purpose of relief under this section is to extricate the corporation from an impasse and enable the corporation to amend

its governing instruments so as to avert future impasses without further resort to the statute. *Bd. of Dirs. of the Alpaca Owners & Breeders Ass'n v. Clang*, 80 P.3d 945 (Colo. App. 2003).



**ARTICLE 122****Incorporation**

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-122-101.	Incorporators.	7-122-105.	Organization of nonprofit corporation.
7-122-102.	Articles of incorporation.	7-122-106.	Bylaws.
7-122-103.	Incorporation.	7-122-107.	Emergency bylaws.
7-122-104.	Unauthorized assumption of corporate powers.		

**7-122-101. Incorporators.** One or more persons may act as the incorporator or incorporators of a nonprofit corporation by delivering articles of incorporation to the secretary of state for filing pursuant to part 3 of article 90 of this title. An incorporator who is an individual shall be eighteen years of age or older.

**Source:** **L. 97:** Entire article added, p. 660, § 3, effective July 1, 1998. **L. 2002:** Entire section amended, p. 1854, § 132, effective July 1; entire section amended, p. 1719, § 133, effective October 1. **L. 2004:** Entire section amended, p. 1510, § 291, effective July 1.

- 7-122-102. Articles of incorporation.** (1) The articles of incorporation shall state:
- (a) The domestic entity name for the nonprofit corporation, which domestic entity name shall comply with part 6 of article 90 of this title;
  - (b) The registered agent name and registered agent address of the nonprofit corporation's initial registered agent;
  - (c) The principal office address of the nonprofit corporation's initial principal office;
  - (d) The true name and mailing address of each incorporator;
  - (e) Whether or not the nonprofit corporation will have voting members; and
  - (f) Repealed.
  - (g) Provisions not inconsistent with law regarding the distribution of assets on dissolution.
- (2) The articles of incorporation may but need not state:
- (a) The names and addresses of the individuals who are elected to serve as the initial directors;
  - (b) Provisions not inconsistent with law regarding:
    - (I) The purpose or purposes for which the nonprofit corporation is incorporated;
    - (II) Managing and regulating the affairs of the nonprofit corporation;
    - (III) Defining, limiting, and regulating the powers of the nonprofit corporation, its board of directors, and its members, or any class of members; and
    - (IV) Whether cumulative voting will be permitted;
  - (c) Any provision that under articles 121 to 137 of this title is required or permitted to be stated in the bylaws;
  - (d) The characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members.
- (3) The articles of incorporation need not state any of the corporate powers enumerated in articles 121 to 137 of this title.
- (4) If articles 121 to 137 of this title condition any matter upon the presence of a provision in the bylaws, the condition is satisfied if such provision is present either in the articles of incorporation or the bylaws. If articles 121 to 137 of this title condition any matter upon the absence of a provision in the bylaws, the condition is satisfied only if the provision is absent from both the articles of incorporation and the bylaws.

**Source:** **L. 97:** Entire article added, p. 660, § 3, effective July 1, 1998. **L. 2000:** (1)(a) amended, p. 982, § 78, effective July 1. **L. 2002:** (1)(f) repealed p. 1854, § 133, effective July 1; (1)(f) repealed, p. 1719, § 134, effective October 1. **L. 2003:** IP(1), (1)(a), (1)(b),

(1)(c), IP(2), (2)(c), and (3) amended, p. 2335, § 283, effective July 1, 2004. **L. 2004:** (1)(d) and (2)(a) amended, p. 1510, § 292, effective July 1. **L. 2006:** (2)(a) amended, p. 881, § 79, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Corporate Director Liability", see 65 Den. U. L. Rev. 59 (1988). For article, "1988 Update on Colorado

Tort Reform Legislation — Part II", see 17 Colo. Law. 1949 (1988).

**7-122-103. Incorporation.** (1) A nonprofit corporation is incorporated when the articles of incorporation are filed by the secretary of state or, if a delayed effective date is stated pursuant to section 7-90-304 in the articles of incorporation as filed by the secretary of state and if a statement of change revoking the articles of incorporation is not filed before such effective date, on such delayed effective date. The corporate existence begins upon incorporation.

(2) The secretary of state's filing of the articles of incorporation is conclusive that all conditions precedent to incorporation have been met.

**Source:** **L. 97:** Entire article added, p. 661, § 3, effective July 1, 1998. **L. 2002:** (1) amended, p. 1859, § 159, effective July 1; (1) amended, pp. 1719, 1724, §§ 135, 158, effective October 1. **L. 2003:** (1) amended, p. 2336, § 284, effective July 1, 2004. **L. 2004:** (1) amended, p. 1510, § 293, effective July 1.

#### ANNOTATION

**Action filed by nonexistent corporation is a nullity.** A nonprofit corporation's lawsuit is void ab initio when it was filed after the secretary of state rejected the corporation's articles of incorporation but before the secretary of state ac-

cepted and filed amended articles. *Black Canyon Citizens Coalition, Inc. v. Bd. of County Comm'rs of Montrose County*, 80 P.3d 932 (Colo. App. 2003).

**7-122-104. Unauthorized assumption of corporate powers.** All persons purporting to act as or on behalf of a nonprofit corporation without authority to do so and without good faith belief that they have such authority shall be jointly and severally liable for all liabilities incurred or arising as a result thereof.

**Source:** **L. 97:** Entire article added, p. 661, § 3, effective July 1, 1998.

#### ANNOTATION

**Annotator's note.** Since § 7-122-104 is similar to § 7-20-106 as it existed prior to the 1997 recodification of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, a case construing that provision has been included in the annotations to this section.

**Directors of dissolved corporation were not statutorily liable for negligent acts of employee** where the directors had no knowledge of the dissolved status of the corporation at the time of plaintiff's accident. *Sims v. Ottenhoff*, 879 P.2d 436 (Colo. App. 1994).

**7-122-105. Organization of nonprofit corporation.** (1) After incorporation:

(a) If initial directors are not named in the articles of incorporation, the incorporators shall hold a meeting, at the call of a majority of the incorporators, to adopt initial bylaws, if desired, and to elect a board of directors; and

(b) If initial directors are named in the articles of incorporation, the initial directors shall hold a meeting, at the call of a majority of the directors, to adopt bylaws, if desired, to appoint officers, and to carry on any other business.

(2) Action required or permitted by articles 121 to 137 of this title to be taken by incorporators at an organizational meeting may be taken without a meeting if the action is



taken in the manner provided in section 7-128-202 for action by directors without a meeting.

(3) An organizational meeting may be held in or out of this state.

**Source: L. 97:** Entire article added, p. 662, § 3, effective July 1, 1998.

**7-122-106. Bylaws.** (1) The board of directors or, if no directors have been named or elected, the incorporators may adopt initial bylaws. If neither the incorporators nor the board of directors have adopted initial bylaws, the members may do so.

(2) The bylaws of a nonprofit corporation may contain any provision for managing and regulating the affairs of the nonprofit corporation that is not inconsistent with law or with the articles of incorporation.

**Source: L. 97:** Entire article added, p. 662, § 3, effective July 1, 1998.

#### ANNOTATION

A nonprofit corporation may alter the default structure set forth in the Nonprofit Corporation Act (NCA) through its articles of incorporation or bylaws, and it may provide different or additional rights and obligations to its members. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

Default structure established by the NCA controls, and the signature of settlement agreement with respondent real estate developer by one member of neighborhood association, its president, insufficient to bind its

members, including petitioner. The articles of incorporation and bylaws of the neighborhood association do not deviate from the NCA in terms of the rights and duties of its members. The articles of incorporation and bylaws contain no provisions either binding a member by a contract signed by the neighborhood association or stating that the association's members have authorized it to represent their individual interests. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

**7-122-107. Emergency bylaws.** (1) Unless otherwise provided in the articles of incorporation, the board of directors may adopt bylaws to be effective only in an emergency as defined in subsection (4) of this section. The emergency bylaws, which are subject to amendment or repeal by the members, may include all provisions necessary for managing the nonprofit corporation during the emergency, including:

- (a) Procedures for calling a meeting of the board of directors;
- (b) Quorum requirements for the meeting; and
- (c) Designation of additional or substitute directors.

(2) All provisions of the regular bylaws consistent with the emergency bylaws shall remain in effect during the emergency. The emergency bylaws shall not be effective after the emergency ends.

(3) Corporate action taken in good faith in accordance with the emergency bylaws:

- (a) Binds the nonprofit corporation; and
- (b) May not be the basis for imposition of liability on any director, officer, employee, or agent of the nonprofit corporation on the ground that the action was not authorized corporate action.

(4) An emergency exists for the purposes of this section if a quorum of the directors cannot readily be obtained because of some catastrophic event.

**Source: L. 97:** Entire article added, p. 662, § 3, effective July 1, 1998.

#### ARTICLE 123

##### Purposes and Powers

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-123-101. Purposes and applicability.

7-123-102. General powers.

7-123-103. Emergency powers.

7-123-104. Ultra vires.

7-123-105. Actions against nonprofit corporations.

**7-123-101. Purposes and applicability.** (1) Every nonprofit corporation incorporated under articles 121 to 137 of this title has the purpose of engaging in any lawful business or activity unless a more limited purpose is stated in the articles of incorporation.

(2) Where another statute of this state requires that corporations of a particular class be formed or incorporated exclusively under that statute, corporations of that class shall be formed or incorporated under such other statute. The corporation shall be subject to all limitations of the other statute.

(3) Where another statute of this state requires nonprofit corporations of a particular class to be formed or incorporated under that statute and also under general nonprofit corporation statutes, such nonprofit corporations shall be formed or incorporated under such other statute and, in addition thereto, under articles 121 to 137 of this title to the extent general nonprofit corporation law is applicable.

(4) Where another statute of this state permits nonprofit corporations of a particular class to be formed or incorporated either under that statute or under the general nonprofit corporation statutes, a nonprofit corporation of that class may at the election of its incorporators be formed or incorporated under articles 121 to 137 of this title. Unless the articles of incorporation of a nonprofit corporation indicate that it is formed or incorporated under another statute, the nonprofit corporation shall for all purposes be considered as formed and incorporated under articles 121 to 137 of this title.

(5) Articles 121 to 137 of this title shall apply to nonprofit corporations of every class, whether or not included in the term "nonprofit corporation" as defined in section 7-121-401 (26), that are formed or incorporated under and governed by other statutes of this state to the extent that said articles are not inconsistent with such other statutes.

(6) Articles 121 to 137 of this title shall apply to any nonprofit corporation formed prior to January 1, 1968, under article 40 or 50 of this title without shares or capital stock and for a purpose for which a nonprofit corporation might be formed under articles 121 to 137 of this title and that elects to accept said articles as provided therein.

(7) Articles 121 to 137 of this title shall apply to any corporation having shares or capital stock and formed under article 40, 50, or 51 of this title, and each nonprofit corporation whether with or without shares or capital stock formed prior to January 1, 1968, under general law or created by special act of the general assembly for a purpose for which a nonprofit corporation may be formed under articles 121 to 137 of this title, but not otherwise entitled to the rights, privileges, immunities, and franchises provided by said articles that elects to accept said articles as provided therein.

(8) A mutual ditch company may elect by a statement in its articles of incorporation that one or more of the provisions of the "Colorado Business Corporation Act", articles 101 to 117 of this title, apply to the mutual ditch company in lieu of one or more of the provisions of articles 121 to 137 of this title.

**Source:** L. 97: Entire article added, p. 663, § 3, effective July 1, 1998. L. 2003: Entire section amended, p. 2336, § 285, effective July 1, 2004. L. 2006: (8) added, p. 882, § 80, effective July 1. L. 2007: (8) amended, p. 249, § 50, effective May 29.

**7-123-102. General powers.** (1) Unless otherwise provided in the articles of incorporation, every nonprofit corporation has perpetual duration and succession in its domestic entity name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including the power:

(a) To sue and be sued, complain, and defend in its name;

(b) To have a corporate seal, which may be altered at will, and to use such seal, or a facsimile thereof, including a rubber stamp, by impressing or affixing it or by reproducing it in any other manner;

(c) To make and amend bylaws;



(d) To purchase, receive, lease, and otherwise acquire, and to own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located;

(e) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(f) To purchase, receive, subscribe for, and otherwise acquire shares and other interests in, and obligations of, any other entity; and to own, hold, vote, use, sell, mortgage, lend, pledge, and otherwise dispose of, and deal in and with, the same;

(g) To make contracts and guarantees, incur liabilities, borrow money, issue notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(h) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment; except that a nonprofit corporation may not lend money to or guarantee the obligation of a director or officer of the nonprofit corporation;

(i) To be an agent, an associate, a fiduciary, a manager, a member, a partner, a promoter, or a trustee of, or to hold any similar position with, any entity;

(j) To conduct its activities, locate offices, and exercise the powers granted by articles 121 to 137 of this title within or without this state;

(k) To elect or appoint directors, officers, employees, and agents of the nonprofit corporation, define their duties, and fix their compensation;

(l) To pay pensions and establish pension plans, pension trusts, profit sharing plans, and other benefit or incentive plans for any of its current or former directors, officers, employees, and agents;

(m) To make donations for the public welfare or for charitable, religious, scientific, or educational purposes and for other purposes that further the corporate interest;

(n) To impose dues, assessments, admission, and transfer fees upon its members;

(o) To establish conditions for admission of members, admit members, and issue or transfer memberships;

(p) To carry on a business;

(q) To make payments or donations and to do any other act, not inconsistent with law, that furthers the affairs of the nonprofit corporation;

(r) To indemnify current or former directors, officers, employees, fiduciaries, or agents as provided in article 129 of this title;

(s) To limit the liability of its directors as provided in section 7-128-402 (1); and

(t) To cease its corporate activities and dissolve.

(2) Unless permitted by another statute of this state or otherwise permitted pursuant to section 7-123-101 (5), 7-123-101 (7), or 7-137-201, a nonprofit corporation shall not authorize or issue shares of stock.

**Source:** **L. 97:** Entire article added, p. 664, § 3, effective July 1, 1998. **L. 2000:** IP(1) and (1)(a) amended, p. 983, § 79, effective July 1. **L. 2003:** IP(1) amended, p. 2337, § 286, effective July 1, 2004. **L. 2004:** (1)(a) amended, p. 1510, § 294, effective July 1.

## ANNOTATION

**Law reviews.** For article, "Corporate Director Liability", see 65 Den. U. L. Rev. 59 (1988). For article, "1988 Update on Colorado Tort Reform Legislation — Part II", see 17 Colo. Law. 1949 (1988).

**Annotator's note.** Since § 7-123-102 is similar to § 7-22-101 as it existed prior to the 1997 recodification of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, a case construing that provision has been included in the annotations to this section.

**Charter school retains status as a public school even if organized as a nonprofit cor-**

**poration.** Standing to sue as a nonprofit corporation under this section is precluded by § 22-30.5-104 (4), which grants that "while a charter school 'may' organize as a nonprofit corporation, this 'shall not affect its status as a public school for any purposes under Colorado law.'" Therefore, plaintiff charter school lacked standing to sue school district under this section. *Dolores Huerta Prep. High v. Colo. State Bd. of Educ.*, 215 P.3d 1229 (Colo. App. 2009).

**Applied** in *People ex rel. Meiresonne v. Arnold*, 37 Colo. App. 414, 553 P.2d 79 (1976).

**7-123-103. Emergency powers.** (1) In anticipation of or during an emergency defined in subsection (4) of this section, the board of directors may:

(a) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(b) Relocate the principal office or designate additional offices, or authorize officers to do so.

(2) During an emergency as contemplated in subsection (4) of this section, unless emergency bylaws provide otherwise:

(a) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication or radio; and

(b) One or more officers of the nonprofit corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(3) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the nonprofit corporation:

(a) Binds the nonprofit corporation; and

(b) May not be the basis for the imposition of liability on any director, officer, employee, or agent of the nonprofit corporation on the ground that the action was not authorized corporate action.

(4) An emergency exists for purposes of this section if a quorum of the directors cannot readily be obtained because of some catastrophic event.

**Source:** L. 97: Entire article added, p. 665, § 3, effective July 1, 1998. L. 2003: (1)(b) amended, p. 2337, § 287, effective July 1, 2004.

**7-123-104. Ultra vires.** (1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the nonprofit corporation lacks or lacked power to act.

(2) A nonprofit corporation's power to act may be challenged:

(a) In a proceeding against the nonprofit corporation to enjoin the act. The proceeding may be brought by a director or by a voting member or voting members in a derivative proceeding.

(b) In a proceeding by or in the right of the nonprofit corporation, whether directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the nonprofit corporation; or

(c) In a proceeding by the attorney general under section 7-134-301.

(3) In a proceeding under paragraph (a) of subsection (2) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if it would be equitable to do so and if all affected persons are parties to the proceeding, and may award damages for loss, including anticipated profits, suffered by the nonprofit corporation or another party because of the injunction.

**Source:** L. 97: Entire article added, p. 666, § 3, effective July 1, 1998.

## ANNOTATION

**Annotator's note.** Since § 7-123-104 is similar to § 7-22-102 as it existed prior to the 1997 recodification of the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, a case construing that provision has been included in the annotations to this section.

**Ultra vires is not a defense under this section to an injunctive action.** Am. Ski Ass'n v. Bergstedt, 682 P.2d 57 (Colo. App. 1984).

**7-123-105. Actions against nonprofit corporations.** Any other provision of law to the contrary notwithstanding, any civil action permitted under the law of this state may be brought against any nonprofit corporation, and the assets of any nonprofit corporation that



would, but for articles 121 to 137 of this title, be immune from levy and execution on any judgment shall nonetheless be subject to levy and execution to the extent that such nonprofit corporation would be reimbursed by proceeds of liability insurance policies carried by it were judgment levied and executed against its assets.

**Source:** **L. 97:** Entire article added, p. 667, § 3, effective July 1, 1998. **L. 2003:** Entire section amended, p. 2337, § 288, effective July 1, 2004.

#### ANNOTATION

**The existence and amount of a nonprofit or charitable defendant's liability insurance provides no basis for limiting a judgment against the defendant.** The issue of liability

insurance is relevant only when a plaintiff seeks to levy and execute on a judgment. *Wycoff v. Grace Cmty. Church*, 251 P.3d 1260 (Colo. App. 2010).

#### ARTICLE 124

##### Name

7-124-101. Corporate name. (Repealed)

7-124-102. Reserved name. (Repealed)

##### **7-124-101. Corporate name. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 667, § 3, effective July 1, 1998. **L. 2000:** Entire section repealed, p. 990, § 109, effective July 1.

##### **7-124-102. Reserved name. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 668, § 3, effective July 1, 1998. **L. 2000:** Entire section repealed, p. 990, § 109, effective July 1.

#### ARTICLE 125

##### Office and Agent

**Editor's note:** This article was added in 1997 and was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2004, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-125-101. Registered office and registered agent.

**7-125-101. Registered office and registered agent.** Part 7 of article 90 of this title, providing for registered agents and service of process, applies to nonprofit corporations incorporated under or subject to articles 121 to 137 of this title.

**Source:** **L. 2003:** Entire article R&RE, p. 2337, § 289, effective July 1, 2004. **L. 2007:** Entire section amended, p. 249, § 51, effective May 29.

#### ARTICLE 126

##### Members and Memberships

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

## PART 1

ADMISSION OF MEMBERS AND  
LIABILITY TO THIRD PARTIES

- 7-126-101. No requirement of members.  
 7-126-102. Admission.  
 7-126-103. Liability to third parties.  
 7-126-104. Consideration.

## PART 2

TYPES OF MEMBERSHIPS - MEMBERS'  
RIGHTS AND OBLIGATIONS

- 7-126-201. Differences in rights and obligations of members.  
 7-126-202. Transfers.  
 7-126-203. Creditor's action against member.

## PART 3

## RESIGNATION AND TERMINATION

- 7-126-301. Resignation.  
 7-126-302. Termination, expulsion, or suspension.  
 7-126-303. Purchase of memberships.  
 7-126-304. Residential membership - return of consideration - cessation of periodic payments - time limits - effective date.

## PART 4

## DERIVATIVE SUITS

- 7-126-401. Derivative suits.

## PART 5

## DELEGATES

- 7-126-501. Delegates.

## PART 1

ADMISSION OF MEMBERS AND  
LIABILITY TO THIRD PARTIES

**7-126-101. No requirement of members.** A nonprofit corporation is not required to have members.

**Source: L. 97:** Entire article added, p. 671, § 3, effective July 1, 1998.

**7-126-102. Admission.** (1) The bylaws may establish criteria or procedures for admission of members.

(2) No person shall be admitted as a member without such person's consent.

(3) A nonprofit corporation may issue certificates evidencing membership therein.

**Source: L. 97:** Entire article added, p. 671, § 3, effective July 1, 1998.

**7-126-103. Liability to third parties.** The directors, officers, employees, and members of a nonprofit corporation are not, as such, personally liable for the acts, debts, liabilities, or obligations of a nonprofit corporation.

**Source: L. 97:** Entire article added, p. 671, § 3, effective July 1, 1998.

## ANNOTATION

Members of a nonprofit corporation may not be held liable for the corporation's tortious acts or breaches of contract merely by virtue of their membership or management authority in the corporation. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

Under the default governance structure of the Nonprofit Corporation Act (NCA), petitioner is not bound by agreement entered into by respondent real estate developer and

neighborhood association of which petitioner was a member, and petitioner fits none of the enumerated exceptions to the general rule of limited liability of members of a nonprofit corporation for contracts entered into by the corporation. Petitioner did not treat the neighborhood association as his or her alter ego, nor did he or she owe money to it. Petitioner did not enter into a contract purporting to act as or on behalf of the neighborhood association, did not expressly become a party to the agreement, and



specifically refused to sign it. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

**Default structure established by the NCA controls, and the signature of settlement agreement with respondent real estate developer by one member of neighborhood association, its president, insufficient to bind its members, including petitioner.** The articles of incorporation and bylaws of the neighborhood

association do not deviate from the NCA in terms of the rights and duties of its members. The articles of incorporation and bylaws contain no provisions either binding a member by a contract signed by the neighborhood association or stating that the association's members have authorized it to represent their individual interests. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859 (Colo. 2004).

**7-126-104. Consideration.** Unless otherwise provided by the bylaws, a nonprofit corporation may admit members for no consideration or for such consideration as is determined by the board of directors.

**Source: L. 97:** Entire article added, p. 671, § 3, effective July 1, 1998.

## PART 2

### TYPES OF MEMBERSHIPS - MEMBERS' RIGHTS AND OBLIGATIONS

**7-126-201. Differences in rights and obligations of members.** (1) Unless otherwise provided by articles 121 to 137 of this title or the bylaws:

(a) All voting members shall have the same rights and obligations with respect to voting and all other matters that articles 121 to 137 of this title specifically reserve to voting members; and

(b) With respect to matters not so reserved, all members, including voting members, shall have the same rights and obligations.

**Source: L. 97:** Entire article added, p. 671, § 3, effective July 1, 1998.

**7-126-202. Transfers.** (1) Unless otherwise provided by the bylaws, no member of a nonprofit corporation may transfer a membership or any right arising therefrom.

(2) Where transfer rights have been provided, no restriction on them shall be binding with respect to a member holding a membership issued prior to the adoption of the restriction unless the restriction is approved by the affected member.

**Source: L. 97:** Entire article added, p. 671, § 3, effective July 1, 1998.

**7-126-203. Creditor's action against member.** No proceeding may be brought by a creditor to reach the liability, if any, of a member to the nonprofit corporation unless final judgment has been rendered in favor of the creditor against the nonprofit corporation and execution has been returned unsatisfied in whole or in part or unless such proceeding would be useless.

**Source: L. 97:** Entire article added, p. 672, § 3, effective July 1, 1998.

## PART 3

### RESIGNATION AND TERMINATION

**7-126-301. Resignation.** (1) Unless otherwise provided by the bylaws, a member may resign at any time.

(2) The resignation of a member does not relieve the member from any obligations the member may have to the nonprofit corporation as a result of obligations incurred or commitments made prior to resignation.

**Source: L. 97:** Entire article added, p. 672, § 3, effective July 1, 1998.

**7-126-302. Termination, expulsion, or suspension.** (1) Unless otherwise provided by the bylaws, no member of a nonprofit corporation may be expelled or suspended, and no membership or memberships in such nonprofit corporation may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith.

(2) For purposes of this section, a procedure is fair and reasonable when either:

(a) The bylaws or a written policy of the board of directors state a procedure that provides:

(I) Not less than fifteen days prior written notice of the expulsion, suspension, or termination and the reasons therefor; and

(II) An opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension, or termination by a person or persons authorized to decide that the proposed expulsion, termination, or suspension not take place; or

(b) It is fair and reasonable taking into consideration all of the relevant facts and circumstances.

(3) For purposes of this section, any written notice given by mail must be given by first-class or certified mail sent to the last address of the member shown on the nonprofit corporation's records.

(4) Unless otherwise provided by the bylaws, any proceeding challenging an expulsion, suspension, or termination, including a proceeding in which defective notice is alleged, must be commenced within one year after the effective date of the expulsion, suspension, or termination.

(5) Unless otherwise provided by the bylaws, a member who has been expelled or suspended may be liable to the nonprofit corporation for dues, assessments, or fees as a result of obligations incurred or commitments made prior to expulsion or suspension.

**Source: L. 97:** Entire article added, p. 672, § 3, effective July 1, 1998. **L. 2003:** IP(2)(a) amended, p. 2337, § 290, effective July 1, 2004.

#### ANNOTATION

**Where the nonprofit corporation is a church,** a civil court has no authority to reverse the church's decision, no matter how arbitrary or unfair, to expel a member. *Levitt v. Calvary Temple of Denver*, 33 P.3d 1227 (Colo. App. 2001).

**7-126-303. Purchase of memberships.** Unless otherwise provided by the bylaws, a nonprofit corporation shall not purchase the membership of a member who resigns or whose membership is terminated. If so authorized, a nonprofit corporation may purchase the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions stated in or authorized by its bylaws. No payment shall be made in violation of article 133 of this title.

**Source: L. 97:** Entire article added, p. 673, § 3, effective July 1, 1998. **L. 2003:** Entire section amended, p. 2338, § 291, effective July 1, 2004.

**7-126-304. Residential membership - return of consideration - cessation of periodic payments - time limits - effective date.** (1) Notwithstanding any provision of the articles of incorporation or bylaws to the contrary:

(a) (I) A residential nonprofit corporation shall refund the entrance fee of a residential member to the member or his or her heirs within ninety days after a transfer of the residential membership.

(II) (A) This paragraph (a) applies only to contracts entered into on or after March 11, 2011.

(B) (Deleted by amendment, L. 2012.)

(b) (Deleted by amendment, L. 2012.)

**Source: L. 2011:** Entire section added, (HB 11-1110), ch. 22, p. 55, § 2, effective March



11; (1)(a) amended, (HB 11-1324), ch. 268, p. 1222, § 1, effective June 2. **L. 2012:** (1) amended, (SB 12-024), ch. 39, p. 137, § 1, effective March 22.

**Editor's note:** Section 3 of chapter 39, Session Laws of Colorado 2012, provides that the act amending subsection (1) applies to resignations, terminations, expulsions, and suspensions from residential nonprofit corporations occurring on or after March 22, 2012, and to committee meetings occurring on or after March 22, 2012.

## PART 4

### DERIVATIVE SUITS

**7-126-401. Derivative suits.** (1) Without affecting the right of a member or director to bring a proceeding against a nonprofit corporation or its officers or directors, a proceeding may be brought in the right of a nonprofit corporation to procure a judgment in its favor by:

(a) Any voting member or voting members having five percent or more of the voting power; or

(b) Any director.

(2) In any such proceeding, each complainant shall be a voting member or director at the time of bringing the proceeding.

(3) A complaint in a proceeding brought in the right of a nonprofit corporation must be verified and allege with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand. If a demand for action was made and the nonprofit corporation's investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.

(4) In any action instituted in the right of a nonprofit corporation by one or more voting members, the court having jurisdiction over the matter may, at any time before final judgment, require the plaintiff to give security for the costs and reasonable expenses that may be directly attributable to and incurred by the nonprofit corporation in the defense of such action or may be incurred by other parties named as defendant for which the nonprofit corporation may become legally liable, but not including fees of attorneys. The amount of such security may from time to time be increased or decreased, in the discretion of the court, upon showing that the security provided has or may become inadequate or is excessive. If the court finds that the action was commenced without reasonable cause, the nonprofit corporation shall have recourse to such security in such amount as the court shall determine upon the termination of such action.

(5) No action shall be commenced in this state by a member of a foreign nonprofit corporation in the right of a foreign nonprofit corporation unless such action is permitted by the law of the state under which such foreign nonprofit corporation is incorporated.

**Source: L. 97:** Entire article added, p. 673, § 3, effective July 1, 1998. **L. 2003:** (5) amended, p. 2338, § 292, effective July 1, 2004.

## PART 5

### DELEGATES

**7-126-501. Delegates.** (1) A nonprofit corporation may provide in its bylaws for delegates having some or all of the authority of members.

(2) The bylaws may state provisions relating to:

(a) The characteristics, qualifications, rights, limitations, and obligations of delegates, including their selection and removal;

(b) Calling, noticing, holding, and conducting meetings of delegates; and

(c) Carrying on corporate activities during and between meetings of delegates.

**Source:** L. 97: Entire article added, p. 674, § 3, effective July 1, 1998. L. 2003: IP(2) amended, p. 2338, § 293, effective July 1, 2004.

## ARTICLE 127

### Members' Meetings and Voting

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

#### PART 1

##### MEETINGS

7-127-101.	Annual and regular meetings.
7-127-102.	Special meeting.
7-127-103.	Court-ordered meeting.
7-127-104.	Notice of meeting.
7-127-105.	Waiver of notice.
7-127-106.	Record date - determining members entitled to notice and vote.
7-127-107.	Action without meeting.
7-127-108.	Meetings by telecommunication.
7-127-109.	Action by written ballot.

#### PART 2

##### VOTING

7-127-201.	Members list for meeting and
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	action by written ballot.
7-127-202.	Voting entitlement generally.
7-127-203.	Proxies.
7-127-204.	Nonprofit corporation's acceptance of votes.
7-127-205.	Quorum and voting requirements for voting groups.
7-127-206.	Action by single and multiple voting groups.
7-127-207.	Lesser or greater quorum or greater voting requirements.
7-127-208.	Voting for directors - cumulative voting.
7-127-209.	Other methods of electing directors.

#### PART 3

##### VOTING AGREEMENTS

7-127-301.	Voting agreements.
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#### PART 1

##### MEETINGS

**7-127-101. Annual and regular meetings.** (1) Unless the bylaws eliminate the requirement for holding an annual meeting, a nonprofit corporation that has voting members shall hold a meeting of the voting members annually at a time stated in or fixed in accordance with the bylaws, or, if not so fixed, at a time and date stated in or fixed in accordance with a resolution of the board of directors.

(2) A nonprofit corporation with members may hold regular membership meetings at a time and date stated in or fixed in accordance with the bylaws, or, if not so fixed, at a time and date stated in or fixed in accordance with a resolution of the board of directors.

(3) Annual and regular membership meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws, or, if not so stated or fixed, at a place stated or fixed in accordance with a resolution of the board of directors. If no place is so stated or fixed, annual and regular meetings shall be held at the nonprofit corporation's principal office.

(4) The failure to hold an annual or regular meeting at the time and date determined pursuant to subsection (1) of this section does not affect the validity of any corporate action and does not work a forfeiture or dissolution of the nonprofit corporation.

**Source:** L. 97: Entire article added, p. 674, § 3, effective July 1, 1998.

**7-127-102. Special meeting.** (1) A nonprofit corporation shall hold a special meeting of its members:

(a) On call of its board of directors or the person or persons authorized by the bylaws or resolution of the board of directors to call such a meeting; or



(b) Unless otherwise provided by the bylaws, if the nonprofit corporation receives one or more written demands for the meeting, stating the purpose or purposes for which it is to be held, signed and dated by members holding at least ten percent of all the votes entitled pursuant to the bylaws to be cast on any issue proposed to be considered at the meeting.

(2) If not otherwise fixed under section 7-127-103 or 7-127-106, the record date for determining the members entitled to demand a special meeting pursuant to paragraph (b) of subsection (1) of this section is the date of the earliest of any of the demands pursuant to which the meeting is called, or the date that is sixty days before the date the first of such demands is received by the nonprofit corporation, whichever is later.

(3) If a notice for a special meeting demanded pursuant to paragraph (b) of subsection (1) of this section is not given pursuant to section 7-127-104 within thirty days after the date the written demand or demands are delivered to a corporate officer, regardless of the requirements of subsection (4) of this section, a person signing the demand or demands may set the time and place of the meeting and give notice pursuant to section 7-127-104.

(4) Special meetings of the members may be held in or out of this state at the place stated in or fixed in accordance with the bylaws, or, if not so stated or fixed, at a place stated or fixed in accordance with a resolution of the board of directors. If no place is so stated or fixed, special meetings shall be held at the nonprofit corporation's principal office.

(5) Unless otherwise provided by the bylaws, only business within the purpose or purposes described in the notice of the meeting required by section 7-127-104 (3) may be conducted at a special meeting of the members.

**Source: L. 97:** Entire article added, p. 675, § 3, effective July 1, 1998.

**7-127-103. Court-ordered meeting.** (1) The holding of a meeting of the members may be summarily ordered by the district court for the county in this state in which the street address of the nonprofit corporation's principal office is located or, if the nonprofit corporation has no principal office in this state, by the district court for the county in which the street address of its registered agent is located or, if the nonprofit corporation has no registered agent, by the district court for the city and county of Denver:

(a) On application of any voting member entitled to participate in an annual meeting if an annual meeting was required to be held and was not held within the earlier of six months after the close of the nonprofit corporation's most recently ended fiscal year or fifteen months after its last annual meeting; or

(b) On application of any person who participated in a call of or demand for a special meeting effective under section 7-127-102 (1), if:

(I) Notice of the special meeting was not given within thirty days after the date of the call or the date the last of the demands necessary to require the calling of the meeting was received by the nonprofit corporation pursuant to section 7-127-102 (1) (b), as the case may be; or

(II) The special meeting was not held in accordance with the notice.

(2) The court may fix the time and place of the meeting, determine the members entitled to participate in the meeting, fix a record date for determining members entitled to notice of and to vote at the meeting, prescribe the form and content of the notice of the meeting, fix the quorum required for specific matters to be considered at the meeting or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary or appropriate to accomplish the holding of the meeting.

**Source: L. 97:** Entire article added, p. 675, § 3, effective July 1, 1998. **L. 2003:** IP(1) and (2) amended, p. 2338, § 294, effective July 1, 2004.

**7-127-104. Notice of meeting.** (1) A nonprofit corporation shall give to each member entitled to vote at the meeting notice consistent with its bylaws of meetings of members in a fair and reasonable manner.

(2) Any notice that conforms to the requirements of subsection (3) of this section is fair and reasonable, but other means of giving notice may also be fair and reasonable when all the circumstances are considered.

(3) Notice is fair and reasonable if:

(a) The nonprofit corporation notifies its members of the place, date, and time of each annual, regular, and special meeting of members no fewer than ten days, or if notice is mailed by other than first class or registered mail, no fewer than thirty days, nor more than sixty days before the meeting date, and if notice is given by newspaper as provided in section 7-121-402 (2), the notice must be published five separate times with the first such publication no more than sixty days, and the last such publication no fewer than ten days, before the meeting date.

(b) Notice of an annual or regular meeting includes a description of any matter or matters that must be approved by the members or for which the members' approval is sought under sections 7-128-501, 7-129-110, 7-130-103, 7-130-201, 7-131-102, 7-132-102, and 7-134-102; and

(c) Unless otherwise provided by articles 121 to 137 of this title or the bylaws, notice of a special meeting includes a description of the purpose or purposes for which the meeting is called.

(4) Unless otherwise provided by the bylaws, if an annual, regular, or special meeting of members is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place, if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 7-127-106, however, notice of the adjourned meeting must be given under this section to the members of record as of the new record date.

(5) When giving notice of an annual, regular, or special meeting of members, a nonprofit corporation shall give notice of a matter a member intends to raise at the meeting if:

(a) Requested in writing to do so by a person entitled to call a special meeting; and

(b) The request is received by the secretary or president of the nonprofit corporation at least ten days before the nonprofit corporation gives notice of the meeting.

**Source:** L. 97: Entire article added, p. 676, § 3, effective July 1, 1998. L. 98: (3)(a) amended, p. 623, § 26, effective July 1.

**7-127-105. Waiver of notice.** (1) A member may waive any notice required by articles 121 to 137 of this title or by the bylaws, whether before or after the date or time stated in the notice as the date or time when any action will occur or has occurred. The waiver shall be in writing, be signed by the member entitled to the notice, and be delivered to the nonprofit corporation for inclusion in the minutes or filing with the corporate records, but such delivery and filing shall not be conditions of the effectiveness of the waiver.

(2) A member's attendance at a meeting:

(a) Waives objection to lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting because of lack of notice or defective notice; and

(b) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member objects to considering the matter when it is presented.

**Source:** L. 97: Entire article added, p. 677, § 3, effective July 1, 1998.

**7-127-106. Record date - determining members entitled to notice and vote.**

(1) The bylaws may fix or provide the manner of fixing a date as the record date for determining the members entitled to notice of a members' meeting. If the bylaws do not fix or provide for fixing such a record date, the board of directors may fix a future date as such a record date. If no such record date is fixed, members at the close of business on the business day preceding the day on which notice is given, or, if notice is waived, at the close of business on the business day preceding the day on which the meeting is held are entitled to notice of the meeting.



(2) The bylaws may fix or provide the manner of fixing a date as the record date for determining the members entitled to vote at a members' meeting. If the bylaws do not fix or provide for fixing such a record date, the board may fix a future date as such a record date. If no such record date is fixed, members on the date of the meeting who are otherwise eligible to vote are entitled to vote at the meeting.

(3) The bylaws may fix or provide the manner for determining a date as the record date for the purpose of determining the members entitled to exercise any rights in respect of any other lawful action. If the bylaws do not fix or provide for fixing such a record date, the board may fix a future date as the record date. If no such record date is fixed, members at the close of business on the day on which the board adopts the resolution relating thereto, or the sixtieth day prior to the date of such other action, whichever is later, are entitled to exercise such rights.

(4) A record date fixed under this section may not be more than seventy days before the meeting or action requiring a determination of members occurs.

(5) A determination of members entitled to notice of or to vote at a meeting of members is effective for any adjournment of the meeting unless the board of directors fixes a new date for determining the right to notice or the right to vote, which it must do if the meeting is adjourned to a date more than one hundred twenty days after the record date for determining members entitled to notice of the original meeting.

(6) If a court orders a meeting adjourned to a date more than one hundred twenty days after the date fixed for the original meeting, it may provide that the original record date for notice or voting continues in effect or it may fix a new record date for notice or voting.

**Source: L. 97:** Entire article added, p. 678, § 3, effective July 1, 1998.

**7-127-107. Action without meeting.** (1) Unless otherwise provided by the bylaws, any action required or permitted by articles 121 to 137 of this title to be taken at a members' meeting may be taken without a meeting if members entitled to vote thereon unanimously agree and consent to such action in writing.

(2) No action taken pursuant to this section shall be effective unless writings describing and consenting to the action, signed by members sufficient under subsection (1) of this section to take the action and not revoked pursuant to subsection (3) of this section, are received by the nonprofit corporation within sixty days after the date the earliest dated writing describing and consenting to the action is received by the nonprofit corporation. Unless otherwise provided by the bylaws, any such writing may be received by the nonprofit corporation by electronically transmitted facsimile or other form of wire or wireless communication providing the nonprofit corporation with a complete copy thereof, including a copy of the signature thereto. Action taken pursuant to this section shall be effective when the last writing necessary to effect the action is received by the nonprofit corporation, unless the writings describing and consenting to the action state a different effective date.

(3) Any member who has signed a writing describing and consenting to action taken pursuant to this section may revoke such consent by a writing signed and dated by the member describing the action and stating that the member's prior consent thereto is revoked, if such writing is received by the nonprofit corporation before the last writing necessary to effect the action is received by the nonprofit corporation.

(4) Subject to subsection (8) of this section, the record date for determining members entitled to take action without a meeting or entitled to be given notice under subsection (7) of this section of action so taken is the date a writing upon which the action is taken pursuant to subsection (1) of this section is first received by the nonprofit corporation.

(5) Action taken under this section has the same effect as action taken at a meeting of members and may be described as such in any document.

(6) In the event voting members are entitled to vote cumulatively in the election of directors, voting members may take action under this section to elect or remove directors only pursuant to section 7-127-208 and only if the required signed writings describing and consenting to the election or removal of the directors are received by the nonprofit corporation.

(7) In the event action is taken under subsection (1) of this section with less than unanimous consent of all members entitled to vote upon the action, the nonprofit corporation or the members taking the action shall, promptly after all of the writings necessary to effect the action have been received by the nonprofit corporation, give notice of such action to all members who were entitled to vote upon the action. The notice shall contain or be accompanied by the same material, if any, that under articles 121 to 137 of this title would have been required to be given to members in or with a notice of the meeting at which the action would have been submitted to the members for action.

(8) The district court for the county in this state in which the street address of the nonprofit corporation's principal office is located or, if the nonprofit corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located or, if the nonprofit corporation has no registered agent, the district court for the city and county of Denver may, upon application of the nonprofit corporation or any member who would be entitled to vote on the action at a members' meeting, summarily state a record date for determining members entitled to sign writings consenting to an action under this section and may enter other orders necessary or appropriate to effect the purposes of this section.

(9) All signed written instruments necessary for any action taken pursuant to this section shall be filed with the minutes of the meetings of the members.

**Source:** L. 97: Entire article added, p. 678, § 3, effective July 1, 1998. L. 2003: (2) and (8) amended, p. 2338, § 295, effective July 1, 2004.

**7-127-108. Meetings by telecommunication.** Unless otherwise provided in the bylaws, any or all of the members may participate in an annual, regular, or special meeting of the members by, or the meeting may be conducted through the use of, any means of communication by which all persons participating in the meeting may hear each other during the meeting. A member participating in a meeting by this means is deemed to be present in person at the meeting.

**Source:** L. 97: Entire article added, p. 680, § 3, effective July 1, 1998.

**7-127-109. Action by written ballot.** (1) Unless otherwise provided by the bylaws, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the nonprofit corporation delivers a written ballot to every member entitled to vote on the matter.

(2) A written ballot shall:

- (a) State each proposed action; and
- (b) Provide an opportunity to vote for or against each proposed action.

(3) Approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(4) All solicitations for votes by written ballot shall:

- (a) Indicate the number of responses needed to meet the quorum requirements;
- (b) State the percentage of approvals necessary to approve each matter other than election of directors;

(c) State the time by which a ballot must be received by the nonprofit corporation in order to be counted; and

(d) Be accompanied by written information sufficient to permit each person casting such ballot to reach an informed decision on the matter.

(5) Unless otherwise provided by the bylaws, a written ballot may not be revoked.

(6) Action taken under this section has the same effect as action taken at a meeting of members and may be described as such in any document.



**Source:** L. 97: Entire article added, p. 680, § 3, effective July 1, 1998. L. 2003: (2)(a) and (4)(c) amended, p. 2339, § 296, effective July 1, 2004.

## PART 2

### VOTING

**7-127-201. Members list for meeting and action by written ballot.** (1) Unless otherwise provided by the bylaws, after fixing a record date for a notice of a meeting or for determining the members entitled to take action by written ballot, a nonprofit corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of, and to vote at, the meeting or to take such action by written ballot. The list shall show the address of each member entitled to notice of, and to vote at, the meeting or to take such action by written ballot and the number of votes each member is entitled to vote at the meeting or by written ballot.

(2) If prepared in connection with a meeting of the members, the members list shall be available for inspection by any member entitled to vote at the meeting, beginning the earlier of ten days before the meeting for which the list was prepared or two business days after notice of the meeting is given and continuing through the meeting, and any adjournment thereof, at the nonprofit corporation's principal office or at a place identified in the notice of the meeting in the city where the meeting will be held. The nonprofit corporation shall make the members list available at the meeting, and any member entitled to vote at the meeting or an agent or attorney of a member entitled to vote at the meeting is entitled to inspect the list at any time during the meeting or any adjournment. If prepared in connection with action to be taken by the members by written ballot, the members list shall be available for inspection by any member entitled to cast a vote by such written ballot, beginning on the date that the first written ballot is delivered to the members and continuing through the time when such written ballots must be received by the nonprofit corporation in order to be counted, at the nonprofit corporation's principal office. A member entitled to vote at the meeting or by such written ballot, or an agent or attorney of a member entitled to vote at the meeting or by such written ballot, is entitled on written demand to inspect and, subject to the requirements of section 7-136-102 (3) and the provisions of section 7-136-103 (2) and (3), to copy the list, during regular business hours, at the member's expense, and during the period it is available for inspection.

(3) If the nonprofit corporation refuses to allow a member entitled to vote at the meeting or by such written ballot, or an agent or attorney of a member entitled to vote at the meeting or by such written ballot, to inspect the members list or to copy the list during the period it is required to be available for inspection under subsection (2) of this section, the district court for the county in this state in which the street address of the nonprofit corporation's principal office is located or, if the nonprofit corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located, or if the nonprofit corporation has no registered agent in this state, the district court for the city and county of Denver may, on application of the member, summarily order the inspection or copying of the list at the nonprofit corporation's expense and may postpone or adjourn the meeting for which the list was prepared, or postpone the time when the nonprofit corporation must receive written ballots in connection with which the list was prepared, until the inspection or copying is complete.

(4) If a court orders inspection or copying of the list of members pursuant to subsection (3) of this section, unless the nonprofit corporation proves that it refused inspection or copying of the list in good faith because it had a reasonable basis for doubt about the right of the member or the agent or attorney of the member to inspect or copy the list of members:

(a) The court shall also order the nonprofit corporation to pay the member's costs, including reasonable counsel fees, incurred in obtaining the order;

(b) The court may order the nonprofit corporation to pay the member for any damages the member incurred; and

(c) The court may grant the member any other remedy afforded the member by law.

(5) If a court orders inspection or copying of the list of members pursuant to subsection (3) of this section, the court may impose reasonable restrictions on the use or distribution of the list by the member.

(6) Failure to prepare or make available the list of members does not affect the validity of action taken at the meeting or by means of such written ballot.

**Source:** L. 97: Entire article added, p. 681, § 3, effective July 1, 1998. L. 2003: (3) amended, p. 2339, § 297, effective July 1, 2004.

**7-127-202. Voting entitlement generally.** (1) Unless otherwise provided by the bylaws:

(a) Only voting members shall be entitled to vote with respect to any matter required or permitted under articles 121 to 137 of this title to be submitted to a vote of the members;

(b) All references in articles 121 to 137 of this title to votes of or voting by the members shall be deemed to permit voting only by the voting members; and

(c) Voting members shall be entitled to vote with respect to all matters required or permitted under articles 121 to 137 of this title to be submitted to a vote of the members.

(2) Unless otherwise provided by the bylaws, each member entitled to vote shall be entitled to one vote on each matter submitted to a vote of members.

(3) Unless otherwise provided by the bylaws, if a membership stands of record in the names of two or more persons, their acts with respect to voting shall have the following effect:

(a) If only one votes, such act binds all; and

(b) If more than one votes, the vote shall be divided on a pro rata basis.

**Source:** L. 97: Entire article added, p. 683, § 3, effective July 1, 1998.

**7-127-203. Proxies.** (1) Unless otherwise provided by the bylaws, a member entitled to vote may vote or otherwise act in person or by proxy.

(2) Without limiting the manner in which a member may appoint a proxy to vote or otherwise act for the member, the following shall constitute valid means of such appointment:

(a) A member may appoint a proxy by signing an appointment form, either personally or by the member's attorney-in-fact.

(b) A member may appoint a proxy by transmitting or authorizing the transmission of a telegram, teletype, or other electronic transmission providing a written statement of the appointment to the proxy, to a proxy solicitor, proxy support service organization, or other person duly authorized by the proxy to receive appointments as agent for the proxy or to the nonprofit corporation; except that the transmitted appointment shall set forth or be transmitted with written evidence from which it can be determined that the member transmitted or authorized the transmission of the appointment.

(3) An appointment of a proxy is effective against the nonprofit corporation when received by the nonprofit corporation, including receipt by the nonprofit corporation of an appointment transmitted pursuant to paragraph (b) of subsection (2) of this section. An appointment is valid for eleven months unless a different period is expressly provided in the appointment form.

(4) Any complete copy, including an electronically transmitted facsimile, of an appointment of a proxy may be substituted for or used in lieu of the original appointment for any purpose for which the original appointment could be used.

(5) An appointment of a proxy is revocable by the member.

(6) Appointment of a proxy is revoked by the person appointing the proxy:

(a) Attending any meeting and voting in person; or

(b) Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a writing stating that the appointment of the proxy is revoked or a subsequent appointment form.



(7) The death or incapacity of the member appointing a proxy does not affect the right of the nonprofit corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises the proxy's authority under the appointment.

(8) Subject to section 7-127-204 and to any express limitation on the proxy's authority appearing on the appointment form, a nonprofit corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment.

**Source: L. 97:** Entire article added, p. 683, § 3, effective July 1, 1998.

**7-127-204. Nonprofit corporation's acceptance of votes.** (1) If the name signed on a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation corresponds to the name of a member, the nonprofit corporation, if acting in good faith, is entitled to accept the vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation and to give it effect as the act of the member.

(2) If the name signed on a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation does not correspond to the name of a member, the nonprofit corporation, if acting in good faith, is nevertheless entitled to accept the vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation and to give it effect as the act of the member if:

(a) The member is an entity and the name signed purports to be that of an officer or agent of the entity;

(b) The name signed purports to be that of an administrator, executor, guardian, or conservator representing the member and, if the nonprofit corporation requests, evidence of fiduciary status acceptable to the nonprofit corporation has been presented with respect to the vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation;

(c) The name signed purports to be that of a receiver or trustee in bankruptcy of the member and, if the nonprofit corporation requests, evidence of this status acceptable to the nonprofit corporation has been presented with respect to the vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation;

(d) The name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the member and, if the nonprofit corporation requests, evidence acceptable to the nonprofit corporation of the signatory's authority to sign for the member has been presented with respect to the vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation;

(e) Two or more persons are the member as cotenants or fiduciaries and the name signed purports to be the name of at least one of the cotenants or fiduciaries and the person signing appears to be acting on behalf of all the cotenants or fiduciaries; or

(f) The acceptance of the vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation is otherwise proper under rules established by the nonprofit corporation that are not inconsistent with the provisions of this subsection (2).

(3) The nonprofit corporation is entitled to reject a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member.

(4) The nonprofit corporation and its officer or agent who accepts or rejects a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation in good faith and in accordance with the standards of this section are not liable in damages for the consequences of the acceptance or rejection.

(5) Corporate action based on the acceptance or rejection of a vote, consent, written ballot, waiver, proxy appointment, or proxy appointment revocation under this section is valid unless a court of competent jurisdiction determines otherwise.

**Source: L. 97:** Entire article added, p. 684, § 3, effective July 1, 1998.

**7-127-205. Quorum and voting requirements for voting groups.** (1) Members entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those members exists with respect to that matter. Unless otherwise provided in articles 121 to 137 of this title or the bylaws, twenty-five percent of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(2) Once a member is represented for any purpose at a meeting, including the purpose of determining that a quorum exists, the member is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting, unless otherwise provided in the bylaws or unless a new record date is or shall be set for that adjourned meeting.

(3) If a quorum exists, action on a matter other than the election of directors by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast within the voting group opposing the action, unless a greater number of affirmative votes is required by articles 121 to 137 of this title or the bylaws.

(4) An amendment to the articles of incorporation or the bylaws adding, changing, or deleting a quorum or voting requirement for a voting group greater than that specified in subsection (1) or (3) of this section is governed by section 7-127-207 (2).

(5) The election of directors is governed by section 7-127-208.

**Source: L. 97:** Entire article added, p. 686, § 3, effective July 1, 1998.

**7-127-206. Action by single and multiple voting groups.** (1) If articles 121 to 137 of this title or the bylaws provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in section 7-127-205.

(2) If articles 121 to 137 of this title or the bylaws provide for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in section 7-127-205. One voting group may vote on a matter even though no action is taken by another voting group entitled to vote on the matter.

**Source: L. 97:** Entire article added, p. 686, § 3, effective July 1, 1998.

**7-127-207. Lesser or greater quorum or greater voting requirements.** (1) The bylaws may provide for a lesser or a greater quorum requirement, or a greater voting requirement for members or voting groups than is provided for by articles 121 to 137 of this title.

(2) An amendment to the articles of incorporation or the bylaws that adds, changes, or deletes a lesser or a greater quorum requirement or a greater voting requirement shall meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

**Source: L. 97:** Entire article added, p. 686, § 3, effective July 1, 1998. **L. 98:** Entire section amended, p. 623, § 27, effective July 1.

**7-127-208. Voting for directors - cumulative voting.** (1) If the bylaws provide for cumulative voting for directors by the voting members, voting members may so vote, by multiplying the number of votes the voting members are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

(2) Cumulative voting is not authorized at a particular meeting unless:

(a) The meeting notice or statement accompanying the notice states that cumulative voting will take place; or

(b) A voting member gives notice during the meeting and before the vote is taken of the voting member's intent to cumulate votes, and if one voting member gives this notice all



other voting members participating in the election are entitled to cumulate their votes without giving further notice.

(3) If cumulative voting is in effect, a director may not be removed if the number of votes cast against such removal, or not consenting in writing to such removal, would be sufficient to elect such director if voted cumulatively at an election for such director.

(4) Members may not vote cumulatively if the directors and members are identical.

(5) In an election of multiple directors, that number of candidates equaling the number of directors to be elected, having the highest number of votes cast in favor of their election, are elected to the board of directors. When only one director is being voted upon, the affirmative vote of a majority of the members constituting a quorum at the meeting at which the election occurs shall be required for election to the board of directors.

**Source: L. 97:** Entire article added, p. 687, § 3, effective July 1, 1998.

**7-127-209. Other methods of electing directors.** (1) A nonprofit corporation may provide in its bylaws for election of directors by voting members or delegates:

- (a) On the basis of chapter or other organizational unit;
- (b) By region or other geographic unit;
- (c) By preferential voting; or
- (d) By any other reasonable method.

**Source: L. 97:** Entire article added, p. 687, § 3, effective July 1, 1998.

### PART 3

#### VOTING AGREEMENTS

**7-127-301. Voting agreements.** (1) Two or more members may provide for the manner in which they will vote by signing an agreement for that purpose.

(2) A voting agreement created under this section is specifically enforceable.

**Source: L. 97:** Entire article added, p. 688, § 3, effective July 1, 1998.

### ARTICLE 128

#### Directors and Officers

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

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## PART 1

## BOARD OF DIRECTORS

**7-128-101. Requirement for board of directors.** (1) Unless otherwise provided in the articles of incorporation, each nonprofit corporation shall have a board of directors. The board of directors and the directors may be known by any other names designated in the bylaws.

(2) Subject to any provision stated in the articles of incorporation, all corporate powers shall be exercised by or under the authority of, and the business and affairs of the nonprofit corporation managed under the direction of, the board of directors or such other persons as the articles of incorporation provide shall have the authority and perform the duties of a board of directors. To the extent the articles of incorporation provide that other persons shall have the authority and perform the duties of the board of directors, the directors shall be relieved to that extent from such authority and duties.

**Source:** L. 97: Entire article added, p. 688, § 3, effective July 1, 1998. L. 2003: (2) amended, p. 2340, § 298, effective July 1, 2004.

**7-128-102. Qualifications of directors.** A director shall be an individual. The bylaws may prescribe other qualifications for directors. A director need not be a resident of this state or a member of the nonprofit corporation unless the bylaws so prescribe.

**Source:** L. 97: Entire article added, p. 688, § 3, effective July 1, 1998. L. 2004: Entire section amended, p. 1510, § 295, effective July 1; entire section amended, p. 342, § 1, effective August 4.

**Editor's note:** Amendments to this section by House Bill 04-1398 and House Bill 04-1224 were harmonized.

**7-128-103. Number of directors.** (1) A board of directors shall consist of one or more directors, with the number stated in, or fixed in accordance with, the bylaws.

(2) The bylaws may establish, or permit the voting members or the board of directors to establish, a range for the size of the board of directors by fixing a minimum and maximum number of directors. If a range is established, the number of directors may be fixed or changed from time to time within the range by the voting members or the board of directors.

**Source:** L. 97: Entire article added, p. 688, § 3, effective July 1, 1998. L. 2003: (1) amended, p. 2340, § 299, effective July 1, 2004.

**7-128-104. Election, appointment, and designation of directors.** (1) All directors except the initial directors shall be elected, appointed, or designated as provided in the bylaws. If no method of election, appointment, or designation is stated in the bylaws, the directors other than the initial directors shall be elected as follows:



(a) If the nonprofit corporation has voting members, all directors except the initial directors shall be elected by the voting members at each annual meeting of the voting members; and

(b) If the nonprofit corporation does not have voting members, all directors except the initial directors shall be elected by the board of directors.

(2) The bylaws may authorize the election of all or a stated number or portion of directors, except the initial directors, by the members of one or more voting groups of voting members or by the directors of one or more authorized classes of directors. A class of voting members or directors entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

(3) The bylaws may authorize the appointment of one or more directors by such person or persons, or by the holder of such office or position, as the bylaws shall state.

(4) For purposes of articles 121 to 137 of this title, designation occurs when the bylaws name an individual as a director or designate the holder of some office or position as a director.

**Source:** L. 97: Entire article added, p. 688, § 3, effective July 1, 1998. L. 2003: IP(1), (2), and (3) amended, p. 2340, § 300, effective July 1, 2004.

**7-128-105. Terms of directors generally.** (1) The bylaws may state the terms of directors. In the absence of any term stated in the bylaws, the term of each director shall be one year. Unless otherwise provided in the bylaws, directors may be elected for successive terms.

(2) Unless otherwise provided in the bylaws, the terms of the initial directors of a nonprofit corporation expire at the first meeting at which directors are elected or appointed.

(3) A decrease in the number of directors or in the term of office does not shorten an incumbent director's term.

(4) Unless otherwise provided in the bylaws, the term of a director filling a vacancy expires at the end of the unexpired term that such director is filling.

(5) Despite the expiration of a director's term, a director continues to serve until the director's successor is elected, appointed, or designated and qualifies, or until there is a decrease in the number of directors.

(6) Repealed.

**Source:** L. 97: Entire article added, p. 689, § 3, effective July 1, 1998. L. 98: (6) added, p. 623, § 28, effective July 1. L. 2000: (6) amended, p. 983, § 81, effective July 1. L. 2002: (6) amended, p. 1855, § 136, effective July 1; (6) amended, p. 1720, § 138, effective October 1. L. 2003: (1) amended, p. 2340, § 302, effective July 1, 2004. L. 2004: (6) repealed, p. 1511, § 296, effective July 1.

**7-128-106. Staggered terms for directors.** The bylaws may provide for staggering the terms of directors by dividing the total number of directors into any number of groups. The terms of office of the several groups need not be uniform.

**Source:** L. 97: Entire article added, p. 689, § 3, effective July 1, 1998.

**7-128-107. Resignation of directors.** (1) A director may resign at any time by giving written notice of resignation to the nonprofit corporation.

(2) A resignation of a director is effective when the notice is received by the nonprofit corporation unless the notice states a later effective date.

(3) Repealed.

(4) If, at the beginning of a director's term on the board, the bylaws provide that a director may be deemed to have resigned for failing to attend a stated number of board meetings, or for failing to meet other stated obligations of directors, and if such failure to

attend or meet obligations is confirmed by an affirmative vote of the board of directors, then such failure to attend or meet obligations shall be effective as a resignation at the time of such vote of the board.

**Source:** **L. 97:** Entire article added, p. 690, § 3, effective July 1, 1998. **L. 2000:** (3) amended, p. 983, § 82, effective July 1. **L. 2002:** (3) amended, p. 1855, § 137, effective July 1; (3) amended, p. 1720, § 139, effective October 1. **L. 2003:** (2) and (4) amended, p. 2340, § 302, effective July 1, 2004. **L. 2004:** (3) repealed, p. 1511, § 297, effective July 1.

**7-128-108. Removal of directors.** (1) Directors elected by voting members or directors may be removed as follows:

(a) The voting members may remove one or more directors elected by them with or without cause unless the bylaws provide that directors may be removed only for cause.

(b) If a director is elected by a voting group, only that voting group may participate in the vote to remove that director.

(c) Subject to section 7-127-208 (3), a director may be removed only if the number of votes cast to remove the director would be sufficient to elect the director at a meeting to elect directors.

(d) A director elected by voting members may be removed by the voting members only at a meeting called for the purpose of removing that director, and the meeting notice shall state that the purpose, or one of the purposes, of the meeting is removal of the director.

(e) An entire board of directors may be removed under paragraphs (a) to (d) of this subsection (1).

(f) A director elected by the board of directors may be removed with or without cause by the vote of a majority of the directors then in office or such greater number as is stated in the bylaws; except that a director elected by the board of directors to fill the vacancy of a director elected by the voting members may be removed without cause by the voting members, but not the board of directors.

(g) (Deleted by amendment, L. 2000, p. 983, § 83, effective July 1, 2000.)

(2) Unless otherwise provided in the bylaws:

(a) An appointed director may be removed without cause by the person appointing the director;

(b) The person removing the director shall do so by giving written notice of the removal to the director and to the nonprofit corporation; and

(c) A removal is effective when the notice is received by both the director to be removed and the nonprofit corporation unless the notice states a later effective date.

(3) A designated director may be removed by an amendment to the bylaws deleting or changing the designation.

(4) Repealed.

**Source:** **L. 97:** Entire article added, p. 690, § 3, effective July 1, 1998. **L. 2000:** (1)(g) amended and (4) added, p. 983, § 83, effective July 1. **L. 2002:** (4) amended, p. 1855, § 138, effective July 1; (4) amended, p. 1720, § 140, effective October 1. **L. 2003:** (1)(f) and (2)(c) amended, p. 2341, § 303, effective July 1, 2004. **L. 2004:** (4) repealed, p. 1511, § 298, effective July 1.

**7-128-109. Removal of directors by judicial proceeding.** (1) A director may be removed by the district court for the county in this state in which the address of the nonprofit corporation's principal office is located or, if the nonprofit corporation has no principal office in this state, by the district court for the county in which the street address of its registered agent is located, or, if the nonprofit corporation has no registered agent, by the district court for the city and county of Denver, in a proceeding commenced either by the nonprofit corporation or by voting members holding at least ten percent of the votes entitled to be cast in the election of such director's successor, if the court finds that the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion



with respect to the nonprofit corporation, or a final judgment has been entered finding that the director has violated a duty set forth in part 4 of this article, and that removal is in the best interests of the nonprofit corporation.

(2) The court that removes a director may bar the director from reelection for a period prescribed by the court.

(3) If voting members commence a proceeding under subsection (1) of this section, they shall make the nonprofit corporation a party defendant.

(4) Repealed.

**Source:** L. 97: Entire article added, p. 691, § 3, effective July 1, 1998. L. 2000: (4) amended, p. 983, § 84, effective July 1. L. 2002: (4) amended, p. 1855, § 139, effective July 1; (4) amended, p. 1720, § 141, effective October 1. L. 2003: (1) amended, p. 2341, § 304, effective July 1, 2004. L. 2004: (4) repealed, p. 1511, § 299, effective July 1.

**7-128-110. Vacancy on board.** (1) Unless otherwise provided in the bylaws, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) The voting members, if any, may fill the vacancy;

(b) The board of directors may fill the vacancy; or

(c) If the directors remaining in office constitute fewer than a quorum of the board of directors, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) Notwithstanding subsection (1) of this section, unless otherwise provided in the bylaws, if the vacant office was held by a director elected by a voting group of voting members:

(a) If one or more of the remaining directors were elected by the same voting group of voting members, only such directors are entitled to vote to fill the vacancy if it is filled by directors, and they may do so by the affirmative vote of a majority of such directors remaining in office; and

(b) Only that voting group is entitled to vote to fill the vacancy if it is filled by the voting members.

(3) Notwithstanding subsection (1) of this section, unless otherwise provided in the bylaws, if the vacant office was held by a director elected by a voting group of directors, and if any persons in that voting group remain as directors, only such directors are entitled to vote to fill the vacancy.

(4) Unless otherwise provided in the bylaws, if a vacant office was held by an appointed director, only the person who appointed the director may fill the vacancy.

(5) If a vacant office was held by a designated director, the vacancy shall be filled as provided in the bylaws. In the absence of an applicable bylaw provision, the vacancy may not be filled by the board.

(6) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under section 7-128-107 (2) or otherwise, may be filled before the vacancy occurs, but the new director may not take office until the vacancy occurs.

**Source:** L. 97: Entire article added, p. 691, § 3, effective July 1, 1998.

**7-128-111. Compensation of directors.** Unless otherwise provided in the bylaws, the board of directors may authorize and fix the compensation of directors.

**Source:** L. 97: Entire article added, p. 692, § 3, effective July 1, 1998.

## PART 2

### MEETINGS AND ACTION OF THE BOARD

**7-128-201. Meetings.** (1) The board of directors may hold regular or special meetings in or out of this state.

(2) Unless otherwise provided in the bylaws, the board of directors may permit any director to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

**Source: L. 97:** Entire article added, p. 692, § 3, effective July 1, 1998.

**7-128-202. Action without meeting.** (1) Unless otherwise provided in the bylaws, any action required or permitted by articles 121 to 137 of this title to be taken at a board of directors' meeting may be taken without a meeting if notice is transmitted in writing to each member of the board and each member of the board by the time stated in the notice:

(a) Votes in writing for such action; or  
(b) (I) Votes in writing against such action, abstains in writing from voting, or fails to respond or vote; and

(II) Fails to demand in writing that action not be taken without a meeting.

(2) The notice required by subsection (1) of this section shall state:

(a) The action to be taken;

(b) The time by which a director must respond;

(c) That failure to respond by the time stated in the notice will have the same effect as abstaining in writing by the time stated in the notice and failing to demand in writing by the time stated in the notice that action not be taken without a meeting; and

(d) Any other matters the nonprofit corporation determines to include.

(3) Action is taken under this section only if, at the end of the time stated in the notice transmitted pursuant to subsection (1) of this section:

(a) The affirmative votes in writing for such action received by the nonprofit corporation and not revoked pursuant to subsection (5) of this section equal or exceed the minimum number of votes that would be necessary to take such action at a meeting at which all of the directors then in office were present and voted; and

(b) The nonprofit corporation has not received a written demand by a director that such action not be taken without a meeting other than a demand that has been revoked pursuant to subsection (5) of this section.

(4) A director's right to demand that action not be taken without a meeting shall be deemed to have been waived unless the nonprofit corporation receives such demand from the director in writing by the time stated in the notice transmitted pursuant to subsection (1) of this section and such demand has not been revoked pursuant to subsection (5) of this section.

(5) Any director who in writing has voted, abstained, or demanded action not be taken without a meeting pursuant to this section may revoke such vote, abstention, or demand in writing received by the nonprofit corporation by the time stated in the notice transmitted pursuant to subsection (1) of this section.

(6) Unless the notice transmitted pursuant to subsection (1) of this section states a different effective date, action taken pursuant to this section shall be effective at the end of the time stated in the notice transmitted pursuant to subsection (1) of this section.

(7) A writing by a director under this section shall be in a form sufficient to inform the nonprofit corporation of the identity of the director, the vote, abstention, demand, or revocation of the director, and the proposed action to which such vote, abstention, demand, or revocation relates. Unless otherwise provided by the bylaws, all communications under this section may be transmitted or received by the nonprofit corporation by electronically transmitted facsimile, e-mail, or other form of wire or wireless communication. For purposes of this section, communications to the nonprofit corporation are not effective until received.

(8) Action taken pursuant to this section has the same effect as action taken at a meeting of directors and may be described as such in any document.

(9) All writings made pursuant to this section shall be filed with the minutes of the meetings of the board of directors.



**Source:** **L. 97:** Entire article added, p. 693, § 3, effective July 1, 1998. **L. 98:** (1)(b)(II) and (3) amended, p. 624, § 29, effective July 1. **L. 2003:** (3) amended, p. 2341, § 305, effective July 1, 2004. **L. 2008:** (1) amended, p. 36, § 2, effective August 5. **L. 2009:** Entire section R&RE, (HB 09-1248), ch. 252, p. 1134, § 20, effective May 14.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (1), see section 1 of chapter 16, Session Laws of Colorado 2008.

**7-128-203. Notice of meeting - rights of residential members.** (1) Unless otherwise provided in articles 121 to 137 of this title or in the bylaws, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(2) Unless the bylaws provide for a longer or shorter period, special meetings of the board of directors shall be preceded by at least two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless otherwise required by articles 121 to 137 of this title or the bylaws.

(3) Notwithstanding subsections (1) and (2) of this section, and notwithstanding any provision of the articles of incorporation or bylaws to the contrary, the following rules and procedures apply to meetings of the board of directors of a residential nonprofit corporation or any committee of the board:

(a) (I) (A) All regular and special meetings of the residential nonprofit corporation's board of directors or executive committee, or any committee of the board that is authorized to take final action on the board's behalf, must be open to attendance by all residential members or their representatives. The board shall make agendas for meetings of the board, and agendas for meetings of committees of the board that are authorized to take final action on the board's behalf, reasonably available for examination in advance by all residential members or their representatives. If there is no formal agenda, residential members or their representatives are nonetheless entitled to a general description of the purpose of the meeting and the subject matter that will be discussed.

(B) The board shall inform all members, at least annually, of the method by which meeting agendas and other information required by sub-subparagraph (A) of this subparagraph (I) will be provided, including the physical location of places where agendas and meeting notices may be posted or the web address where on-line postings may be made. The board shall give at least thirty days' advance notice of any change in the manner or means by which meeting information will be provided.

(II) The residential nonprofit corporation is encouraged to provide all notices and agendas required by this article in electronic form, by posting on a web site or otherwise, in addition to printed form. If such electronic means are available, the corporation shall provide notice of all regular and special meetings of residential members by electronic mail to all residential members who so request and who furnish the corporation with their electronic mail addresses. Electronic notice of a special meeting must be given as soon as possible but at least twenty-four hours before the meeting.

(b) At an appropriate time determined by the board of directors, but before the board votes on an issue under discussion, the board shall permit residential members or their designated representatives to speak regarding the issue. The board may place reasonable time restrictions on persons speaking during the meeting. If more than one person desires to address an issue and there are opposing views, the board shall provide for a reasonable number of persons to speak on each side of the issue.

(c) The board of directors or any committee of the board may hold an executive or closed-door session and may restrict attendance to board members and such other persons requested by the board during a regular or specially announced meeting or a part thereof. The matters to be discussed at such an executive session may include only matters enumerated in paragraph (d) of this subsection (3).

(d) Matters for discussion by an executive or closed session are limited to:

(I) Matters pertaining to employees of the residential nonprofit corporation or the managing agent's contract or involving the employment, promotion, discipline, or dismissal of an officer, agent, or employee of the corporation;

(II) Consultation with legal counsel concerning disputes that are the subject of pending or imminent court proceedings or matters that are privileged or confidential between attorney and client;

(III) Investigative proceedings concerning possible or actual criminal misconduct;

(IV) Matters subject to specific constitutional, statutory, or judicially imposed requirements protecting particular proceedings or matters from public disclosure;

(V) Any matter the disclosure of which would constitute an unwarranted invasion of individual privacy;

(VI) Review of or discussion relating to any written or oral communication from legal counsel.

(e) Upon the final resolution of any matter for which the board of directors received legal advice or that concerned pending or contemplated litigation, the board may elect to preserve the attorney-client privilege in any appropriate manner, or it may elect to disclose such information, as it deems appropriate, about such matter in an open meeting.

(f) Before the board of directors or any committee of the board convenes in executive session, the chair of the body shall announce the general matter of discussion as enumerated in paragraph (d) of this subsection (3).

(g) The board of directors shall not adopt any change to the residential nonprofit corporation's articles of incorporation or bylaws during an executive session. An articles of incorporation or bylaw change may be validly adopted only during a regular or special meeting or after the board of directors goes back into regular session following an executive session.

(h) The minutes of all meetings at which an executive session was held must indicate that an executive session was held and the general subject matter of the executive session.

**Source:** L. 97: Entire article added, p. 694, § 3, effective July 1, 1998. L. 2011: (3) added, (HB 11-1110), ch. 22, p. 55, § 3, effective March 11. L. 2012: (3)(a)(I) amended, (SB 12-024), ch. 39, p. 137, § 2, effective March 22.

**Editor's note:** Section 3 of chapter 39, Session Laws of Colorado 2012, provides that the act amending subsection (3)(a)(I) applies to resignations, terminations, expulsions, and suspensions from residential nonprofit corporations occurring on or after March 22, 2012, and to committee meetings occurring on or after March 22, 2012.

**7-128-204. Waiver of notice.** (1) A director may waive any notice of a meeting before or after the time and date of the meeting stated in the notice. Except as provided by subsection (2) of this section, the waiver shall be in writing and signed by the director entitled to the notice. Such waiver shall be delivered to the nonprofit corporation for filing with the corporate records, but such delivery and filing shall not be conditions of the effectiveness of the waiver.

(2) A director's attendance at or participation in a meeting waives any required notice to that director of the meeting unless:

(a) At the beginning of the meeting or promptly upon the director's later arrival, the director objects to holding the meeting or transacting business at the meeting because of lack of notice or defective notice and does not thereafter vote for or assent to action taken at the meeting; or

(b) If special notice was required of a particular purpose pursuant to section 7-128-203 (2), the director objects to transacting business with respect to the purpose for which such special notice was required and does not thereafter vote for or assent to action taken at the meeting with respect to such purpose.

**Source:** L. 97: Entire article added, p. 694, § 3, effective July 1, 1998.

**7-128-205. Quorum and voting.** (1) Unless a greater or lesser number is required by the bylaws, a quorum of a board of directors consists of a majority of the number of directors in office immediately before the meeting begins.

(2) The bylaws may authorize a quorum of a board of directors to consist of:



(a) No fewer than one-third of the number of directors fixed if the corporation has a fixed board size; or

(b) No fewer than one-third of the number of directors fixed or, if no number is fixed, of the number in office immediately before the meeting begins, if a range for the size of the board is established pursuant to section 7-128-103 (2).

(3) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the vote of a greater number of directors is required by articles 121 to 137 of this title or the bylaws.

(4) If provided in the bylaws, for purposes of determining a quorum with respect to a particular proposal, and for purposes of casting a vote for or against a particular proposal, a director may be deemed to be present at a meeting and to vote if the director has granted a signed written proxy to another director who is present at the meeting, authorizing the other director to cast the vote that is directed to be cast by the written proxy with respect to the particular proposal that is described with reasonable specificity in the proxy. Except as provided in this subsection (4) and as permitted by section 7-128-202, directors may not vote or otherwise act by proxy.

(5) A director who is present at a meeting of the board of directors when corporate action is taken is deemed to have assented to all action taken at the meeting unless:

(a) The director objects at the beginning of the meeting, or promptly upon the director's arrival, to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to any action taken at the meeting;

(b) The director contemporaneously requests that the director's dissent or abstention as to any specific action taken be entered in the minutes of the meeting; or

(c) The director causes written notice of the director's dissent or abstention as to any specific action to be received by the presiding officer of the meeting before adjournment of the meeting or by the nonprofit corporation promptly after adjournment of the meeting.

(6) The right of dissent or abstention pursuant to subsection (5) of this section as to a specific action is not available to a director who votes in favor of the action taken.

**Source: L. 97:** Entire article added, p. 694, § 3, effective July 1, 1998.

**7-128-206. Committees of the board.** (1) Unless otherwise provided in the bylaws and subject to the provisions of section 7-129-106, the board of directors may create one or more committees of the board and appoint one or more directors to serve on them.

(2) Unless otherwise provided in the bylaws, the creation of a committee of the board and appointment of directors to it shall be approved by the greater of a majority of all the directors in office when the action is taken or the number of directors required by the bylaws to take action under section 7-128-205.

(3) Unless otherwise provided in the bylaws, sections 7-128-201 to 7-128-205, which govern meetings, action without meeting, notice, waiver of notice, and quorum and voting requirements of the board of directors, apply to committees of the board and their members as well.

(4) To the extent stated in the bylaws or by the board of directors, each committee of the board shall have the authority of the board of directors under section 7-128-101; except that a committee of the board shall not:

(a) Authorize distributions;

(b) Approve or propose to members action that articles 121 to 137 of this title require to be approved by members;

(c) Elect, appoint, or remove any director;

(d) Amend articles of incorporation pursuant to section 7-130-102;

(e) Adopt, amend, or repeal bylaws;

(f) Approve a plan of conversion or plan of merger not requiring member approval; or

(g) Approve a sale, lease, exchange, or other disposition of all, or substantially all, of its property, with or without goodwill, otherwise than in the usual and regular course of business subject to approval by members.

(5) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section 7-128-401.

(6) Nothing in this part 2 shall prohibit or restrict a nonprofit corporation from establishing in its bylaws or by action of the board of directors or otherwise one or more committees, advisory boards, auxiliaries, or other bodies of any kind, having such members and rules of procedure as the bylaws or board of directors may provide, in order to provide such advice, service, and assistance to the nonprofit corporation, and to carry out such duties and responsibilities for the nonprofit corporation, as may be stated in the bylaws or by the board of directors; except that, if any such committee or other body has one or more members thereof who are entitled to vote on committee matters and who are not then also directors, such committee or other body may not exercise any power or authority reserved to the board of directors in articles 121 to 137 of this title, in the articles of incorporation, or in the bylaws.

**Source:** L. 97: Entire article added, p. 695, § 3, effective July 1, 1998. L. 2003: IP(4) and (6) amended, p. 2342, § 306, effective July 1, 2004. L. 2007: (4)(f) amended, p. 249, § 52, effective May 29.

### PART 3

### OFFICERS

**7-128-301. Officers.** (1) Unless otherwise provided in the bylaws, a nonprofit corporation shall have a president, a secretary, a treasurer, and such other officers as may be designated by the board of directors. An officer shall be an individual who is eighteen years of age or older. An officer need not be a director or a member of the nonprofit corporation, unless the bylaws so prescribe.

(2) Officers may be appointed by the board of directors or in such other manner as the board of directors or bylaws may provide. A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(3) The bylaws or the board of directors shall delegate to the secretary or to one or more other persons responsibility for the preparation and maintenance of minutes of the directors' and members' meetings and other records and information required to be kept by the nonprofit corporation under section 7-136-101 and for authenticating records of the nonprofit corporation.

(4) The same individual may simultaneously hold more than one office in the nonprofit corporation.

**Source:** L. 97: Entire article added, p. 696, § 3, effective July 1, 1998. L. 2004: (1) amended, p. 1511, § 300, effective July 1.

**7-128-302. Duties of officers.** Each officer shall have the authority and shall perform the duties stated with respect to such office in the bylaws or, to the extent not inconsistent with the bylaws, prescribed with respect to such office by the board of directors or by an officer authorized by the board of directors.

**Source:** L. 97: Entire article added, p. 697, § 3, effective July 1, 1998. L. 2003: Entire section amended, p. 2342, § 307, effective July 1, 2004.

**7-128-303. Resignation and removal of officers.** (1) An officer may resign at any time by giving written notice of resignation to the nonprofit corporation.

(2) A resignation of an officer is effective when the notice is received by the nonprofit corporation unless the notice states a later effective date.

(3) If a resignation is made effective at a later date, the board of directors may permit the officer to remain in office until the effective date and may fill the pending vacancy before



the effective date with the provision that the successor does not take office until the effective date, or the board of directors may remove the officer at any time before the effective date and may fill the resulting vacancy.

(4) Unless otherwise provided in the bylaws, the board of directors may remove any officer at any time with or without cause. The bylaws or the board of directors may make provisions for the removal of officers by other officers or by the voting members.

(5) Repealed.

**Source:** **L. 97:** Entire article added, p. 697, § 3, effective July 1, 1998. **L. 2000:** (5) amended, p. 984, § 85, effective July 1. **L. 2002:** (5) amended, p. 1855, § 140, effective July 1; (5) amended, p. 1720, § 142, effective October 1. **L. 2003:** (2) amended, p. 2342, § 308, effective July 1, 2004. **L. 2004:** (5) repealed, p. 1511, § 301, effective July 1.

**7-128-304. Contract rights with respect to officers.** (1) The appointment of an officer does not itself create contract rights.

(2) An officer's removal does not affect the officer's contract rights, if any, with the nonprofit corporation. An officer's resignation does not affect the nonprofit corporation's contract rights, if any, with the officer.

**Source:** **L. 97:** Entire article added, p. 697, § 3, effective July 1, 1998.

## PART 4

### STANDARDS OF CONDUCT

**7-128-401. General standards of conduct for directors and officers.** (1) Each director shall discharge the director's duties as a director, including the director's duties as a member of a committee of the board, and each officer with discretionary authority shall discharge the officer's duties under that authority:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director or officer reasonably believes to be in the best interests of the nonprofit corporation.

(2) In discharging duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(a) One or more officers or employees of the nonprofit corporation whom the director or officer reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, a public accountant, or another person as to matters the director or officer reasonably believes are within such person's professional or expert competence;

(c) Religious authorities or ministers, priests, rabbis, or other persons whose position or duties in the nonprofit corporation, or in a religious organization with which the nonprofit corporation is affiliated, the director or officer believes justify reliance and confidence and who the director or officer believes to be reliable and competent in the matters presented; or

(d) In the case of a director, a committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(3) A director or officer is not acting in good faith if the director or officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) A director or officer is not liable as such to the nonprofit corporation or its members for any action taken or omitted to be taken as a director or officer, as the case may be, if, in connection with such action or omission, the director or officer performed the duties of the position in compliance with this section.

(5) A director, regardless of title, shall not be deemed to be a trustee with respect to the nonprofit corporation or with respect to any property held or administered by the nonprofit

corporation including, without limitation, property that may be subject to restrictions imposed by the donor or transferor of such property.

(6) A director or officer of a nonprofit corporation, in the performance of duties in that capacity, shall not have any fiduciary duty to any creditor of the nonprofit corporation arising only from the status as a creditor.

(7) No person shall be liable in contract or tort merely by reason of being a director, officer, or member of a nonprofit corporation that was suspended, declared defunct, administratively dissolved, or dissolved by operation of law, and the business or activities of which have been continued for nonprofit purposes, with or without knowledge of the suspension, declaration, or dissolution, and the business and activities of which have not been wound up.

**Source:** L. 97: Entire article added, p. 698, § 3, effective July 1, 1998. L. 2006: (6) and (7) added, p. 882, § 81, effective July 1.

**Editor's note:** Subsections (6) and (7) were originally enacted as subsections (5) and (6) respectively in Senate Bill 06-187 but were renumbered on revision for ease of location.

**7-128-402. Limitation of certain liabilities of directors and officers.** (1) If so provided in the articles of incorporation, the nonprofit corporation shall eliminate or limit the personal liability of a director to the nonprofit corporation or to its members for monetary damages for breach of fiduciary duty as a director; except that any such provision shall not eliminate or limit the liability of a director to the nonprofit corporation or to its members for monetary damages for any breach of the director's duty of loyalty to the nonprofit corporation or to its members, acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, acts specified in section 7-128-403 or 7-128-501 (2), or any transaction from which the director directly or indirectly derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director to the nonprofit corporation or to its members for monetary damages for any act or omission occurring before the date when such provision becomes effective.

(2) No director or officer shall be personally liable for any injury to person or property arising out of a tort committed by an employee unless such director or officer was personally involved in the situation giving rise to the litigation or unless such director or officer committed a criminal offense in connection with such situation. The protection afforded in this subsection (2) shall not restrict other common law protections and rights that a director or officer may have. This subsection (2) shall not restrict the nonprofit corporation's right to eliminate or limit the personal liability of a director to the nonprofit corporation or to its members for monetary damages for breach of fiduciary duty as a director as provided in subsection (1) of this section.

**Source:** L. 97: Entire article added, p. 699, § 3, effective July 1, 1998. L. 98: (1) amended, p. 624, § 30, effective July 1.

**7-128-403. Liability of directors for unlawful distributions.** (1) A director who votes for or assents to a distribution made in violation of section 7-133-101 or the articles of incorporation is personally liable to the nonprofit corporation for the amount of the distribution that exceeds what could have been distributed without violating said section or the articles of incorporation if it is established that the director did not perform the director's duties in compliance with section 7-128-401. In any proceeding commenced under this section, a director shall have all of the defenses ordinarily available to a director.

(2) A director held liable under subsection (1) of this section for an unlawful distribution is entitled to contribution:



(a) From every other director who could be held liable under subsection (1) of this section for the unlawful distribution; and

(b) From each person who accepted the distribution knowing the distribution was made in violation of section 7-133-101 or the articles of incorporation, the amount of the contribution from such person being the amount of the distribution to that person that exceeds what could have been distributed to that person without violating section 7-133-101 or the articles of incorporation.

**Source: L. 97:** Entire article added, p. 699, § 3, effective July 1, 1998.

## PART 5

### DIRECTORS' CONFLICTING INTEREST TRANSACTIONS

**7-128-501. Conflicting interest transaction.** (1) As used in this section, "conflicting interest transaction" means: A contract, transaction, or other financial relationship between a nonprofit corporation and a director of the nonprofit corporation, or between the nonprofit corporation and a party related to a director, or between the nonprofit corporation and an entity in which a director of the nonprofit corporation is a director or officer or has a financial interest.

(2) No loans shall be made by a corporation to its directors or officers. Any director or officer who assents to or participates in the making of any such loan shall be liable to the corporation for the amount of such loan until the repayment thereof.

(3) No conflicting interest transaction shall be void or voidable or be enjoined, set aside, or give rise to an award of damages or other sanctions in a proceeding by a member or by or in the right of the nonprofit corporation, solely because the conflicting interest transaction involves a director of the nonprofit corporation or a party related to a director or an entity in which a director of the nonprofit corporation is a director or officer or has a financial interest or solely because the director is present at or participates in the meeting of the nonprofit corporation's board of directors or of the committee of the board of directors that authorizes, approves, or ratifies the conflicting interest transaction or solely because the director's vote is counted for such purpose if:

(a) The material facts as to the director's relationship or interest and as to the conflicting interest transaction are disclosed or are known to the board of directors or the committee, and the board of directors or committee in good faith authorizes, approves, or ratifies the conflicting interest transaction by the affirmative vote of a majority of the disinterested directors, even though the disinterested directors are less than a quorum; or

(b) The material facts as to the director's relationship or interest and as to the conflicting interest transaction are disclosed or are known to the members entitled to vote thereon, and the conflicting interest transaction is specifically authorized, approved, or ratified in good faith by a vote of the members entitled to vote thereon; or

(c) The conflicting interest transaction is fair as to the nonprofit corporation.

(4) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes, approves, or ratifies the conflicting interest transaction.

(5) For purposes of this section, a "party related to a director" shall mean a spouse, a descendant, an ancestor, a sibling, the spouse or descendant of a sibling, an estate or trust in which the director or a party related to a director has a beneficial interest, or an entity in which a party related to a director is a director, officer, or has a financial interest.

**Source: L. 97:** Entire article added, p. 700, § 3, effective July 1, 1998. **L. 98:** (3)(b) amended, p. 624, § 31, effective July 1.

**ARTICLE 129****Indemnification**

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-129-101.	Indemnification definitions.		of indemnification of directors.
7-129-102.	Authority to indemnify directors.	7-129-107.	Indemnification of officers, employees, fiduciaries, and agents.
7-129-103.	Mandatory indemnification of directors.	7-129-108.	Insurance.
7-129-104.	Advance of expenses to directors.	7-129-109.	Limitation of indemnification of directors.
7-129-105.	Court-ordered indemnification of directors.	7-129-110.	Notice to voting members of indemnification of director.
7-129-106.	Determination and authorization		

**7-129-101. Indemnification definitions.** As used in this article:

(1) “Director” means an individual who is or was a director of a nonprofit corporation or an individual who, while a director of a nonprofit corporation, is or was serving at the nonprofit corporation’s request as a director, officer, partner, member, manager, trustee, employee, fiduciary, or agent of another domestic or foreign entity or of an employee benefit plan. A director is considered to be serving an employee benefit plan at the nonprofit corporation’s request if the director’s duties to the nonprofit corporation also impose duties on, or otherwise involve services by, the director to the plan or to participants in or beneficiaries of the plan. “Director” includes, unless the context requires otherwise, the estate or personal representative of a deceased director.

(2) “Expenses” includes counsel fees.

(3) “Liability” means the obligation incurred with respect to a proceeding to pay a judgment, settlement, penalty, fine, including an excise tax assessed with respect to an employee benefit plan, or reasonable expenses.

(4) “Nonprofit corporation” includes any domestic or foreign entity that is a predecessor of a nonprofit corporation by reason of a merger or other transaction in which the predecessor’s existence ceased upon consummation of the transaction.

(5) “Official capacity” means, when used with respect to a director, the office of director in a nonprofit corporation and, when used with respect to a person other than a director as contemplated in section 7-129-107, the office in a nonprofit corporation held by the officer or the employment, fiduciary, or agency relationship undertaken by the employee, fiduciary, or agent on behalf of the nonprofit corporation. “Official capacity” does not include service for any other domestic or foreign corporation, nonprofit corporation, or other person or employee benefit plan.

(6) “Party” includes a person who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) “Proceeding” means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

**Source:** **L. 97:** Entire article added, p. 701, § 3, effective July 1, 1998. **L. 2003:** (1) amended, p. 2342, § 309, effective July 1, 2004. **L. 2004:** (1) amended, p. 1511, § 302, effective July 1.

**7-129-102. Authority to indemnify directors.** (1) Except as provided in subsection (4) of this section, a nonprofit corporation may indemnify a person made a party to a proceeding because the person is or was a director against liability incurred in the proceeding if:

(a) The person’s conduct was in good faith; and

(b) The person reasonably believed:

(1) In the case of conduct in an official capacity with the nonprofit corporation, that the conduct was in the nonprofit corporation’s best interests; and



(II) In all other cases, that the conduct was at least not opposed to the nonprofit corporation's best interests; and

(c) In the case of any criminal proceeding, the person had no reasonable cause to believe the conduct was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in or beneficiaries of the plan is conduct that satisfies the requirement of subparagraph (II) of paragraph (b) of subsection (1) of this section. A director's conduct with respect to an employee benefit plan for a purpose that the director did not reasonably believe to be in the interests of the participants in or beneficiaries of the plan shall be deemed not to satisfy the requirements of paragraph (a) of subsection (1) of this section.

(3) The termination of a proceeding by judgment, order, settlement, or conviction or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(4) A nonprofit corporation may not indemnify a director under this section:

(a) In connection with a proceeding by or in the right of the nonprofit corporation in which the director was adjudged liable to the nonprofit corporation; or

(b) In connection with any other proceeding charging that the director derived an improper personal benefit, whether or not involving action in an official capacity, in which proceeding the director was adjudged liable on the basis that the director derived an improper personal benefit.

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the nonprofit corporation is limited to reasonable expenses incurred in connection with the proceeding.

**Source: L. 97:** Entire article added, p. 702, § 3, effective July 1, 1998.

**7-129-103. Mandatory indemnification of directors.** Unless limited by its articles of incorporation, a nonprofit corporation shall indemnify a person who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the person was a party because the person is or was a director, against reasonable expenses incurred by the person in connection with the proceeding.

**Source: L. 97:** Entire article added, p. 703, § 3, effective July 1, 1998.

**7-129-104. Advance of expenses to directors.** (1) A nonprofit corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(a) The director furnishes to the nonprofit corporation a written affirmation of the director's good faith belief that the director has met the standard of conduct described in section 7-129-102;

(b) The director furnishes to the nonprofit corporation a written undertaking, executed personally or on the director's behalf, to repay the advance if it is ultimately determined that the director did not meet the standard of conduct; and

(c) A determination is made that the facts then known to those making the determination would not preclude indemnification under this article.

(2) The undertaking required by paragraph (b) of subsection (1) of this section shall be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) Determinations and authorizations of payments under this section shall be made in the manner specified in section 7-129-106.

**Source: L. 97:** Entire article added, p. 703, § 3, effective July 1, 1998.

**7-129-105. Court-ordered indemnification of directors.** (1) Unless otherwise provided in the articles of incorporation, a director who is or was a party to a proceeding may

apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification in the following manner:

(a) If it determines that the director is entitled to mandatory indemnification under section 7-129-103, the court shall order indemnification, in which case the court shall also order the nonprofit corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification.

(b) If it determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in section 7-129-102 (1) or was adjudged liable in the circumstances described in section 7-129-102 (4), the court may order such indemnification as the court deems proper; except that the indemnification with respect to any proceeding in which liability shall have been adjudged in the circumstances described in section 7-129-102 (4) is limited to reasonable expenses incurred in connection with the proceeding and reasonable expenses incurred to obtain court-ordered indemnification.

**Source:** L. 97: Entire article added, p. 703, § 3, effective July 1, 1998.

**7-129-106. Determination and authorization of indemnification of directors.**

(1) A nonprofit corporation may not indemnify a director under section 7-129-102 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in section 7-129-102. A nonprofit corporation shall not advance expenses to a director under section 7-129-104 unless authorized in the specific case after the written affirmation and undertaking required by section 7-129-104 (1) (a) and (1) (b) are received and the determination required by section 7-129-104 (1) (c) has been made.

(2) The determinations required by subsection (1) of this section shall be made:

(a) By the board of directors by a majority vote of those present at a meeting at which a quorum is present, and only those directors not parties to the proceeding shall be counted in satisfying the quorum; or

(b) If a quorum cannot be obtained, by a majority vote of a committee of the board of directors designated by the board of directors, which committee shall consist of two or more directors not parties to the proceeding; except that directors who are parties to the proceeding may participate in the designation of directors for the committee.

(3) If a quorum cannot be obtained as contemplated in paragraph (a) of subsection (2) of this section, and a committee cannot be established under paragraph (b) of subsection (2) of this section, or, even if a quorum is obtained or a committee is designated, if a majority of the directors constituting such quorum or such committee so directs, the determination required to be made by subsection (1) of this section shall be made:

(a) By independent legal counsel selected by a vote of the board of directors or the committee in the manner specified in paragraph (a) or (b) of subsection (2) of this section or, if a quorum of the full board cannot be obtained and a committee cannot be established, by independent legal counsel selected by a majority vote of the full board of directors; or

(b) By the voting members, but voting members who are also directors and who are at the time seeking indemnification may not vote on the determination.

(4) Authorization of indemnification and advance of expenses shall be made in the same manner as the determination that indemnification or advance of expenses is permissible; except that, if the determination that indemnification or advance of expenses is permissible is made by independent legal counsel, authorization of indemnification and advance of expenses shall be made by the body that selected such counsel.

**Source:** L. 97: Entire article added, p. 704, § 3, effective July 1, 1998.

**7-129-107. Indemnification of officers, employees, fiduciaries, and agents.** (1) Unless otherwise provided in the articles of incorporation:



(a) An officer is entitled to mandatory indemnification under section 7-129-103, and is entitled to apply for court-ordered indemnification under section 7-129-105, in each case to the same extent as a director;

(b) A nonprofit corporation may indemnify and advance expenses to an officer, employee, fiduciary, or agent of the nonprofit corporation to the same extent as to a director; and

(c) A nonprofit corporation may also indemnify and advance expenses to an officer, employee, fiduciary, or agent who is not a director to a greater extent, if not inconsistent with public policy, and if provided for by its bylaws, general or specific action of its board of directors or voting members, or contract.

**Source:** L. 97: Entire article added, p. 705, § 3, effective July 1, 1998.

**7-129-108. Insurance.** A nonprofit corporation may purchase and maintain insurance on behalf of a person who is or was a director, officer, employee, fiduciary, or agent of the nonprofit corporation, or who, while a director, officer, employee, fiduciary, or agent of the nonprofit corporation, is or was serving at the request of the nonprofit corporation as a director, officer, partner, member, manager, trustee, employee, fiduciary, or agent of any domestic or foreign entity or of any employee benefit plan, against liability asserted against or incurred by the person in that capacity or arising from the person's status as a director, officer, employee, fiduciary, or agent, whether or not the nonprofit corporation would have power to indemnify the person against the same liability under section 7-129-102, 7-129-103, or 7-129-107. Any such insurance may be procured from any insurance company designated by the board of directors, whether such insurance company is formed under the law of this state or any other jurisdiction, including any insurance company in which the nonprofit corporation has an equity or any other interest through stock ownership or otherwise.

**Source:** L. 97: Entire article added, p. 705, § 3, effective July 1, 1998. L. 2003: Entire section amended, p. 2343, § 310, effective July 1, 2004.

**7-129-109. Limitation of indemnification of directors.** (1) A provision treating a nonprofit corporation's indemnification of, or advance of expenses to, directors that is contained in its articles of incorporation or bylaws, in a resolution of its members or board of directors, or in a contract, except an insurance policy, or otherwise, is valid only to the extent the provision is not inconsistent with sections 7-129-101 to 7-129-108. If the articles of incorporation limit indemnification or advance of expenses, indemnification and advance of expenses are valid only to the extent not inconsistent with the articles of incorporation.

(2) Sections 7-129-101 to 7-129-108 do not limit a nonprofit corporation's power to pay or reimburse expenses incurred by a director in connection with an appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent in the proceeding.

**Source:** L. 97: Entire article added, p. 706, § 3, effective July 1, 1998.

**7-129-110. Notice to voting members of indemnification of director.** If a nonprofit corporation indemnifies or advances expenses to a director under this article in connection with a proceeding by or in the right of the nonprofit corporation, the nonprofit corporation shall give written notice of the indemnification or advance to the voting members with or before the notice of the next voting members' meeting. If the next voting member action is taken without a meeting at the instigation of the board of directors, such notice shall be given to the voting members at or before the time the first voting member signs a writing consenting to such action.

**Source:** L. 97: Entire article added, p. 706, § 3, effective July 1, 1998.

**ARTICLE 130****Amendment of Articles of  
Incorporation and Bylaws**

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

**PART 1****AMENDMENT OF ARTICLES  
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- 7-130-101. Authority to amend articles of incorporation.
- 7-130-102. Amendment of articles of incorporation by board of directors or incorporators.
- 7-130-103. Amendment of articles of incorporation by board of directors and members.
- 7-130-104. Voting on amendments of articles of incorporation by voting groups.
- 7-130-105. Articles of amendment to articles of incorporation.
- 7-130-106. Restated articles of incorporation.
- 7-130-107. Amendment of articles of incorporation pursuant to reorganization.
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**PART 2****AMENDMENT OF BYLAWS**

- 7-130-201. Amendment of bylaws by board of directors or members.
- 7-130-202. Bylaw changing quorum or voting requirement for members.
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**PART 3****APPROVAL BY THIRD PERSONS AND  
TERMINATING MEMBERS OR  
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MEMBERSHIPS**

- 7-130-301. Approval by third persons.
- 7-130-302. Amendment terminating members or redeeming or canceling memberships.

**PART 1****AMENDMENT OF ARTICLES  
OF INCORPORATION**

**7-130-101. Authority to amend articles of incorporation.** (1) A nonprofit corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

(2) A member does not have a vested property right resulting from any provision in the articles of incorporation or the bylaws, including any provision relating to management, control, purpose, or duration of the nonprofit corporation.

**Source:** L. 97: Entire article added, p. 706, § 3, effective July 1, 1998. L. 98: (2) amended, p. 625, § 32, effective July 1.

**7-130-102. Amendment of articles of incorporation by board of directors or incorporators.** (1) Unless otherwise provided in the articles of incorporation, the board of directors may adopt, without member approval, one or more amendments to the articles of incorporation to:

(a) Delete the statement of the names and addresses of the incorporators or of the initial directors;

(b) Delete the statement of the registered agent name and registered agent address of the initial registered agent, if a statement of change changing the registered agent name and registered agent address of the registered agent is on file in the records of the secretary of state;



(b.4) Delete the statement of the principal office address of the initial principal office, if a statement of change changing the principal office address is on file in the records of the secretary of state;

(b.5) Delete the statement of the names and addresses of any or all of the individuals named in the articles of incorporation, pursuant to section 7-90-301 (6), as being individuals who caused the articles of incorporation to be delivered for filing;

(c) Extend the duration of the nonprofit corporation if it was incorporated at a time when limited duration was required by law;

(d) Change the domestic entity name by substituting the word "corporation", "incorporated", "company", or "limited", or an abbreviation of any such word for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution; or

(e) Make any other change expressly permitted by articles 121 to 137 of this title to be made without member action.

(2) The board of directors may adopt, without member action, one or more amendments to the articles of incorporation to change the entity name, if necessary, in connection with the reinstatement of a nonprofit corporation pursuant to part 10 of article 90 of this title.

(3) If a nonprofit corporation has no members or no members entitled to vote on amendments or no members yet admitted to membership, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one or more amendments to the nonprofit corporation's articles of incorporation, subject to any approval required pursuant to section 7-130-301. The nonprofit corporation shall provide notice of any meeting at which an amendment is to be voted upon. The notice shall be in accordance with section 7-128-203. The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider a proposed amendment to the articles of incorporation and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. The amendment shall be approved by a majority of the incorporators, until directors have been chosen, and thereafter by a majority of the directors in office at the time the amendment is adopted.

**Source:** **L. 97:** Entire article added, p. 707, § 3, effective July 1, 1998. **L. 98:** (3) amended, p. 625, § 33, effective July 1. **L. 2000:** (1)(d) and (2) amended, p. 984, § 86, effective July 1. **L. 2003:** (1)(a), (1)(b), (1)(d), and (2) amended and (1)(b.5) added, p. 2343, § 311, effective July 1, 2004. **L. 2004:** (1)(b) amended and (1)(b.4) added, p. 1512, § 303, effective July 1.

**7-130-103. Amendment of articles of incorporation by board of directors and members.** (1) Unless articles 121 to 137 of this title, the articles of incorporation, the bylaws, or the members or the board of directors acting pursuant to subsection (5) of this section require a different vote or voting by class, the board of directors or the members representing at least ten percent of all of the votes entitled to be cast on the amendment may propose an amendment to the articles of incorporation for submission to the members.

(2) For an amendment to the articles of incorporation to be adopted pursuant to subsection (1) of this section:

(a) The board of directors shall recommend the amendment to the members unless the amendment is proposed by members or unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the members with the amendment; and

(b) The members entitled to vote on the amendment shall approve the amendment as provided in subsection (5) of this section.

(3) The proposing board of directors or the proposing members may condition the effectiveness of the amendment on any basis.

(4) The nonprofit corporation shall give notice, in accordance with section 7-127-104, to each member entitled to vote on the amendment of the members' meeting at which the amendment will be voted upon. The notice of the meeting shall state that the purpose, or one of the purposes, of the meeting is to consider the amendment, and the notice shall contain

or be accompanied by a copy or a summary of the amendment or shall state the general nature of the amendment.

(5) Unless articles 121 to 137 of this title, the articles of incorporation, bylaws adopted by the members, or the proposing board of directors or the proposing members acting pursuant to subsection (3) of this section require a greater vote, the amendment shall be approved by the votes required by sections 7-127-205 and 7-127-206 by every voting group entitled to vote on the amendment.

(6) If the board of directors or the members seek to have the amendment approved by the members by written consent, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment.

**Source:** L. 97: Entire article added, p. 708, § 3, effective July 1, 1998. L. 98: (1) and (4) amended, p. 625, § 34, effective July 1.

**7-130-104. Voting on amendments of articles of incorporation by voting groups.**

(1) Unless otherwise provided by articles 121 to 137 of this title or the articles of incorporation, if membership voting is otherwise required by articles 121 to 137 of this title, the members of a class who are entitled to vote are entitled to vote as a separate voting group on an amendment to the articles of incorporation if the amendment would:

(a) Affect the rights, privileges, preferences, restrictions, or conditions of that class as to voting, dissolution, redemption, or transfer of memberships in a manner different than such amendment would affect another class;

(b) Change the rights, privileges, preferences, restrictions, or conditions of that class as to voting, dissolution, redemption, or transfer by changing the rights, privileges, preferences, restrictions, or conditions of another class;

(c) Increase or decrease the number of memberships authorized for that class;

(d) Increase the number of memberships authorized for another class;

(e) Effect an exchange, reclassification, or termination of the memberships of that class;

or

(f) Authorize a new class of memberships.

(2) If a class is to be divided into two or more classes as a result of an amendment to the articles of incorporation, the amendment shall be approved by the members of each class that would be created by the amendment.

**Source:** L. 97: Entire article added, p. 708, § 3, effective July 1, 1998.

**7-130-105. Articles of amendment to articles of incorporation.** (1) A nonprofit corporation amending its articles of incorporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment stating:

(a) The domestic entity name of the nonprofit corporation; and

(b) The text of each amendment adopted.

(c) to (f) (Deleted by amendment, L. 2005, p. 1217, § 24, effective October 1, 2005.)

**Source:** L. 97: Entire article added, p. 709, § 3, effective July 1, 1998. L. 2002: IP(1) amended, p. 1855, § 141, effective July 1; IP(1) amended, p. 1720, § 143, effective October 1. L. 2003: IP(1) and (1)(a) amended, p. 2344, § 312, effective July 1, 2004. L. 2005: Entire section amended, p. 1217, § 24, effective October 1.

**7-130-106. Restated articles of incorporation.** (1) The board of directors may restate the articles of incorporation at any time with or without member action. If the nonprofit corporation has no members and no directors have been elected, its incorporators may restate the articles of incorporation at any time.

(2) The restatement may include one or more amendments to the articles of incorporation. If the restatement includes an amendment requiring member approval, it shall be adopted as provided in section 7-130-103.



(3) If the board of directors submits a restatement for member action, the nonprofit corporation shall give notice, in accordance with section 7-127-104, to each member entitled to vote on the restatement of the members' meeting at which the restatement will be voted upon. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the restatement, and the notice shall contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles of incorporation.

(4) A nonprofit corporation restating its articles of incorporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of restatement stating:

- (a) The domestic entity name of the nonprofit corporation;
- (b) The text of the restated articles of incorporation; and
- (c) (Deleted by amendment, L. 2008, p. 1879, § 8, effective August 5, 2008.)
- (d) If the restatement was adopted by the board of directors or incorporators without member action, a statement to that effect and that member action was not required.

(5) Upon filing by the secretary of state or at any later effective date determined pursuant to section 7-90-304, restated articles of incorporation supersede the original articles of incorporation and all prior amendments to them.

**Source:** L. 97: Entire article added, p. 710, § 3, effective July 1, 1998. L. 2002: IP(4) and (5) amended, p. 1856, § 142, effective July 1; IP(4) and (5) amended, p. 1721, § 144, effective October 1. L. 2003: IP(4) and (4)(a) amended, p. 2344, § 313, effective July 1, 2004. L. 2008: (4)(b) and (4)(c) amended, p. 1879, § 8, effective August 5.

#### **7-130-107. Amendment of articles of incorporation pursuant to reorganization.**

(1) Articles of incorporation may be amended, without action by the board of directors or members, to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under a statute of this state or of the United States if the articles of incorporation after amendment contain only provisions required or permitted by section 7-122-102.

(2) For an amendment to the articles of incorporation to be made pursuant to subsection (1) of this section, an individual or individuals designated by the court shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of amendment stating:

- (a) The domestic entity name of the nonprofit corporation;
- (b) The text of each amendment approved by the court;
- (c) The date of the court's order or decree approving the articles of amendment;
- (d) The title of the reorganization proceeding in which the order or decree was entered; and
- (e) A statement that the court had jurisdiction of the proceeding under a specified statute of this state or of the United States.

(3) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

**Source:** L. 97: Entire article added, p. 710, § 3, effective July 1, 1998. L. 2002: IP(2) amended, p. 1856, § 143, effective July 1; IP(2) amended, p. 1721, § 145, effective October 1. L. 2003: IP(2) and (2)(a) amended, p. 2344, § 314, effective July 1, 2004.

**7-130-108. Effect of amendment of articles of incorporation.** An amendment to the articles of incorporation does not affect any existing right of persons other than members, any cause of action existing against or in favor of the nonprofit corporation, or any proceeding to which the nonprofit corporation is a party. An amendment changing a nonprofit corporation's domestic entity name does not abate a proceeding brought by or against a nonprofit corporation in its former entity name.

**Source:** **L. 97:** Entire article added, p. 711, § 3, effective July 1, 1998. **L. 2000:** Entire section amended, p. 984, § 87, effective July 1. **L. 2003:** Entire section amended, p. 2344, § 315, effective July 1, 2004.

## PART 2

### AMENDMENT OF BYLAWS

**7-130-201. Amendment of bylaws by board of directors or members.** (1) The board of directors may amend the bylaws at any time to add, change, or delete a provision, unless:

(a) Articles 121 to 137 of this title or the articles of incorporation reserve such power exclusively to the members in whole or part; or

(b) A particular bylaw expressly prohibits the board of directors from doing so; or

(c) It would result in a change of the rights, privileges, preferences, restrictions, or conditions of a membership class as to voting, dissolution, redemption, or transfer by changing the rights, privileges, preferences, restrictions, or conditions of another class.

(2) The members may amend the bylaws even though the bylaws may also be amended by the board of directors. In such instance, the action shall be taken in accordance with sections 7-130-103 and 7-130-104 as if each reference therein to the articles of incorporation was a reference to the bylaws.

**Source:** **L. 97:** Entire article added, p. 711, § 3, effective July 1, 1998. **L. 98:** (2) amended, p. 626, § 35, effective July 1. **L. 2007:** (2) amended, p. 249, § 53, effective May 29.

### **7-130-202. Bylaw changing quorum or voting requirement for members.**

(1) (Deleted by amendment, L. 98, p. 626, § 36, effective July 1, 1998.)

(2) A bylaw that fixes a lesser or greater quorum requirement or a greater voting requirement for members pursuant to section 7-127-207 shall not be amended by the board of directors.

**Source:** **L. 97:** Entire article added, p. 712, § 3, effective July 1, 1998. **L. 98:** Entire section amended, p. 626, § 36, effective July 1.

**7-130-203. Bylaw changing quorum or voting requirement for directors.** (1) A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended:

(a) If adopted by the members, only by the members; or

(b) If adopted by the board of directors, either by the members or by the board of directors.

(2) A bylaw adopted or amended by the members that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended only by a stated vote of either the members or the board of directors.

(3) Action by the board of directors under paragraph (b) of subsection (1) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors shall meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

**Source:** **L. 97:** Entire article added, p. 712, § 3, effective July 1, 1998. **L. 2003:** (2) amended, p. 2344, § 316, effective July 1, 2004.



## PART 3

APPROVAL BY THIRD PERSONS AND  
TERMINATING MEMBERS OR REDEEMING OR  
CANCELING MEMBERSHIPS

**7-130-301. Approval by third persons.** The articles of incorporation may require an amendment to the articles of incorporation or bylaws to be approved in writing by a stated person or persons other than the board of directors. Such a provision may only be amended with the approval in writing of such person or persons.

**Source:** **L. 97:** Entire article added, p. 712, § 3, effective July 1, 1998. **L. 2003:** Entire section amended, p. 2345, § 317, effective July 1, 2004.

**7-130-302. Amendment terminating members or redeeming or canceling memberships.** (1) Any amendment to the articles of incorporation or bylaws of a nonprofit corporation that would terminate all members or any class of members or redeem or cancel all memberships or any class of memberships shall meet the requirements of articles 121 to 137 of this title and this section.

(2) Before adopting a resolution proposing an amendment as described in subsection (1) of this section, the board of directors of a nonprofit corporation shall give notice of the general nature of the amendment to the members.

**Source:** **L. 97:** Entire article added, p. 713, § 3, effective July 1, 1998.

## ARTICLE 131

## Merger

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-131-101. Merger.

7-131-101.5. Conversion.

7-131-102. Action on plan of conversion or merger.

7-131-103. Statement of merger or conversion.

7-131-104. Effect of merger or conversion.

7-131-105. Merger with foreign entity.

**7-131-101. Merger.** (1) One or more domestic nonprofit corporations may merge into another domestic entity if the board of directors of each nonprofit corporation that is a party to the merger and each other entity that is a party to the merger adopts a plan of merger complying with section 7-90-203.3 and the members entitled to vote thereon, if any, of each such nonprofit corporation, if required by section 7-131-102, approve the plan of merger.

(2) and (3) (Deleted by amendment, L. 2007, p. 249, § 54, effective May 29, 2007.)

**Source:** **L. 97:** Entire article added, p. 713, § 3, effective July 1, 1998. **L. 2003:** (2) and (3) amended, p. 2345, § 318, effective July 1, 2004. **L. 2007:** Entire section amended, p. 249, § 54, effective May 29.

**7-131-101.5. Conversion.** A nonprofit corporation may convert into any form of entity permitted by section 7-90-201 if the board of directors of the nonprofit corporation adopts a plan of conversion that complies with section 7-90-201.3 and the members entitled to vote thereon, if any, if required by section 7-131-102, approve the plan of conversion.

**Source:** **L. 2007:** Entire section added, p. 250, § 55, effective May 29.

**7-131-102. Action on plan of conversion or merger.** (1) After adopting a plan of conversion complying with section 7-90-201.3 or a plan of merger complying with section

7-90-203.3, the board of directors of the converting nonprofit corporation or the board of directors of each nonprofit corporation that is a party to the merger shall also submit the plan of conversion or plan of merger to its members, if any are entitled to vote thereon, for approval.

(2) If the nonprofit corporation does have members entitled to vote with respect to the approval of a plan of conversion or plan of merger, a plan of conversion or a plan of merger is approved by the members if:

(a) The board of directors recommends the plan of conversion or plan of merger to the members entitled to vote thereon unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the members with the plan; and

(b) The members entitled to vote on the plan of conversion or plan of merger approve the plan as provided in subsection (7) of this section.

(3) After adopting the plan of conversion or plan of merger, the board of directors of the converting nonprofit corporation or the board of directors of each nonprofit corporation party to the merger shall submit the plan of conversion or plan of merger for written approval by any person or persons whose approval is required by a provision of the articles of incorporation of the nonprofit corporation and as recognized by section 7-130-301 for an amendment to the articles of incorporation or bylaws.

(4) If the nonprofit corporation does not have members entitled to vote on a conversion or merger, the conversion or merger shall be approved and adopted by a majority of the directors elected and in office at the time the plan of conversion or plan of merger is considered by the board of directors. In addition, the nonprofit corporation shall provide notice of any meeting of the board of directors at which such approval is to be obtained in accordance with section 7-128-203. The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider the proposed conversion or merger.

(5) The board of directors may condition the effectiveness of the plan of conversion or plan of merger on any basis.

(6) The nonprofit corporation shall give notice, in accordance with section 7-127-104, to each member entitled to vote on the plan of conversion or plan of merger of the members' meeting at which the plan will be voted on. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the plan of conversion or plan of merger, and the notice shall contain or be accompanied by a copy of the plan or a summary thereof.

(7) Unless articles 121 to 137 of this title, the articles of incorporation, bylaws adopted by the members, or the board of directors acting pursuant to subsection (5) of this section require a greater vote, the plan of conversion or plan of merger shall be approved by the votes required by sections 7-127-205 and 7-127-206 by every voting group entitled to vote on the plan of conversion or plan of merger.

(8) Separate voting by voting groups is required on a plan of conversion or plan of merger if the plan contains a provision that, if contained in an amendment to the articles of incorporation, would require action by one or more separate voting groups on the amendment.

**Source:** L. 97: Entire article added, p. 713, § 3, effective July 1, 1998. L. 2007: Entire section amended, p. 250, § 56, effective May 29.

**7-131-103. Statement of merger or conversion.** (1) After a plan of merger is approved, the surviving nonprofit corporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of merger pursuant to section 7-90-203.7. If the plan of merger provides for amendments to the articles of incorporation of the surviving nonprofit corporation, articles of amendment effecting the amendments shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title.

(2) (Deleted by amendment, L. 2002, p. 1856, § 144, effective July 1, 2002; p. 1721, § 146, effective October 1, 2002.)

(3) Repealed.



(4) After a plan of conversion is approved, the converting nonprofit corporation shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a statement of conversion pursuant to section 7-90-201.7.

**Source:** **L. 97:** Entire article added, p. 715, § 3, effective July 1, 1998. **L. 2002:** IP(1), (2), and (3) amended, p. 1856, § 144, effective July 1; IP(1), (2), and (3) amended, p. 1721, § 146, effective October 1. **L. 2003:** (1) amended, p. 2345, § 319, effective July 1, 2004. **L. 2004:** (1) amended, p. 1512, § 304, effective July 1. **L. 2006:** (3) repealed, p. 884, § 87, effective July 1. **L. 2007:** (1) amended and (4) added, p. 251, § 57, effective May 29.

**7-131-104. Effect of merger or conversion.** (1) The effect of a merger shall be as provided in section 7-90-204.

(2) The effect of a conversion shall be as provided in section 7-90-202.

(3) Nothing in this title shall limit the common law powers of the attorney general concerning the merger or conversion of a nonprofit corporation.

**Source:** **L. 97:** Entire article added, p. 715, § 3, effective July 1, 1998. **L. 2005:** Entire section amended, p. 1218, § 25, effective October 1. **L. 2007:** Entire section amended, p. 251, § 58, effective May 29.

**7-131-105. Merger with foreign entity.** (1) One or more domestic nonprofit corporations may merge with one or more foreign entities if:

(a) The merger is permitted by section 7-90-203 (2);

(b) (Deleted by amendment, L. 2007, p. 252, § 59, effective May 29, 2007.)

(c) The foreign entity complies with section 7-90-203.7, if it is the surviving entity of the merger; and

(d) Each domestic nonprofit corporation complies with the applicable provisions of sections 7-131-101 and 7-131-102 and, if it is the surviving nonprofit corporation of the merger, with section 7-131-103.

(2) Upon the merger taking effect, the surviving foreign entity of a merger shall comply with section 7-90-204.5.

(3) and (4) (Deleted by amendment, L. 2006, p. 882, § 82, effective July 1, 2006.)

**Source:** **L. 97:** Entire article added, p. 716, § 3, effective July 1, 1998. **L. 2003:** (1)(a) and (2) amended, p. 2346, § 320, effective July 1, 2004. **L. 2006:** (2) to (4) amended, p. 882, § 82, effective July 1. **L. 2007:** IP(1), (1)(a) to (1)(c), and (2) amended, p. 252, § 59, effective May 29.

## ARTICLE 132

### Sale of Property

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-132-101. Sale of property.

7-132-102. Sale of property other than in regular course of activities.

**7-132-101. Sale of property.** (1) Unless the bylaws otherwise provide, a nonprofit corporation may, as authorized by the board of directors:

(a) Sell, lease, exchange, or otherwise dispose of all or substantially all of its property in the usual and regular course of business;

(b) Mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber all or substantially all of its property whether or not in the usual and regular course of business.

(2) Unless otherwise provided in the bylaws, approval by the members of a transaction described in this section is not required.

**Source: L. 97:** Entire article added, p. 717, § 3, effective July 1, 1998.

**7-132-102. Sale of property other than in regular course of activities.** (1) A nonprofit corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, with or without its good will, other than in the usual and regular course of business on the terms and conditions and for the consideration determined by the board of directors, if the board of directors proposes and the members entitled to vote thereon approve the transaction. A sale, lease, exchange, or other disposition of all, or substantially all, of the property of a nonprofit corporation, with or without its good will, in connection with its dissolution, other than in the usual and regular course of business, and other than pursuant to a court order, shall be subject to the requirements of this section; but a sale, lease, exchange, or other disposition of all, or substantially all, of the property of a nonprofit corporation, with or without its good will, pursuant to a court order shall not be subject to the requirements of this section.

(2) If a nonprofit corporation is entitled to vote or otherwise consent, other than in the usual and regular course of its business, with respect to the sale, lease, exchange, or other disposition of all, or substantially all, of the property with or without the good will of another entity which it controls, and if the property interests held by the nonprofit corporation in such other entity constitute all, or substantially all, of the property of the nonprofit corporation, then the nonprofit corporation shall consent to such transaction only if the board of directors proposes and the members, if any are entitled to vote thereon, approve the giving of consent.

(3) For a transaction described in subsection (1) of this section or a consent described in subsection (2) of this section to be approved by the members:

(a) The board of directors shall recommend the transaction or the consent to the members unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the members at a membership meeting with the submission of the transaction or consent; and

(b) The members entitled to vote on the transaction or the consent shall approve the transaction or the consent as provided in subsection (6) of this section.

(4) The board of directors may condition the effectiveness of the transaction or the consent on any basis.

(5) The nonprofit corporation shall give notice, in accordance with section 7-127-104 to each member entitled to vote on the transaction described in subsection (1) of this section or the consent described in subsection (2) of this section, of the members' meeting at which the transaction or the consent will be voted upon. The notice shall:

(a) State that the purpose, or one of the purposes, of the meeting is to consider:

(I) In the case of action pursuant to subsection (1) of this section, the sale, lease, exchange, or other disposition of all, or substantially all, of the property of the nonprofit corporation; or

(II) In the case of action pursuant to subsection (2) of this section, the nonprofit corporation's consent to the sale, lease, exchange, or other disposition of all, or substantially all, of the property of another entity, which entity shall be identified in the notice, property interests of which are held by the nonprofit corporation and constitute all, or substantially all, of the property of the nonprofit corporation; and

(b) Contain or be accompanied by a description of the transaction, in the case of action pursuant to subsection (1) of this section, or by a description of the transaction underlying the consent, in the case of action pursuant to subsection (2) of this section.

(6) Unless articles 121 to 137 of this title, the articles of incorporation, bylaws adopted by the members, or the board of directors acting pursuant to subsection (4) of this section require a greater vote, the transaction described in subsection (1) of this section or the consent described in subsection (2) of this section shall be approved by the votes required



by sections 7-127-205 and 7-127-206 by every voting group entitled to vote on the transaction or the consent.

(7) After a transaction described in subsection (1) of this section or a consent described in subsection (2) of this section is authorized, the transaction may be abandoned or the consent withheld or revoked, subject to any contractual rights or other limitations on such abandonment, withholding, or revocation, without further action by the members.

(8) A transaction that constitutes a distribution is governed by article 133 and not by this section.

**Source: L. 97:** Entire article added, p. 717, § 3, effective July 1, 1998.

ARTICLE 133

Distributions

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-133-101. Distributions prohibited.

7-133-102. Authorized distributions.

**7-133-101. Distributions prohibited.** Except as authorized by section 7-133-102, a nonprofit corporation shall not make any distributions.

**Source: L. 97:** Entire article added, p. 719, § 3, effective July 1, 1998.

**7-133-102. Authorized distributions.** (1) A nonprofit corporation may:

(a) Make distributions of its income or assets to its members that are domestic or foreign nonprofit corporations;

(b) Pay compensation in a reasonable amount to its members, directors, or officers for services rendered; and

(c) Confer benefits upon its members in conformity with its purposes.

(2) Nonprofit corporations may make distributions upon dissolution in conformity with article 134 of this title.

**Source: L. 97:** Entire article added, p. 719, § 3, effective July 1, 1998.

ARTICLE 134

Dissolution

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

PART 1		7-134-108.	Enforcement of claims against dissolved nonprofit corporation. (Repealed)
VOLUNTARY DISSOLUTION		7-134-109.	Service on dissolved nonprofit corporation - repeal. (Repealed)
7-134-101.	Dissolution by incorporators or directors if no members.		
7-134-102.	Dissolution by directors and members.		
7-134-103.	Articles of dissolution.		
7-134-104.	Revocation of dissolution. (Repealed)		
7-134-105.	Effect of dissolution.	7-134-201.	Grounds for administrative dissolution. (Repealed)
7-134-106.	Disposition of known claims by notification. (Repealed)	7-134-202.	Procedure for and effect of administrative dissolution. (Repealed)
7-134-107.	Disposition of claims by publication. (Repealed)		

- 7-134-203. Reinstatement following administrative dissolution - repeal. (Repealed)
- 7-134-204. Appeal from denial of reinstatement - repeal. (Repealed)
- 7-134-205. Continuation as unincorporated association. (Repealed)

## PART 3

## JUDICIAL DISSOLUTION

- 7-134-301. Grounds for judicial dissolution.
- 7-134-302. Procedure for judicial dissolution.

- 7-134-303. Receivership or custodianship.
- 7-134-304. Decree of dissolution.

## PART 4

DISSOLUTION UPON EXPIRATION  
OF PERIOD OF DURATION

- 7-134-401. Dissolution upon expiration of period of duration.

## PART 5

## MISCELLANEOUS

- 7-134-501. Deposit with state treasurer.

## PART 1

## VOLUNTARY DISSOLUTION

**7-134-101. Dissolution by incorporators or directors if no members.** (1) If a nonprofit corporation has no members, a majority of its directors or, if there are no directors, a majority of its incorporators may authorize the dissolution of the nonprofit corporation.

(2) The incorporators or directors in approving dissolution shall adopt a plan of dissolution indicating to whom the assets owned or held by the nonprofit corporation will be distributed after all creditors have been paid.

**Source: L. 97:** Entire article added, p. 719, § 3, effective July 1, 1998.

**7-134-102. Dissolution by directors and members.** (1) Unless otherwise provided in the bylaws, dissolution of a nonprofit corporation may be authorized in the manner provided in subsection (2) of this section.

(2) For a proposal to dissolve the nonprofit corporation to be authorized:

(a) The board of directors shall adopt the proposal to dissolve;

(b) The board of directors shall recommend the proposal to dissolve to the members entitled to vote thereon unless the board of directors determines that, because of conflict of interest or other special circumstances, it should make no recommendation and communicates the basis for its determination to the members; and

(c) The members entitled to vote on the proposal to dissolve shall approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition the effectiveness of the dissolution, and the members may condition their approval of the dissolution, on any basis.

(4) The nonprofit corporation shall give notice, in accordance with section 7-127-104, to each member entitled to vote on the proposal of the members' meeting at which the proposal to dissolve will be voted on. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposal to dissolve the nonprofit corporation, and the notice shall contain or be accompanied by a copy of the proposal or a summary thereof.

(5) Unless articles 121 to 137 of this title, the articles of incorporation, bylaws adopted by the members, or the board of directors acting pursuant to subsection (3) of this section require a greater vote, the proposal to dissolve shall be approved by the votes required by sections 7-127-205 and 7-127-206 by every voting group entitled to vote on the proposal to dissolve.

(6) The plan of dissolution shall indicate to whom the assets owned or held by the nonprofit corporation will be distributed after all creditors have been paid.

**Source: L. 97:** Entire article added, p. 720, § 3, effective July 1, 1998. **L. 2008:** (2)(b) amended, p. 21, § 9, effective August 5.



**7-134-103. Articles of dissolution.** (1) At any time after dissolution is authorized, the nonprofit corporation may dissolve by delivering to the secretary of state, for filing pursuant to part 3 of article 90 of this title, articles of dissolution stating:

- (a) The domestic entity name of the nonprofit corporation;
  - (b) The principal office address of the nonprofit corporation's principal office; and
  - (c) That the nonprofit corporation is dissolved.
- (d) to (f) (Deleted by amendment, L. 2004, p. 1513, § 305, effective July 1, 2004.)
- (2) A nonprofit corporation is dissolved upon the effective date of its articles of dissolution.
- (3) Articles of dissolution need not be filed by a nonprofit corporation that is dissolved pursuant to section 7-134-401.

**Source:** L. 97: Entire article added, p. 720, § 3, effective July 1, 1998. L. 2002: IP(1) amended, p. 1856, § 145, effective July 1; IP(1) amended, p. 1721, § 147, effective October 1. L. 2003: IP(1), (1)(a), and (1)(b) amended, p. 2346, § 321, effective July 1, 2004. L. 2004: (1) amended, p. 1513, § 305, effective July 1.

**7-134-104. Revocation of dissolution. (Repealed)**

**Source:** L. 97: Entire article added, p. 721, § 3, effective July 1, 1998. L. 98: (4) amended, p. 626, § 37, effective July 1. L. 2000: (3)(a) and (5) amended, p. 984, § 88, effective July 1. L. 2002: IP(3) and (4) amended, p. 1856, § 146, effective July 1; IP(3) and (4) amended, p. 1721, § 148, effective October 1. L. 2003: IP(3), (3)(a), (4), and (5) amended, p. 2347, § 322, effective July 1, 2004. L. 2004: Entire section repealed, p. 1513, § 306, effective July 1.

**7-134-105. Effect of dissolution.** (1) A dissolved nonprofit corporation continues its corporate existence but may not carry on any activities except as is appropriate to wind up and liquidate its affairs, including:

- (a) Collecting its assets;
  - (b) Returning, transferring, or conveying assets held by the nonprofit corporation upon a condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, in accordance with such condition;
  - (c) Transferring, subject to any contractual or legal requirements, its assets as provided in or authorized by its articles of incorporation or bylaws;
  - (d) Discharging or making provision for discharging its liabilities;
  - (e) Doing every other act necessary to wind up and liquidate its assets and affairs.
- (2) Upon dissolution of a nonprofit corporation exempt under section 501 (c) (3) of the internal revenue code or corresponding section of any future federal tax code, the assets of such nonprofit corporation shall be distributed for one or more exempt purposes under said section, or to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by the district court for the county in this state in which the street address of the nonprofit corporation's principal office is located, or, if the nonprofit corporation has no principal office in this state, by the district court of the county in which the street address of its registered agent is located, or, if the nonprofit corporation has no registered agent, the district court of the city and county of Denver exclusively for such purposes or to such organization or organizations, as said court shall determine, that are formed and operated exclusively for such purposes.
- (3) Dissolution of a nonprofit corporation does not:
- (a) Transfer title to the nonprofit corporation's property;
  - (b) Subject its directors or officers to standards of conduct different from those prescribed in article 128 of this title;
  - (c) Change quorum or voting requirements for its board of directors or members, change provisions for selection, resignation, or removal of its directors or officers, or both, or change provisions for amending its bylaws or its articles of incorporation;

(d) Prevent commencement of a proceeding by or against the nonprofit corporation in its entity name; or

(e) Abate or suspend a proceeding pending by or against the nonprofit corporation on the effective date of dissolution.

(4) (Deleted by amendment, L. 2003, p. 2347, § 323, effective July 1, 2004.)

(5) A dissolved nonprofit corporation may dispose of claims against it pursuant to sections 7-90-911 and 7-90-912.

**Source:** **L. 97:** Entire article added, p. 722, § 3, effective July 1, 1998. **L. 2000:** (3)(d) and (4) amended, p. 985, § 89, effective July 1. **L. 2003:** (2) and (4) amended, p. 2347, § 323, effective July 1, 2004. **L. 2006:** (5) added, p. 883, § 83, effective July 1.

#### **7-134-106. Disposition of known claims by notification. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 723, § 3, effective July 1, 1998. **L. 2006:** Entire section repealed, p. 884, § 87, effective July 1.

#### **7-134-107. Disposition of claims by publication. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 724, § 3, effective July 1, 1998. **L. 2003:** (2)(a) amended, p. 2348, § 324, effective July 1, 2004. **L. 2006:** Entire section repealed, p. 884, § 87, effective July 1.

#### **7-134-108. Enforcement of claims against dissolved nonprofit corporation. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 725, § 3, effective July 1, 1998. **L. 2006:** Entire section repealed, p. 884, § 87, effective July 1.

#### **7-134-109. Service on dissolved nonprofit corporation - repeal. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 725, § 3, effective July 1, 1998. **L. 2003:** (4) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (4) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

### **PART 2**

### **ADMINISTRATIVE DISSOLUTION**

#### **7-134-201. Grounds for administrative dissolution. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 726, § 3, effective July 1, 1998. **L. 2000:** (1)(b) amended, p. 985, § 90, effective July 1. **L. 2003:** Entire section amended, p. 2348, § 325, effective July 1, 2004. **L. 2004:** (1)(b) amended, p. 1514, § 307, effective July 1. **L. 2005:** Entire section repealed, p. 1218, § 26, effective October 1.

#### **7-134-202. Procedure for and effect of administrative dissolution. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 726, § 3, effective July 1, 1998. **L. 2000:** (3) amended, p. 985, § 91, effective July 1. **L. 2003:** (2), (3), (4), and (5) amended, p. 2348, § 326, effective July 1, 2004. **L. 2005:** Entire section repealed, p. 1218, § 26, effective October 1.



**7-134-203. Reinstatement following administrative dissolution - repeal. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 727, § 3, effective July 1, 1998. **L. 2000:** (1)(a) and (1)(c) amended, p. 985, § 92, effective July 1. **L. 2002:** IP(1), (2), and (3) amended, p. 1857, § 147, effective July 1; IP(1), (2), and (3) amended, p. 1722, &sec; 149, effective October 1. **L. 2003:** (5) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-134-204. Appeal from denial of reinstatement - repeal. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 728, § 3, effective July 1, 1998. **L. 2003:** (5) added by revision, pp. 2356, 2357, §§ 347, 348.

**Editor's note:** Subsection (5) provided for the repeal of this section, effective July 1, 2004. (See L. 2003, pp. 2356, 2357.)

**7-134-205. Continuation as unincorporated association. (Repealed)**

**Source:** **L. 97:** Entire article added, p. 728, § 3, effective July 1, 1998. **L. 2003:** Entire section amended, p. 2349, § 327, effective July 1, 2004. **L. 2006:** Entire section repealed, p. 884, § 87, effective July 1.

**PART 3****JUDICIAL DISSOLUTION**

**7-134-301. Grounds for judicial dissolution.** (1) A nonprofit corporation may be dissolved in a proceeding by the attorney general if it is established that:

(a) The nonprofit corporation obtained its articles of incorporation through fraud; or  
(b) The nonprofit corporation has continued to exceed or abuse the authority conferred upon it by law.

(2) A nonprofit corporation may be dissolved in a proceeding by a director or member if it is established that:

(a) The directors are deadlocked in the management of the corporate affairs, the members, if any, are unable to break the deadlock, and irreparable injury to the nonprofit corporation is threatened or being suffered;

(b) The directors or those otherwise in control of the nonprofit corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;

(c) The members are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or

(d) The corporate assets are being misapplied or wasted.

(3) A nonprofit corporation may be dissolved in a proceeding by a creditor if it is established that:

(a) The creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied, and the nonprofit corporation is insolvent; or

(b) The nonprofit corporation is insolvent and the nonprofit corporation has admitted in writing that the creditor's claim is due and owing.

(4) (a) If a nonprofit corporation has been dissolved by voluntary action taken under part 1 of this article:

(I) The nonprofit corporation may bring a proceeding to wind up and liquidate its business and affairs under judicial supervision in accordance with section 7-134-105; and

(II) The attorney general, a director, a member, or a creditor may bring a proceeding to wind up and liquidate the affairs of the nonprofit corporation under judicial supervision in

accordance with section 7-134-105, upon establishing the grounds set forth in subsections (1) to (3) of this section.

(b) As used in sections 7-134-302 to 7-134-304, a “proceeding to dissolve a nonprofit corporation” includes a proceeding brought under this subsection (4), and a “decree of dissolution” includes an order of court entered in a proceeding under this subsection (4) that directs that the affairs of a nonprofit corporation shall be wound up and liquidated under judicial supervision.

**Source:** L. 97: Entire article added, p. 728, § 3, effective July 1, 1998. L. 2004: (4)(b) amended, p. 1514, § 308, effective July 1. L. 2005: IP(4)(a) amended, p. 1219, § 30, effective October 1.

**7-134-302. Procedure for judicial dissolution.** (1) A proceeding by the attorney general to dissolve a nonprofit corporation shall be brought in the district court for the county in this state in which the street address of the nonprofit corporation’s principal office or the street address of its registered agent is located or, if the nonprofit corporation has no principal office in this state and no registered agent, in the district court for the city and county of Denver. A proceeding brought by any other party named in section 7-134-301 shall be brought in the district court for the county in this state in which the street address of the nonprofit corporation’s principal office is located or, if it has no principal office in this state, in the district court for the county in which the street address of its registered agent is located, or, if the nonprofit corporation has no registered agent, in the district court for the city and county of Denver.

(2) It is not necessary to make directors or members parties to a proceeding to dissolve a nonprofit corporation unless relief is sought against them individually.

(3) A court in a proceeding brought to dissolve a nonprofit corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the activities of the nonprofit corporation until a full hearing can be held.

**Source:** L. 97: Entire article added, p. 729, § 3, effective July 1, 1998. L. 2003: (1) amended, p. 2349, § 328, effective July 1, 2004.

**7-134-303. Receivership or custodianship.** (1) A court in a judicial proceeding to dissolve a nonprofit corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the affairs of the nonprofit corporation. The court shall hold a hearing, after giving notice to all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the nonprofit corporation and all of its property, wherever located.

(2) The court may appoint an individual, a domestic entity, or a foreign entity authorized to transact business or conduct activities in this state, or a domestic or foreign nonprofit corporation authorized to transact business or conduct activities in this state as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount stated by the court.

(3) The court shall describe the powers and duties of the receiver or custodian in its appointing order which may be amended from time to time. Among other powers the receiver shall have the power to:

(a) Dispose of all or any part of the property of the nonprofit corporation, wherever located, at a public or private sale, if authorized by the court; and

(b) Sue and defend in the receiver’s own name as receiver of the nonprofit corporation in all courts.

(4) The custodian may exercise all of the powers of the nonprofit corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the nonprofit corporation in the best interests of its members and creditors.



(5) The court, during a receivership, may redesignate the receiver a custodian and during a custodianship may redesignate the custodian a receiver if doing so is in the best interests of the nonprofit corporation and its members and creditors.

(6) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and such person's counsel from the assets of the nonprofit corporation or proceeds from the sale of the assets.

**Source:** L. 97: Entire article added, p. 730, § 3, effective July 1, 1998. L. 2003: (2) amended, p. 2349, § 329, effective July 1, 2004. L. 2004: (1) amended, p. 1515, § 309, effective July 1.

**7-134-304. Decree of dissolution.** (1) If after a hearing the court determines that one or more grounds for judicial dissolution described in section 7-134-301 exist, it may enter a decree dissolving the nonprofit corporation and stating the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the secretary of state for filing pursuant to part 3 of article 90 of this title.

(2) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the nonprofit corporation's activities in accordance with section 7-134-105 and the giving of notice to claimants in accordance with sections 7-90-911 and 7-90-912.

(3) The court's order or decision may be appealed as in other civil proceedings.

**Source:** L. 97: Entire article added, p. 731, § 3, effective July 1, 1998. L. 2003: (1) and (2) amended, p. 2350, § 330, effective July 1, 2004. L. 2004: (2) amended, p. 1515, § 310, effective July 1. L. 2006: (2) amended, p. 883, § 84, effective July 1.

## PART 4

### DISSOLUTION UPON EXPIRATION OF PERIOD OF DURATION

**7-134-401. Dissolution upon expiration of period of duration.** (1) A nonprofit corporation shall be dissolved upon and by reason of the expiration of its period of duration, if any, stated in its articles of incorporation.

(2) A provision in the articles of incorporation to the effect that the nonprofit corporation or its existence shall be terminated at a stated date or after a stated period of time or upon a contingency, or any similar provision, shall be deemed to be a provision for a period of duration within the meaning of this section. The occurrence of such date, the expiration of the stated period of time, the occurrence of such contingency, or the satisfaction of such provision shall be deemed to be the expiration of the nonprofit corporation's period of duration for purposes of this section.

**Source:** L. 97: Entire article added, p. 731, § 3, effective July 1, 1998. L. 2003: (2) amended, p. 2350, § 331, effective July 1, 2004.

## PART 5

### MISCELLANEOUS

**7-134-501. Deposit with state treasurer.** Assets of a dissolved nonprofit corporation that should be transferred to a creditor, claimant, or member of the nonprofit corporation who cannot be found or who is not legally competent to receive them shall be reduced to cash and deposited with the state treasurer as property presumed to be abandoned under the provisions of article 13 of title 38, C.R.S.

**Source:** L. 97: Entire article added, p. 732, § 3, effective July 1, 1998.

## ARTICLE 135

### Foreign Nonprofit Corporations - Authority to Conduct Activities

**Editor's note:** This article was added in 1997 and was subsequently repealed and reenacted in 2003, effective July 1, 2004, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2004, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

7-135-101. Authority to conduct activities required.

**7-135-101. Authority to conduct activities required.** Part 8 of article 90 of this title, providing for the transaction of business or the conduct of activities by foreign entities, applies to foreign nonprofit corporations.

**Source: L. 2003:** Entire article R&RE, p. 2350, § 332, effective July 1, 2004.

## ARTICLE 136

### Records, Information, and Reports

**Cross references:** For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

**Law reviews:** For article, "Public Disclosure of Records: Changes to Come", see 27 Colo. Law. 41 (February 1998).

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|---|---|
| 7-136-101. Corporate records.                             | ship list.  |
| 7-136-102. Inspection of corporate records by members.    | 7-136-106. Financial statements.  |
| 7-136-103. Scope of member's inspection right.            | 7-136-107. Periodic report to secretary of state.                       |
| 7-136-104. Court-ordered inspection of corporate records. | 7-136-108. Statement of person named as director or officer. (Repealed) |
| 7-136-105. Limitations on use of member-                  | 7-136-109. Interrogatories by secretary of state. (Repealed)            |

**7-136-101. Corporate records.** (1) A nonprofit corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or board of directors without a meeting, a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the nonprofit corporation, and a record of all waivers of notices of meetings of members and of the board of directors or any committee of the board of directors.

(2) A nonprofit corporation shall maintain appropriate accounting records.

(3) A nonprofit corporation or its agent shall maintain a record of its members in a form that permits preparation of a list of the name and address of all members in alphabetical order, by class, showing the number of votes each member is entitled to vote.

(4) A nonprofit corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A nonprofit corporation shall keep a copy of each of the following records at its principal office:

- (a) Its articles of incorporation;
- (b) Its bylaws;

(c) Resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;



(d) The minutes of all members' meetings, and records of all action taken by members without a meeting, for the past three years;

(e) All written communications within the past three years to members generally as members;

(f) A list of the names and business or home addresses of its current directors and officers;

(g) A copy of its most recent periodic report pursuant to part 5 of article 90 of this title; and

(h) All financial statements prepared for periods ending during the last three years that a member could have requested under section 7-136-106.

**Source: L. 97:** Entire article added, p. 742, § 3, effective July 1, 1998. **L. 2000:** (5)(g) amended, p. 987, § 98, effective July 1. **L. 2003:** (5)(g) amended, p. 2350, § 333, effective July 1, 2004. **L. 2010:** (5)(g) amended, (HB 10-1403), ch. 404, p. 2000, § 27, effective August 11.

**7-136-102. Inspection of corporate records by members.** (1) A member is entitled to inspect and copy, during regular business hours at the nonprofit corporation's principal office, any of the records of the nonprofit corporation described in section 7-136-101 (5) if the member gives the nonprofit corporation written demand at least five business days before the date on which the member wishes to inspect and copy such records.

(2) Pursuant to subsection (5) of this section, a member is entitled to inspect and copy, during regular business hours at a reasonable location stated by the nonprofit corporation, any of the other records of the nonprofit corporation if the member meets the requirements of subsection (3) of this section and gives the nonprofit corporation written demand at least five business days before the date on which the member wishes to inspect and copy such records.

(3) A member may inspect and copy the records described in subsection (2) of this section only if:

(a) The member has been a member for at least three months immediately preceding the demand to inspect or copy or is a member holding at least five percent of the voting power as of the date the demand is made;

(b) The demand is made in good faith and for a proper purpose;

(c) The member describes with reasonable particularity the purpose and the records the member desires to inspect; and

(d) The records are directly connected with the described purpose.

(4) For purposes of this section:

(a) "Member" includes a beneficial owner whose membership interest is held in a voting trust and any other beneficial owner of a membership interest who establishes beneficial ownership.

(b) "Proper purpose" means a purpose reasonably related to the demanding member's interest as a member.

(5) The right of inspection granted by this section may not be abolished or limited by the articles of incorporation or bylaws.

(6) This section does not affect:

(a) The right of a member to inspect records under section 7-127-201;

(b) The right of a member to inspect records to the same extent as any other litigant if the member is in litigation with the nonprofit corporation; or

(c) The power of a court, independent of articles 121 to 137 of this title, to compel the production of corporate records for examination.

**Source: L. 97:** Entire article added, p. 743, § 3, effective July 1, 1998. **L. 2003:** (2) amended, p. 2351, § 334, effective July 1, 2004.

## ANNOTATION

**Expelled member has no standing** to inspect the financial records of the nonprofit cor-

poration. *Levitt v. Calvary Temple of Denver*, 33 P.3d 1227 (Colo. App. 2001).

**7-136-103. Scope of member's inspection right.** (1) A member's agent or attorney has the same inspection and copying rights as the member.

(2) The right to copy records under section 7-136-102 includes, if reasonable, the right to receive copies made by photographic, xerographic, electronic, or other means.

(3) Except as provided in section 7-136-106, the nonprofit corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. The charge may not exceed the estimated cost of production and reproduction of the records.

(4) The nonprofit corporation may comply with a member's demand to inspect the record of members under section 7-136-102 (2) (c) by furnishing to the member a list of members that complies with section 7-136-101 (3) and was compiled no earlier than the date of the member's demand.

**Source:** L. 97: Entire article added, p. 744, § 3, effective July 1, 1998.

**7-136-104. Court-ordered inspection of corporate records.** (1) If a nonprofit corporation refuses to allow a member, or the member's agent or attorney, who complies with section 7-136-102 (1) to inspect or copy any records that the member is entitled to inspect or copy by said section, the district court for the county in this state in which the street address of the nonprofit corporation's principal office is located or, if the nonprofit corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located or, if the nonprofit corporation has no registered agent, the district court for the city and county of Denver may, on application of the member, summarily order the inspection or copying of the records demanded at the nonprofit corporation's expense.

(2) If a nonprofit corporation refuses to allow a member, or the member's agent or attorney, who complies with section 7-136-102 (2) and (3) to inspect or copy any records that the member is entitled to inspect or copy pursuant to section 7-136-102 (2) and (3) within a reasonable time following the member's demand, the district court for the county in this state in which the street address of the nonprofit corporation's principal office is located or, if the nonprofit corporation has no principal office in this state, the district court for the county in which the street address of its registered agent is located or, if the nonprofit corporation has no registered agent, the district court for the city and county of Denver may, on application of the member, summarily order the inspection or copying of the records demanded.

(3) If a court orders inspection or copying of the records demanded, unless the nonprofit corporation proves that it refused inspection or copying in good faith because it had a reasonable basis for doubt about the right of the member, or the member's agent or attorney, to inspect or copy the records demanded:

(a) The court shall also order the nonprofit corporation to pay the member's costs, including reasonable counsel fees, incurred to obtain the order;

(b) The court may order the nonprofit corporation to pay the member for any damages the member incurred;

(c) If inspection or copying is ordered pursuant to subsection (2) of this section, the court may order the nonprofit corporation to pay the member's inspection and copying expenses; and

(d) The court may grant the member any other remedy provided by law.

(4) If a court orders inspection or copying of records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member.

**Source:** L. 97: Entire article added, p. 745, § 3, effective July 1, 1998. L. 2003: (1) and (2) amended, p. 2351, § 335, effective July 1, 2004.



**7-136-105. Limitations on use of membership list.** (1) Without consent of the board of directors, a membership list or any part thereof may not be obtained or used by any person for any purpose unrelated to a member's interest as a member.

(2) Without limiting the generality of subsection (1) of this section, without the consent of the board of directors a membership list or any part thereof may not be:

(a) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the nonprofit corporation;

(b) Used for any commercial purpose; or

(c) Sold to or purchased by any person.

**Source: L. 97:** Entire article added, p. 746, § 3, effective July 1, 1998.

**7-136-106. Financial statements.** Upon the written request of any member, a nonprofit corporation shall mail to such member its most recent annual financial statements, if any, and its most recently published financial statements, if any, showing in reasonable detail its assets and liabilities and results of its operations.

**Source: L. 97:** Entire article added, p. 746, § 3, effective July 1, 1998.

**7-136-107. Periodic report to secretary of state.** Part 5 of article 90 of this title, providing for periodic reports from reporting entities, applies to domestic nonprofit corporations and applies to foreign nonprofit corporations that are authorized to transact business or conduct activities in this state.

**Source: L. 97:** Entire article added, p. 746, § 3, effective July 1, 1998. **L. 2000:** Entire section R&RE, p. 987, § 99, effective July 1. **L. 2003:** Entire section amended, p. 2351, § 336, effective July 1, 2004. **L. 2004:** Entire section amended, p. 1515, § 311, effective July 1. **L. 2010:** Entire section amended, (HB 10-1403), ch. 404, p. 2000, § 28, effective August 11.

**7-136-108. Statement of person named as director or officer. (Repealed)**

**Source: L. 97:** Entire article added, p. 748, § 3, effective July 1, 1998. **L. 2000:** Entire section repealed, p. 990, § 109, effective July 1.

**7-136-109. Interrogatories by secretary of state. (Repealed)**

**Source: L. 97:** Entire article added, p. 748, § 3, effective July 1, 1998. **L. 2002:** (4) amended, p. 1859, § 154, effective July 1; (4) amended, p. 1724, § 156, effective October 1. **L. 2003:** (4) and (5) amended, p. 2351, § 337, effective July 1, 2004. **L. 2004:** (1) amended, p. 1515, § 312, effective July 1. **L. 2006:** Entire section repealed, p. 884, § 87, effective July 1.

## ARTICLE 137

### Transition Provisions

**Cross references:** (1) For definitions applicable to this article, see §§ 7-90-102 and 7-121-401.

(2) For the provisions of articles 20 to 29 of this title, the "Colorado Nonprofit Corporation Act", prior to its repeal on July 1, 1998, see volume 2 of the 1997 Colorado Revised Statutes.

#### PART 1

#### APPLICATION OF ACT

7-137-101. Application to existing corpo-

7-137-102.

rations.  
Pre-1968 corporate entities -  
failure to file reports and des-  
ignate registered agents - dis-  
solution.

7-137-103. Application to foreign non-profit corporations.

## PART 2

### ELECTION BY PRE-1968 CORPORATE ENTITIES

7-137-201. Procedure to elect to accept articles 121 to 137 of this title.

7-137-202. Statement of election to accept articles 121 to 137 of this

7-137-203. title.  
Filing statement of election to accept articles 121 to 137 of this title.

7-137-204. Effect of certificate of acceptance.

## PART 3

### SAVING PROVISIONS

7-137-301. Saving provisions.

## PART 1

### APPLICATION OF ACT

**7-137-101. Application to existing corporations.** (1) (a) For purposes of this article, “existing corporate entity” means any corporate entity that was in existence on June 30, 1998, and that was incorporated under articles 20 to 29 of this title or elected to accept such articles as provided therein.

(b) A corporate entity that was either incorporated under or elected to accept articles 20 to 29 of this title and that was suspended or, as a consequence of such suspension, dissolved by operation of law before July 1, 1998, and was eligible for reinstatement or restoration, renewal, and revival on June 30, 1998, shall be deemed to be in existence on that date for purposes of this subsection (1) and shall be deemed administratively dissolved on the date of such suspension for purposes of section 7-134-105.

(c) A corporate entity that was either incorporated under or elected to accept articles 20 to 29 of this title and that was suspended or, as a consequence of such suspension, dissolved by operation of law before July 1, 1998, and was not eligible for reinstatement or restoration, renewal, and revival on June 30, 1998, shall be treated as a domestic entity as to which a constituent filed document has been filed by, or placed in the records of, the secretary of state and that has been dissolved for purposes of section 7-90-1001.

(2) Subject to this section, articles 121 to 137 of this title apply to all existing corporate entities subject to articles 20 to 29 of this title.

(3) Unless the articles of incorporation or bylaws of an existing corporate entity recognize the right of a member to transfer such member’s membership interests in such corporate entity, such interests shall be presumed to be nontransferable. However, if the transferability of such interests is not prohibited by such articles of incorporation or bylaws, such transferability may be established by a preponderance of the evidence taking into account any representation made by the corporate entity, the practice of such corporate entity, other transactions involving such interests, and other facts bearing on the existence of the rights to transfer such interests.

(4) Until the articles of incorporation of an existing corporate entity are amended or restated on or after July 1, 1998, they need not be amended or restated to comply with articles 121 to 137 of this title.

(5) Unless changed by an amendment to its articles of incorporation, members or classes of members of an existing corporate entity shall be deemed to be voting members for purposes of articles 121 to 137 of this title if such members or classes of members, on June 30, 1998, had the right by reason of a provision of the corporate entity’s articles of incorporation or bylaws, or by a custom, practice, or tradition, to vote for the election of a director or directors.

(6) The bylaws of an existing corporate entity may be amended as provided in its articles of incorporation or bylaws. Unless otherwise so provided, the power to amend such bylaws shall be vested in the board of directors.

**Source:** **L. 97:** Entire article added, p. 749, § 3, effective July 1, 1998. **L. 98:** (6) added, p. 626, § 38, effective July 1. **L. 2005:** (1)(b) amended, p. 1219, § 31, effective October 1. **L. 2006:** (1)(b) amended and (1)(c) added, p. 883, § 85, effective July 1.



**7-137-102. Pre-1968 corporate entities - failure to file reports and designate registered agents - dissolution.** (1) Corporate entities that were formed prior to January 1, 1968, and that did not elect to be governed by articles 20 to 29 of this title and could, if they so elected, elect to be governed by articles 121 to 137 of this title, but that have not done so, are nevertheless reporting entities that are subject to part 5 of article 90 of this title, providing for periodic reports from reporting entities, and are domestic entities that are subject to part 7 of article 90 of this title, providing for registered agents and service of process.

(2) Every corporate entity that could or has elected to be governed by articles 20 to 29 or 121 to 137 of this title whose articles of incorporation, affidavit of incorporation, or other basic corporate charter, by whatever name denominated, is not on file in the records of the secretary of state shall file a certified copy of such articles of incorporation, affidavit of incorporation, or other basic corporate charter in the office of the secretary of state. Such certified copy may be secured from any clerk or recorder with whom the instrument may be filed or recorded.

(3) If any corporate entity, formed prior to January 1, 1968, that could elect to be governed by articles 20 to 29 or 121 to 137 of this title, but that has not so elected and has failed to file periodic reports or maintain a registered agent, may be declared delinquent pursuant to section 7-90-902.

(4) Any corporate entity formed prior to January 1, 1968, that could elect to be governed by articles 20 to 29 of this title, that was suspended or was declared defunct, but not dissolved by operation of law under section 7-20-105 before July 1, 1998, and that was eligible for reinstatement on June 30, 1998, shall be deemed administratively dissolved on the date of such suspension for purposes of section 7-134-105 and may reinstate itself as a nonprofit corporation as provided in part 10 of article 90 of this title.

(5) Any nonprofit corporate entity formed prior to January 1, 1968, that could elect to be governed by articles 20 to 29 of this title, that was suspended, declared defunct, administratively dissolved, or dissolved by operation of law, and continues to operate for nonprofit purposes and does not wind up its business and affairs, shall be deemed an unincorporated organization that qualifies as a nonprofit association as provided in section 7-30-101.1 for purposes of the "Uniform Unincorporated Nonprofit Association Act", article 30 of this title, unless such corporate entity is eligible to reinstate itself as a nonprofit corporation as provided in part 10 of article 90 of this title and does so reinstate itself.

**Source:** L. 97: Entire article added, p. 750, § 3, effective July 1, 1998. L. 2000: (1) and (3) amended, p. 987, § 100, effective July 1. L. 2003: (1), (3), (4), and (5) amended, p. 2352, § 338, effective July 1, 2004. L. 2004: (1) and (2) amended, p. 1516, § 313, effective July 1. L. 2005: (3) and (4) amended, p. 1219, § 32, effective October 1. L. 2006: (4) amended, p. 884, § 86, effective July 1. L. 2010: (1) and (3) amended, (HB 10-1403), ch. 404, p. 2000, § 29, effective August 11.

**Editor's note:** Section 7-20-105, referred to in subsection (4), was repealed, effective July 1, 1998.

**7-137-103. Application to foreign nonprofit corporations.** A foreign nonprofit corporation authorized to transact business or conduct activities in this state on June 30, 1998, is subject to articles 121 to 137 of this title but is not required to obtain new authorization to transact business or conduct activities under said articles.

**Source:** L. 97: Entire article added, p. 751, § 3, effective July 1, 1998. L. 2003: Entire section amended, p. 2353, § 339, effective July 1, 2004.

## PART 2

### ELECTION BY PRE-1968 CORPORATE ENTITIES

**7-137-201. Procedure to elect to accept articles 121 to 137 of this title.** (1) Any corporate entity with shares of capital stock formed before January 1, 1968, under article 40,

50, or 51 of this title, any corporate entity formed before January 1, 1968, under article 40 or 50 of this title without shares of capital stock, and any corporate entity whether with or without shares of capital stock and formed before January 1, 1968, under any general law or created by any special act of the general assembly for a purpose for which a nonprofit corporation may be formed under articles 121 to 137 of this title may elect to accept said articles in the following manner:

(a) If there are members or stockholders entitled to vote thereon, the board of directors shall adopt a resolution recommending that the corporate entity accept articles 121 to 137 of this title and directing that the question of acceptance be submitted to a vote at a meeting of the members or stockholders entitled to vote thereon, which may be either an annual or special meeting. The question shall also be submitted whenever one-twentieth of the members or stockholders entitled to vote thereon so request. Written notice stating that the purpose, or one of the purposes, of the meeting is to consider electing to accept said articles shall be given to each member or stockholder entitled to vote at the meeting within the time and in the manner provided in said articles for the giving of notice of meetings to members or stockholders. Such election to accept said articles shall require for adoption at least two-thirds of the votes that members or stockholders present at such meeting in person or by proxy are entitled to cast.

(b) If there are no members or stockholders entitled to vote thereon, election to accept articles 121 to 137 of this title may be made at a meeting of the board of directors pursuant to a majority vote of the directors in office.

(2) In effecting acceptance of articles 121 to 137 of this title, the corporate entity shall follow the requirements of the law under which it was formed, its articles of incorporation, and its bylaws so far as applicable.

(3) If the domestic entity name of the corporate entity accepting articles 121 to 137 of this title is not in conformity with part 6 of article 90 of this title, the corporate entity shall change its domestic entity name to conform with part 6 of article 90 of this title. The adoption of a domestic entity name that is in conformity with said part 6 by the members or stockholders of the corporate entity, and its inclusion in the statement of election to accept articles 121 to 137 as the entity name, shall be the only action necessary to effect the change. The articles of incorporation, affidavit, or other basic organizational charter shall be deemed for all purposes amended to conform to the entity name.

(4) All corporate entities accepting articles 121 to 137 of this title whose articles of incorporation, affidavits of incorporation, or other basic charters, by whatever names denominated, are not on file in the records of the secretary of state as required by section 7-137-102 (2) shall deliver to the secretary of state, for filing pursuant to part 3 of article 90 of this title, a certified copy of such articles of incorporation, affidavits of incorporation, or other basic charters at the time of delivery of the statement of election to accept articles 121 to 137 of this title.

(5) All corporate entities accepting articles 121 to 137 of this title are reporting entities subject to part 5 of article 90 of this title, providing for periodic reports from reporting entities, and are subject to part 7 of article 90 of this title, providing for registered agents and service of process.

**Source:** L. 97: Entire article added, p. 751, § 3, effective July 1, 1998. L. 2000: IP(1) and (1)(d) amended, p. 987, § 101, effective July 1. L. 2003: Entire section amended, p. 2353, § 340, effective July 1, 2004. L. 2004: (4) and (5) amended, p. 1516, § 314, effective July 1. L. 2008: (3) amended, p. 24, § 20, effective August 5. L. 2010: (5) amended, (HB 10-1403), ch. 404, p. 2001, § 30, effective August 11.

**7-137-202. Statement of election to accept articles 121 to 137 of this title.** (1) A statement of election to accept articles 121 to 137 of this title shall state:

(a) The domestic entity name of the corporate entity;

(b) A statement by the corporate entity that it has elected to accept said articles and that all required reports have been or will be filed and all fees, taxes, and penalties due to the state of Colorado accruing under any law to which the corporate entity heretofore has been subject have been paid;



(c) If there are members or stockholders entitled to vote thereon, a statement stating the date of the meeting of such members or stockholders at which the election to accept articles 121 to 137 of this title was made, that a quorum was present at the meeting, and that such acceptance was authorized by at least two-thirds of the votes that members or stockholders present at such meeting in person or by proxy were entitled to cast;

(d) If there are no members or stockholders entitled to vote thereon, a statement of such fact, the date of the meeting of the board of directors at which election to accept said articles was made, that a quorum was present at the meeting, and that such acceptance was authorized by a majority vote of the directors in office;

(e) A statement that the corporate entity followed the requirements of the law under which it was formed, its articles of incorporation, and its bylaws so far as applicable in effecting such acceptance;

(f) and (g) Repealed.

(h) A statement that any attached copy of the articles of incorporation, affidavit, or other basic corporate charter of the corporate entity is true and correct;

(i) If the corporate entity has issued shares of stock, a statement of such fact including the number of shares heretofore authorized, the number issued and outstanding, and a statement that all issued and outstanding shares of stock have been delivered to the corporate entity to be canceled upon the acceptance of articles 121 to 137 of this title by the corporate entity becoming effective and that from and after the effective date of said acceptance the authority of the corporate entity to issue shares of stock is terminated; except that this shall not apply to corporate entities formed for the acquisition and distribution of water to their stockholders.

**Source:** L. 97: Entire article added, p. 753, § 3, effective July 1, 1998. L. 2003: IP(1), (1)(a), (1)(c), (1)(e), (1)(f), and (1)(i) amended, p. 2354, § 341, effective July 1, 2004. L. 2004: (1)(f) and (1)(g) repealed, p. 1516, § 315, effective July 1.

**7-137-203. Filing statement of election to accept articles 121 to 137 of this title.** The statement of election to accept articles 121 to 137 of this title shall be delivered to the secretary of state for filing pursuant to part 3 of article 90 of this title.

**Source:** L. 97: Entire article added, p. 754, § 3, effective July 1, 1998. L. 2002: Entire section amended, p. 1859, § 155, effective July 1; entire section amended, p. 1724, § 157, effective October 1.

**7-137-204. Effect of certificate of acceptance.** (1) Upon the filing by the secretary of state of the statement of election to accept articles 121 to 137 of this title, the election of the corporate entity to accept said articles shall become effective.

(2) A corporate entity so electing under articles 121 to 137 of this title or corresponding provision of prior law shall have the same powers and privileges and be subject to the same duties, restrictions, penalties, and liabilities as though such corporate entity had been originally formed under said articles and shall also be subject to any duties or obligations expressly imposed upon the corporate entity by a special charter, subject to the following:

(a) If no period of duration is expressly fixed in the articles of incorporation of such corporate entity, its period of duration shall be deemed to be perpetual.

(b) No amendment to the articles of incorporation adopted after such election to accept articles 121 to 137 of this title shall release or terminate any duty or obligation expressly imposed upon any such corporate entity under and by virtue of a special charter or enlarge any right, power, or privilege granted to any such corporate entity under a special charter, except to the extent that such right, power, or privilege might have been included in the articles of incorporation of a corporate entity formed under said articles.

(c) In the case of any corporate entity with issued shares of stock, the holders of such issued shares who surrender them to the corporate entity to be canceled upon the acceptance of said articles by the corporate entity becoming effective shall become members of the

corporate entity with one vote for each share of stock so surrendered until such time as the corporate entity by proper corporate action relative to the election, qualification, terms, and voting power of members shall otherwise prescribe.

**Source: L. 97:** Entire article added, p. 754, § 3, effective July 1, 1998. **L. 2003:** IP(2) and (2)(b) amended, p. 2355, § 342, effective July 1, 2004.

### PART 3

#### SAVING PROVISIONS

**7-137-301. Saving provisions.** (1) Except as provided in subsection (3) of this section, the repeal of any provision of the “Colorado Nonprofit Corporation Act”, articles 20 to 29 of this title, does not affect:

- (a) The operation of the statute, or any action taken under it, before its repeal;
- (b) Any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the provision before its repeal;
- (c) Any violation of the provision, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal; or
- (d) Any proceeding or reorganization commenced under the provision before its repeal, and the proceeding or reorganization may be completed in accordance with the provision as if it had not been repealed.

(2) Except as provided in subsection (3) of this section or in sections 7-137-101 (1) (b) and 7-137-102 (4) for the reinstatement, as provided in part 10 of article 90 of this title, of a corporate entity suspended, declared defunct, or administratively dissolved before July 1, 1998, any dissolution commenced under the provision before its repeal may be completed in accordance with the provision as if it had not been repealed.

(3) If a penalty or punishment imposed for violation of any provision of the “Colorado Nonprofit Corporation Act”, articles 20 to 29 of this title, is reduced by articles 121 to 137 of this title, the penalty or punishment, if not already imposed, shall be imposed in accordance with said articles.

**Source: L. 97:** Entire article added, p. 754, § 3, effective July 1, 1998. **L. 2003:** (2) amended, p. 2355, § 343, effective July 1, 2004.



## **TITLE 8**

# **LABOR AND INDUSTRY**

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# TITLE 8

## LABOR AND INDUSTRY

### LABOR I - DEPARTMENT OF LABOR AND EMPLOYMENT

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- Art. 2. Labor Relations, Generally, 8-2-101 to 8-2-205.  
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Art. 6. Minimum Wages of Workers, 8-6-101 to 8-6-119.  
Art. 7. Salaries of Employees in Mining (Repealed).  
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Art. 13.3. Parental Involvement in K-12 Education Act, 8-13.3-101 to 8-13.3-104.  
Art. 13.5. Workplace Accommodations for Nursing Mothers, 8-13.5-101 to 8-13.5-104.  
Art. 14. Protection of Building Employees, 8-14-101 to 8-14-105.

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#### Public Works

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## LABOR II - WORKERS' COMPENSATION AND RELATED PROVISIONS

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- Art. 40. General Provisions, 8-40-101 to 8-40-302.
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- Art. 45. Pinnacol Assurance, 8-45-101 to 8-45-125.
- Art. 46. Specific Insurance Funds, 8-46-101 to 8-46-309.
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- Art. 48. Contractors and Lessees (Repealed).
- Art. 49. Medical, Surgical, and Hospital (Repealed).
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- Art. 51. Benefits (Repealed).
- Art. 52. General Provisions (Repealed).
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## Medical Insurance Provisions

- Art. 65. Colorado Medical Disaster Insurance Fund (Repealed).
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- Art. 70. Definitions - General Provisions, 8-70-101 to 8-70-143.
- Art. 71. Unemployment Insurance, 8-71-101 to 8-71-224.
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- Art. 73. Benefits - Eligibility - Disqualification, 8-73-101 to 8-73-114.
- Art. 74. Claims for Benefits, 8-74-101 to 8-74-110.
- Art. 75. Extended Benefits Program, 8-75-101 to 8-75-209.
- Art. 76. Premiums - Coverage, 8-76-101 to 8-76-115.
- Art. 77. Unemployment Compensation and Revenue Funds, 8-77-101 to 8-77-109.
- Art. 78. Employment Security Administration Fund, 8-78-101 to 8-78-104.
- Art. 79. Collection of Contributions, Penalties, Interest, 8-79-101 to 8-79-108.
- Art. 80. Protection of Rights and Benefits, 8-80-101 to 8-80-103.
- Art. 81. Penalties and Enforcement, 8-81-101 to 8-81-103.
- Art. 82. Acquisition of Lands and Buildings, 8-82-101 to 8-82-105.
- Art. 83. Work Force Development, 8-83-101 to 8-83-226.

## LABOR I - DEPARTMENT OF LABOR AND EMPLOYMENT

## Division of Labor - Industrial Claim Appeals Office

**Cross references:** For the duty of the department of labor and employment with respect to the Colorado customized training program, see § 23-60-306.



**ARTICLE 1****Division of Labor -  
Industrial Claim Appeals Office**

8-1-101.	Definitions.	8-1-131.	Review - notice - evidence - order. (Repealed)
8-1-102.	Industrial claim appeals office - creation - powers and duties.	8-1-132.	Final findings and awards - interlocutory orders - modification. (Repealed)
8-1-103.	Division of labor - director - employees - qualifications - compensation - expenses.	8-1-132.5.	Fact-finding by commission - workmen's compensation. (Repealed)
8-1-104.	Director - seal.	8-1-133.	Court to modify or vacate - venue. (Repealed)
8-1-105.	Offices and supplies.	8-1-134.	Review - complaint - answer - hearing. (Repealed)
8-1-106.	Records - sessions.	8-1-135.	Cause referred back to director and commission - procedure. (Repealed)
8-1-107.	Powers and duties of director - rules.	8-1-136.	Setting aside order of director or commission. (Repealed)
8-1-108.	Orders effective - when - validity presumed.	8-1-137.	Appellate review. (Repealed)
8-1-109.	Employer to furnish safe place to work. (Repealed)	8-1-138.	Fees - costs - counsel for director or commission. (Repealed)
8-1-110.	Unsafe places - investigation - report - order. (Repealed)	8-1-139.	Failure of witness to appear or testify - penalty.
8-1-111.	Jurisdiction over employer and employee relation.	8-1-140.	Violation - penalty.
8-1-112.	Officers to assist in enforcing orders.	8-1-141.	Each day separate offense.
8-1-113.	Agents of division and director - powers.	8-1-142.	Collection of penalties.
8-1-114.	Employers and employees to furnish information - penalty.	8-1-143.	Costs - counsel for director - attorney general and district attorney to enforce.
8-1-115.	Information not public - penalty for divulging.	8-1-144.	Penalty for false statements.
8-1-116.	Investigators to have access to premises.	8-1-145.	Authority of department of public health and environment not affected.
8-1-117.	Director to have access to books - penalty.	8-1-146.	Effect of transfer of powers, duties, and functions.
8-1-118.	Rules of evidence - procedure.	8-1-147.	Actions, suits, or proceedings not to abate by reorganization - maintenance by or against successors. (Repealed)
8-1-119.	Record of proceedings.	8-1-148.	Rules, regulations, rates, and orders adopted prior to article - abolishment of commission - continued.
8-1-120.	Depositions.	8-1-149.	Transfer of officers, employees, and property. (Repealed)
8-1-121.	Contempt - punishment - fees.	8-1-150.	Licensing functions subject to periodic review. (Repealed)
8-1-122.	Inquiries - scope - report.	8-1-151.	Public safety inspection fund created.
8-1-123.	Arbitration.	8-1-152.	Applications for licenses - authority to suspend licenses - rules.
8-1-124.	Witnesses - rules of evidence. (Repealed)		
8-1-125.	Disputes - jurisdiction - request for intervention - penalty.		
8-1-126.	Lockouts and strikes unlawful - when.		
8-1-127.	When findings or awards are binding. (Repealed)		
8-1-128.	Petition - writ - dissolution.		
8-1-129.	Strikes and lockouts - penalties.		
8-1-130.	Judicial review.		

**8-1-101. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Commission" means the industrial commission of Colorado, as said commission existed prior to July 1, 1986.
- (2) "Commissioner" means one of the members of the commission.
- (2.5) "Department" means the department of labor and employment.
- (3) "Deputy" means any person employed by the division designated as such deputy by

the director, and who may be engaged in the performance of duties under the direction of the director.

(4) "Director" means the director of the division of labor.

(5) "Division" means the division of labor in the department of labor and employment.

(6) "Employee" means every person in the service of an employer, under any contract of hire, express or implied, not including an elective official of the state, or of any county, city, town, irrigation, drainage, or school district thereof, and not including any officers or enlisted men of the National Guard of the state of Colorado.

(7) (a) "Employer" means:

(I) The state, and each county, city, town, irrigation, and school district therein, and all public institutions and administrative boards thereof having four or more employees;

(II) Every person, association of persons, firm, and private corporation, including any public service corporation, manager, personal representative, assignee, trustee, and receiver, who has four or more persons regularly engaged in the same business or employment, except as otherwise expressly provided in this article, in service under any contract of hire, expressed or implied.

(b) This article is not intended to apply to employers of private domestic servants or farm and ranch labor; nor to employers who employ less than four employees regularly in the same business, or in or about the same place of employment.

(8) "Employment" means any trade, occupation, job, position, or process of manufacture or any method of carrying on any such trade, occupation, job, position, or process of manufacture in which any person is engaged, except as otherwise expressly provided in this article.

(8.5) "Executive director" means the executive director of the department of labor and employment.

(9) "General order" means an order of the director applying generally throughout the state to all persons, employments, or places of employment under the jurisdiction of the division. All other orders of the director shall be considered special orders.

(10) "Local order" means any ordinance, order, rule, or determination of any common council, board of aldermen, board of supervisors, board of trustees, or board of commissioners of any county, town, city, or city and county operating under any general or special law of this state or of the board of health of the state or any municipality therein or any order or direction of any official of the state or municipality therein.

(11) "Order" means any decision, rule, regulation, requirement, or standard promulgated by the director.

(12) "Place of employment" means every place, whether indoors or outdoors or underground, and the premises, work places, works, and plants appertaining thereto or used in connection therewith where either temporarily or permanently any industry, trade, or business is carried on, or where any process or operation directly or indirectly relating to any industry, trade, or business is carried on, or where any person is directly or indirectly employed by another for direct or indirect gain or profit, except as otherwise expressly provided in this article.

(13) "Safe" or "safety", as applied to an employment or place of employment, means such freedom from danger to the life, health, and safety of employees and such reasonable means of notification, egress, and escape in case of catastrophe as the nature of the employment reasonably permits.

(14) "State personnel system" means the personnel system of the state as described in section 13 of article XII of the state constitution and the state personnel system as described in article 50 of title 24, C.R.S.

**Source:** L. 15: pp. 562, 563, §§ 1, 2, 4. L. 21: p. 828, § 2. C.L. §§ 4325, 4326, 4328. CSA: C. 97, §§ 1, 2, 4. CRS 53: §§ 80-1-1 to 80-1-3. C.R.S. 1963: §§ 80-1-1 to 80-1-3. L. 69: p. 573, §§ 18-20. L. 72: p. 601, §§ 94-96. L. 86: (1) and (11) amended and (2.5) and (8.5) added, p. 464, § 3, effective July 1. L. 2008: (14) added, p. 292, § 1, effective April 3.



## ANNOTATION

**Law reviews.** For article, "The Colorado Industrial Commission and Wage Disputes", see 9 Dicta 44 (1931). For article, "Governmental Adjustment of Colorado's Industrial Disputes 1915-1930", see 3 Rocky Mt. L. Rev. 223 (1931). For note, "Use of Evidence in Hearings Before Colorado Administrative Agencies", see 29 Dicta 437 (1952).

**The act establishing this article was not irregularly passed** because the purpose of the bill was changed during its course through the two houses. *People v. UMW*, Dist. 15, 70 Colo. 269, 201 P. 54 (1921).

**One who goes from farm to farm operating a thresher is not a farm laborer** within the exception contained in subsection (7)(c) of this section. *Indus. Comm'n v. Shadowen*, 68 Colo. 69, 187 P. 926 (1920).

**By its definitions, the Industrial Relations Act grants the right to strike to all employees, private and public,** and concurrently places conditions on the exercise of that right. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**Reading the Industrial Relations Act with the express definitions of employer and employee in mind,** it can be concluded that public employees have a qualified or conditional right to strike, as do private employees. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**Disputes in the public sector, particularly those leading to strikes, are subject to the authority of the director of the division of labor.** *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**Teaching in a public school is certainly an "occupation" or "position" within the meaning of the Industrial Relations Act.** *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**As school districts are expressly included in the definition of employer,** the director has the power to supervise the employment relationship between school districts and their teachers. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**In view of the general assembly's demonstrated ability to be selective by expressly**

**excluding certain employers from the provisions of the Industrial Relations Act,** the court cannot exclude public employers from the substantive provisions of the Industrial Relations Act, especially when those public employers are expressly included. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**Arguments advanced by the school district against the right of public employees to strike** that invoke concepts of sovereignty and the control of the public purse and that are predicated on the classical distinction between the private and public sectors, are better directed to the general assembly since the plain definitions in the Industrial Relations Act include public employers and their employees. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**The principle of statutory construction that statutes in derogation of the common law must be narrowly construed** is a principle applicable only when an ambiguity in the language of the statute in question permits such narrowing construction and when the intent of the legislature is not to the contrary and cannot be invoked to defeat the plain and manifest language of the Industrial Relations Act. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**The Industrial Relations Act and the Labor Peace Act do not conflict** and the court will not infer from the passage of another act regulating collective bargaining in the private sector that the legislature intended to repeal the express provisions of the Industrial Relations Act and to return public sector labor relations to adjudication by the common law. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**Because the Industrial Relations Act provides the regulatory framework for the resolution of public sector labor disputes and ample statutory remedies,** the common law need not be searched for remedies to resolve those disputes or claims arising from those disputes. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**8-1-102. Industrial claim appeals office - creation - powers and duties.** (1) There is hereby created in the office of the executive director of the department of labor and employment the industrial claim appeals office, which may consist of five industrial claim appeals examiners, who shall be appointed to serve on the industrial claim appeals panel by the executive director pursuant to section 13 of article XII of the state constitution and the laws and rules governing the state personnel system. Each industrial claim appeals examiner shall exercise such examiner's powers and perform such examiner's duties and functions in the industrial claim appeals office within the office of the executive director of the department as if transferred thereto by a **type 2** transfer as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S. Decisions and

orders of the industrial claim appeals panel may be made by two appeals examiners. In the event of a disagreement between such two appeals examiners, a third appeals examiner shall review the case, and the decision and final order of the appeals panel shall reflect the collective decision of all three appeals examiners.

(2) The industrial claim appeals panel has the duty and the power to conduct administrative appellate review of any order entered pursuant to articles 43 and 74 of this title and to make a decision on said appeal.

**Source:** L. 15: p. 564, § 5. C.L. § 4329. CSA: C. 97, § 5. CRS 53: § 80-1-4. C.R.S. 1963: § 80-1-4. L. 69: p. 574, § 21. L. 83: (1) amended, p. 401, § 1, effective July 1. L. 84: (1) amended, p. 298, § 1, effective July 1. L. 86: Entire section R&RE, p. 463, § 3, effective July 1. L. 89: (1) amended, p. 371, § 1, effective July 1. L. 91: (2) amended, p. 1291, § 1, effective July 1. L. 92: (1) amended, p. 1811, § 1, effective March 19.

**Cross references:** For the powers, duties, and functions of the industrial claim appeals office, see articles 43 and 74 of this title.

### ANNOTATION

The increase in the number of panel members made by the 1989 amendment was not intended to result in a modification of the procedure for reviewing workers' compensation cases. Orders signed by two members are authorized and valid. *O'Gorman v. Indus. Claim Appeals Office*, 826 P.2d 390 (Colo. App. 1991).

**Requiring three members to address each case** would frustrate the purposes of the 1989 amendment, which were to address the heavy load of cases and the delay in resolving them. *O'Gorman v. Indus. Claim Appeals Office*, 826 P.2d 390 (Colo. App. 1991).

**Industrial Claim Appeals Office is a public body** within the meaning of § 2-4-110 and for decisions rendered prior to March 19, 1992, is subject to the limitation of § 2-4-110 to act through a majority of its members. *O'Gorman v. Indus. Claim Appeals Office*, 839 P.2d 1149 (Colo. 1992).

**Where Industrial Claim Appeals Panel rendered decision within statutory time limit and in good faith belief that it had authority to act, but court determines that decision rendered by the panel was ineffective because taken by only two members when a majority was required, proper course is to remand case to the panel for reconsideration.** (Decided under § 8-1-102 as it existed prior to 1992 amendment.) *O'Gorman v. Indus. Claim Appeals Office*, 839 P.2d 1149 (Colo. 1992).

**This section does not require or authorize the panel to entertain an untimely appeal.** The procedure for perfecting an appeal to the panel is set forth exclusively in § 8-43-301 (2). *Brodeur v. Indus. Claim Appeals Office*, 159 P.3d 810 (Colo. App. 2007).

**8-1-103. Division of labor - director - employees - qualifications - compensation - expenses.** (1) There is hereby created a division of labor in the department of labor and employment. Pursuant to section 13 of article XII of the state constitution, the executive director of the department of labor and employment shall appoint the director of the division of labor, and the director shall appoint such deputies, experts, statisticians, accountants, inspectors, clerks, and other employees as are necessary to carry out the provisions of law and to perform the duties and exercise the powers conferred by law upon the division and the director. The director shall be the chief administrative officer of the division with such powers, duties, and functions as prescribed by law.

(2) All employees, except experts, shall have been for one year prior to such employment or appointment bona fide residents of this state and, while in the employ of the division, shall receive such compensation as is fixed by the state personnel system laws of this state, such compensation to be paid monthly from funds appropriated for the use of the division. All expenses incurred by the division and its employees pursuant to the provisions of law shall be paid from funds appropriated for its use upon the approval of the director. The traveling expenses of the director or of any employee of the division incurred while on business of the division outside this state shall be paid in the manner prescribed in this subsection (2), but only when such expenses are authorized in advance.



(3) The powers, duties, and functions of the director prescribed under this article, including rule-making, regulation, licensing, promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications, shall be performed under the direction and supervision of the executive director of the department of labor and employment, as prescribed by section 24-1-105 (4), C.R.S.

**Source:** L. 15: p. 566, § 6. L. 21: p. 830, § 3. C.L. § 4330. CSA: C. 97, § 6. CRS 53: § 80-1-5. C.R.S. 1963: § 80-1-5. L. 69: p. 574, § 22. L. 71: p. 106, § 18. L. 83: (3) added, p. 403, § 1, effective May 25.

#### ANNOTATION

**The exercise of jurisdiction by the director of the division of labor, or the decision not to exercise jurisdiction, is itself subject to the restraints of the electoral process** since the director is subject to the oversight of the executive director of the Department of Labor and Employment and the executive director is in

turn politically accountable, serving at the pleasure of the governor. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**Applied** in *Matthews v. Indus. Comm'n*, 44 Colo. App. 159, 609 P.2d 1127 (1980).

#### **8-1-104. Director - seal.**

(1) Repealed.

(2) The director shall have a seal upon which shall be inscribed the words "Director - Division of Labor - Department of Labor and Employment - Colorado - Seal". His seal shall be affixed to all orders, awards, and copies thereof of the division and to such other instruments as the director shall direct.

(3) All courts of the state shall take judicial notice of said seal. Any copy of an order, award, or record of the director under his seal shall be received in all courts as evidence as if such copy were the original thereof.

**Source:** L. 15: p. 567, § 7. C.L. § 4331. CSA: C. 97, § 7. CRS 53: § 80-1-6. C.R.S. 1963: § 80-1-6. L. 69: p. 575, § 23. L. 86: (3) amended and (1) repealed, pp. 464, 502, §§ 5, 125, effective July 1.

**8-1-105. Offices and supplies.** The division shall have offices in the city and county of Denver and at such other places in the state as the executive director of the department may direct. The division shall be provided with suitable office space by the office of state planning and budgeting. The division is authorized to procure all necessary office furniture, stationery, books, periodicals, maps, instruments, apparatus, appliances, and other supplies and incur such other expenses as necessary, and the same shall be paid for in the same manner as other expenses authorized by law. The director or any deputy or referee of the division may hold sessions at any place other than the city and county of Denver when the convenience of the director, deputy, referee, or parties interested requires.

**Source:** L. 15: p. 567, § 8. C.L. § 4332. CSA: C. 97, § 8. CRS 53: § 80-1-7. C.R.S. 1963: § 80-1-7. L. 69: p. 575, § 24. L. 75: Entire section amended, p. 818, § 5, effective July 18. L. 86: Entire section amended, p. 464, § 6, effective July 1.

#### **8-1-106. Records - sessions.**

(1) Repealed.

(2) The division shall keep a full and accurate record of all proceedings of the division and issue all necessary processes, writs, warrants, orders, awards, and notices as the director or any deputy or referee may require. The director shall supervise the collection of data and information concerning matters within the jurisdiction of the division and shall make such reports thereon as the executive director of the department of labor and employment may require.

(3) The sessions of the director or any deputy or referee of the division shall be open to the public and shall stand and be adjourned without further notice thereof on the record. All proceedings of the division shall be shown on its records, which shall be public records.

**Source:** L. 15: p. 567, § 9. C.L. § 4333. CSA: C. 97, § 9. CRS 53: § 80-1-8. C.R.S. 1963: § 80-1-8. L. 69: p. 575, § 25. L. 86: (3) amended and (1) repealed, pp. 464, 502, §§ 7, 125, effective July 1.

#### **8-1-107. Powers and duties of director - rules.**

(1) Repealed.

(2) In addition to any other duties prescribed by law, the director has the duty and the power to:

(a) Appoint advisors who, without compensation, shall advise the director relative to the duties imposed upon the director by articles 1 to 18 of this title and part 3 of article 34 of title 24, C.R.S.;

(b) Inquire into and supervise the enforcement, with respect to relations between employer and employee, of the laws relating to child labor, laundries, stores, factory inspection, employment offices and bureaus, and fire escapes and means of egress from places of employment and all other laws protecting the life, health, and safety of employees in employments and places of employment;

(c) to (h) Repealed.

(i) Accept, use, disburse, and administer all federal aid or other property, services, and moneys allotted to the division as part of any grant-in-aid safety program authorized by an act of congress and to make such agreements, not inconsistent with any act of congress and the laws of this state, as may be required as a condition precedent to receiving such funds or other assistance. Such acceptance, conditions, and agreement shall not be effective unless and until the director has recommended to and received the written approval of the governor and the executive director of the department. The state treasurer is designated custodian of all funds received pursuant to this paragraph (i) from the federal government, and he shall hold such funds separate and distinct from state funds and is authorized to make disbursements from such funds for the designated purpose or administrative costs which may be provided in such grants-in-aid, upon warrants issued by the controller and upon the voucher of the director.

(j) Repealed.

(k) Collect and collate statistical and other information relating to the work under his jurisdiction. All materials of the division circulated in quantity outside the executive branch shall be issued in accordance with the provisions of section 24-1-136, C.R.S. The director shall cause to be printed and, upon application, furnished free of charge to any employer or employee such blank forms as he shall deem required for the proper and efficient administration of articles 1 to 18 of this title and part 3 of article 34 of title 24, C.R.S., all such records to be kept in the offices of the division. Copies of orders, regulations, and rules of procedure shall be made for distribution in a manner to constitute sufficient publication as required by law.

(l) to (o) Repealed.

(p) Adopt reasonable and proper rules and regulations relative to the exercise of his powers and proper rules and regulations to govern the proceedings of the division and to regulate the manner of investigations and hearings and to amend said rules and regulations from time to time in his discretion. Such rules and regulations, and amendments thereto, shall be made in accordance with section 24-4-103, C.R.S.

(q) Repealed.

(r) Promulgate rules to implement the provisions of section 26-2-716 (3) (b), C.R.S.

**Source:** L. 15: p. 568, § 11. L. 21: p. 831, § 4. C.L. § 4335. CSA: C. 97, § 11. CRS 53: § 80-1-9. L. 56: p. 158, § 1. C.R.S. 1963: § 80-1-9. L. 64: p. 147, § 80. L. 69: p. 576, § 26. L. 73: p. 917, § 2. L. 75: (1)(f), (2)(c), (2)(d), and (2)(l) amended, (1)(g) and (2)(m) added, and (1)(b), (1)(c), and (1)(d) repealed, pp. 274, 286, §§ 1, 2, 22,



effective July 25. **L. 77:** (2)(a) and (2)(k) amended, p. 414, § 1, effective June 1; (2)(n) added, p. 418, § 1, effective June 1; (2)(b) amended, p. 416, § 1, effective June 9; (2)(b) amended, p. 428, § 1, effective July 1. **L. 80:** (2)(d) amended and (2)(c), (2)(e), (2)(l), and (2)(m) repealed, pp. 449, 451, §§ 1, 6, effective April 13. **L. 81:** (1)(d) R&RE, p. 457, § 1, effective March 27; (1)(h) added, p. 509, § 1, effective July 1. **L. 83:** (2)(a) and (2)(k) amended, p. 700, § 2, effective June 10; (2)(j) and (2)(k) amended, p. 825, § 2, effective July 1. **L. 84:** (2)(f) and (2)(g) repealed, p. 1116, § 2, effective June 7. **L. 85:** (1)(g) amended, p. 337, § 2, effective July 1. **L. 86:** (2)(a), (2)(d), (2)(i), and (2)(k) amended and (2)(o) and (2)(p) added, p. 465, § 8, effective July 1; (1) repealed, p. 502, § 125, effective July 1. **L. 91:** (2)(h) repealed, p. 1291, § 2, effective July 1. **L. 95:** (2)(q) added, p. 418, § 3, effective July 1. **L. 97:** (2)(j) repealed, p. 1473, § 5, effective June 3; (2)(r) added, p. 1239, § 34, effective July 1. **L. 2001:** (2)(d), (2)(n), (2)(o), and (2)(q) repealed, p. 1139, § 67, effective June 5.

## ANNOTATION

**Law reviews.** For comment on the administrative review of workmen's compensation claims, see 45 U. Colo. L. Rev. 195 (1973).

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the division of labor.

**The industrial commission has no power to appoint to an office that does not exist**, nor to draw upon the employment agency fund to pay an appointee thereto. *Stong v. Milliken*, 76 Colo. 515, 233 P. 154 (1925).

**There are no provisions under article I of the industrial commission act under which one can obtain damages from an employer.** *Indus. Comm'n v. Sheard*, 170 Colo. 76, 459 P.2d 127 (1969).

**Commission not stripped of authority to hold hearings and make findings.** The general

assembly did not intend to strip the commission of its general authority to hold hearings and make findings of fact, although such language was deleted from § 8-53-106 (2) by amendment in 1973. There are numerous other references within the workmen's compensation act to the commission's general authority to hold hearings and make factual findings. *Harrison W. Corp. v. Hicks' Claimants*, 185 Colo. 142, 522 P.2d 722 (1974).

**The authority of the director in subsection (2)(d) to "enforce the provisions of §§ 22-32-124 and 23-71-122"** relating to building inspections is not exclusive but may also be taken by a fire protection district absent the school district or junior college district's exercise of authority to contract with a qualified fire inspector. *West Adams County Fire v. Adams County Sch. Dist.* 12, 926 P.2d 172 (Colo. App. 1996).

**Applied** in *Matthews v. Indus. Comm'n*, 44 Colo. App. 159, 609 P.2d 1127 (1980).

**8-1-108. Orders effective - when - validity presumed.** (1) All general orders shall be effective ten days after they are adopted by the director and posted upon the bulletin board of the division in its offices in the city and county of Denver. Special orders shall take effect as therein directed.

(2) The director, upon application of any person, may grant such time as may be reasonably necessary for compliance with any order. Any person may petition the director for an extension of time, which the director shall grant if he finds such an extension of time necessary.

(3) All orders of the division shall be valid and in force and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose, pursuant to the provisions of this article, or until altered or revoked by the director.

(4) Substantial compliance with the requirements of this article shall be sufficient to give effect to the orders or awards of the director, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature with respect thereto.

**Source:** **L. 15:** p. 570, § 12. **L. 21:** p. 834, § 5. **C.L.** § 4336. **CSA:** C. 97, § 12. **CRS 53:** § 80-1-10. **C.R.S. 1963:** § 80-1-10. **L. 69:** p. 577, § 27. **L. 72:** p. 602, § 97. **L. 86:** (1) and (3) amended, p. 1223, § 39, effective July 1; (4) amended, p. 466, § 9, effective July 1.

**Cross references:** For the nonapplicability of this section to the "Labor Peace Act", see § 8-3-123.

**8-1-109. Employer to furnish safe place to work. (Repealed)**

**Source:** L. 15: p. 570, § 13. C.L. § 4337. CSA: C. 97, § 13. CRS 53: § 80-1-11. C.R.S. 1963: § 80-1-11. L. 73: p. 919, § 3. L. 75: Entire section repealed, p. 286, § 22, effective July 25.

**8-1-110. Unsafe places - investigation - report - order. (Repealed)**

**Source:** L. 15: p. 571, § 14. C. L. § 4338. CSA: C. 97. CRS 53: § 80-1-12. C.R.S. 1963: § 80-1-12. L. 69: p. 578, § 28. L. 72: p. 602, § 98. L. 73: p. 919, § 4. L. 75: Entire section repealed, p. 286, § 22, effective July 25.

**8-1-111. Jurisdiction over employer and employee relation.** The director is vested with the power and jurisdiction to have such supervision of every employment and place of employment in this state as may be necessary adequately to ascertain and determine the conditions under which the employees labor, and the manner and extent of the obedience by the employer to all laws and all lawful orders requiring such employment and places of employment to be safe, and requiring the protection of the life, health, and safety of every employee in such employment or place of employment, and to enforce all provisions of law relating thereto. The director is also vested with power and jurisdiction to administer all provisions of this article with respect to the relations between employer and employee and to do all other acts and things convenient and necessary to accomplish the purposes of this article including entering into reciprocal agreements with other states and governmental entities.

**Source:** L. 15: p. 571, § 15. C.L. § 4339. CSA: C. 97, § 17. CRS 53: § 80-1-15. C.R.S. 1963: § 80-1-15. L. 69: p. 578, § 29. L. 72: p. 602, § 99. L. 93: Entire section amended, p. 867, § 1, effective May 6.

**ANNOTATION**

**The Industrial Relations Act unequivocally vests the director with jurisdiction over “every employment”.** Martin v. Montezuma-

Cortez Sch. Dist. RE-1, 841 P.2d 237 (Colo. 1992); Weissman v. Crawford Rehab. Servs., 914 P.2d 380 (Colo. App. 1995).

**8-1-112. Officers to assist in enforcing orders.** It is the duty of all officers and employees of the state, counties, and municipalities, upon request of the director, to enforce in their respective departments all lawful orders of the director, insofar as the same may be applicable and consistent with the general duties of such officers and employees. It is also their duty to make such reports as the director may require concerning matters within their knowledge pertaining to the purposes of this article and to furnish to the division such facts, data, statistics, and information as may from time to time come to them pertaining to the purposes of this article and the duties of the division thereunder, and particularly all information coming to their knowledge respecting the condition of all places of employment subject to the provisions of this article as regards the health, protection, and safety of employees and the conditions under which they labor. It is the duty of the division to collect and compile such data, facts, and information as shall come to it concerning the relations between employer and employee and relating in any way to the provisions of this article.

**Source:** L. 15: p. 571, § 16. C.L. § 4340. CSA: C. 97, § 18. CRS 53: § 80-1-16. C.R.S. 1963: § 80-1-16. L. 69: p. 578, § 30. L. 72: p. 603, § 100.

**Cross references:** For the duty of governmental officers and employees to enforce orders and furnish information pursuant to the “Workers’ Compensation Act of Colorado”, see § 8-47-110.

**8-1-113. Agents of division and director - powers.** (1) For the purpose of making any investigation with regard to any employment or place of employment or other matter



contemplated by the provisions of this article, the director, with the approval of the executive director of the department of labor and employment, has the power to appoint temporarily, by an order in writing, any deputy or any other competent person as an agent, whose duties shall be prescribed in such order.

(2) In the discharge of his duties such agent has every power whatsoever for obtaining information granted in this article to the director and the division, and all powers granted by law to officers authorized to take depositions are granted to such agent.

(3) The director may conduct any number of investigations contemporaneously through different agents and may delegate to such agents the taking of all testimony bearing upon any investigation or hearing. The decision of the director shall be based upon his examination of all testimony and records. The recommendations made by such agent shall be advisory only and shall not preclude any further investigation or the taking of further testimony if the director so orders.

**Source:** L. 15: p. 572, § 17. C.L. § 4341. CSA: C. 97, § 19. CRS 53: § 80-1-17. C.R.S. 1963: § 80-1-17. L. 69: p. 579, § 31. L. 72: p. 603, § 101.

**8-1-114. Employers and employees to furnish information - penalty.** (1) Upon request, every employer and employee shall furnish the division all information required by it to accomplish the purposes of this article, which information shall be furnished on blanks to be prepared by the division. It is the duty of the division to furnish such blanks to the employer free of charge upon request therefor. Every employer receiving from the division any blanks, with directions to fill out same, shall answer fully and correctly all questions therein propounded and give all the information therein sought, or, if unable to do so, he shall give in writing good and sufficient reasons for the failure. The director may require that the information required to be furnished be verified under oath and returned to the division within the period fixed by him or by law. The director, or any person employed by the division for that purpose, has the right to examine, under oath, any employee or employer, or the officer, agent, or employee thereof, for the purpose of ascertaining any information which such employer or employee is required by this article to furnish to the division.

(2) Any employer or employee who fails or refuses to furnish such information as may be required by the division under authority of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of two hundred dollars if an employer and twenty-five dollars if an employee.

**Source:** L. 15: p. 572, § 18. C.L. § 4342. CSA: C. 97, § 20. CRS 53: § 80-1-18. C.R.S. 1963: § 80-1-18. L. 69: p. 579, § 32. L. 72: p. 603, § 102.

**8-1-115. Information not public - penalty for divulging.** (1) The information contained in the reports lawfully required to be furnished by the employer in section 8-1-114, such other information as may be furnished to the division by employers and employees in pursuance of the provisions of this article, and such information obtained through inspections or other proceedings of this article which might reveal a trade secret shall be for the exclusive use and information of said division in the discharge of its official duties. The director may treat and file the information or any part thereof as confidential, and, when so treated or filed by the director, the same shall be considered to be confidential information for the sole use of the division and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the division is a party to such action or proceeding. The court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. The information contained in this report may be tabulated and published by the division in statistical form for the use and information of other state departments and the public.

(2) Any person in the employ of the division who divulges any confidential information to any person other than the director shall be punished by a fine of not more than one

thousand dollars and shall thereafter be disqualified from holding any appointment or employment with any department under the state.

(3) Pursuant to this section, the director shall provide a physical environment and establish policies and procedures to ensure confidentiality for all information regarding any employer, employee, or person pertaining to any action pursuant to articles 1 to 13 of this title; except that such information may be released if there exists an overriding need for access to such information arising pursuant to articles 1 to 13 of this title in connection with:

- (a) A dispute resolution, a mediation, or an administrative or judicial proceeding; or
- (b) A cooperative effort with another subdivision of government.

**Source:** L. 15: p. 573, § 19. L. 21: p. 835, § 6. C.L. § 4343. CSA: C. 97, § 21. CRS 53: § 80-1-19. C.R.S. 1963: § 80-1-19. L. 69: p. 580, § 33. L. 72: p. 604, § 103. L. 73: p. 919, § 5. L. 75: (1) amended, p. 275, § 3, effective July 25. L. 80: (1) amended, p. 449, § 2, effective April 13. L. 86: (2) amended, p. 466, § 10, effective July 1. L. 93: (3) added, p. 867, § 2, effective May 6.

**Cross references:** For the “Uniform Trade Secrets Act”, see article 74 of title 7.

**8-1-116. Investigators to have access to premises.** (1) The director and any other person authorized in writing by the director at any reasonable time may enter any building, surface construction and demolition, factory, workshop, place, or premises of any kind wherein, or in respect of which, any industry except mining is carried on, any work is being or has been done or commenced, or any matter or thing is taking place which has been made the subject of any investigation, hearing, or arbitration by the division; inspect any work, material, machinery, appliance, or article therein; and interrogate any persons in or upon any such building, factory, workshop, place, or premises, except mines, mine workings, and ore milling operations, with respect to any matter or thing mentioned in this article.

(2) Any person who hinders or obstructs the director or any such person authorized by the director in the exercise of any power conferred by this article, or any employer who in bad faith refuses reasonable access to his premises, or any person who gives advance notice of any inspection to be conducted under this article without authority from the director or his designee is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

**Source:** L. 15: p. 574, § 20. C.L. § 4344. CSA: C. 97, § 22. CRS 53: § 80-1-20. C.R.S. 1963: § 80-1-20. L. 69: p. 580, § 34. L. 73: p. 920, § 6. L. 75: Entire section amended, p. 275, § 4, effective July 25. L. 77: (1) amended, p. 416, § 2, effective June 9. L. 80: Entire section amended, p. 450, § 3, effective April 13.

**8-1-117. Director to have access to books - penalty.** (1) All books, records, and payrolls of employers, showing or reflecting in any way upon the amount of wage expenditure of such employers, and other data, facts, and statistics appertaining to the purposes of this article shall always be open for inspection by the director or any of his deputies or agents for the purpose of ascertaining the conditions of employment and such other information as may be necessary for the uses and purposes of the director in his administration of the law.

(2) Any employer who refuses to exhibit and furnish said director or any agents of the division an inspection of any books, records, and payrolls of such employer, showing or reflecting in any way upon the amount of wage expenditure of such employers, and other data, facts, and statistics appertaining to the purposes of this article or who refuses to admit such director or any agent of the division to any place of employment shall pay a penalty of not less than fifty dollars for each day that such failure, neglect, or refusal continues.

**Source:** L. 15: p. 574, § 21. L. 21: p. 835, § 7. C.L. § 4345. CSA: C. 97, § 23. CRS 53: § 80-1-21. C.R.S. 1963: § 80-1-21. L. 69: p. 580, § 35. L. 72: p. 604, § 104.



**Cross references:** For the right of the director to have access to books of employers under the "Workers' Compensation Act of Colorado", see § 8-47-208.

## ANNOTATION

**Law reviews.** For article, "The Occupational Disease Disability Act from the Standpoint of the Claimant", see 28 Dicta 41 (1951).

**8-1-118. Rules of evidence - procedure.** The director, or persons designated by him, shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as provided in this article or by the rules of the division, but he may make such investigations in such manner as in his judgment are best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this article.

**Source:** L. 15: p. 574, § 22. C.L. § 4346. CSA: C. 97, § 24. CRS 53: § 80-1-22. C.R.S. 1963: § 80-1-22. L. 69: p. 581, § 36. L. 72: p. 604, § 105. L. 86: Entire section amended, p. 466, § 11, effective July 1.

## ANNOTATION

**Law reviews.** For note, "Right of Cross-Examination Before Administrative Agencies in Colorado", see 29 Dicta 446 (1952). For note, "The Right to Cross-Examine Adverse Witnesses as a Part of Due Process in Hearings Before Colorado Agencies", see 31 Dicta 383 (1954). For note, "The Admissibility of Hearsay in Hearings Before Workmen's Compensation Commissions", see 31 Dicta 423 (1954).

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment to this section vesting in the director of the division of labor powers and duties previously exercised by the industrial commission.

**This section cannot be so construed as to wipe out basic and fundamental rules governing the competency of evidence** required to establish a fact in all judicial or quasi-judicial proceedings and which are essential ingredients of due process of law. A right created by statute cannot be denied where the sole support for that denial is evidence which under the law of the land has been held incompetent by the courts. Neither can a liability created by law attach where the only support therefor is incompetent evidence, to the introduction of which proper objection is made. *Williams v. New Amsterdam Cas. Co.*, 136 Colo. 458, 319 P.2d 1078 (1957).

For this section means that, while the industrial commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure and that it may, in its discretion, accept any evidence that is offered, in the end there must be a residuum of legal evidence to support the claim before an award can be made. *Williams v. New Amster-*

*dam Cas. Co.*, 136 Colo. 458, 319 P.2d 1078 (1957).

However, it is not required that the residuum of legal evidence should independently of hearsay evidence establish an accident, as the sufficiency of the residuum of legal evidence cannot be measured by the mechanical formula. *Williams v. New Amsterdam Cas. Co.*, 136 Colo. 458, 319 P.2d 1078 (1957).

**Rather, there must be evidence setting forth facts of a probative character** outside of hearsay statements to prove the award and show it is fair and just. *Williams v. New Amsterdam Cas. Co.*, 136 Colo. 458, 319 P.2d 1078 (1957).

**And reviewing courts may not interfere with the findings of the commission if there is competent probative evidence** in support thereof. It is only when the showing made is without probative force and effect, or is of such a character as not to constitute any legitimate evidence, that the award will be disturbed. *Williams v. New Amsterdam Cas. Co.*, 136 Colo. 458, 319 P.2d 1078 (1957).

**Industrial commission is not bound to follow rigid rules of evidence** in justly administering the workmen's compensation act. *San Isabel Elec. Ass'n v. Bramer*, 182 Colo. 15, 510 P.2d 438 (1973).

**Admission of hearsay evidence by claimant was proper** where testimony was merely cumulative and augmented competent evidence so as not to vitiate findings. *San Isabel Elec. Ass'n v. Bramer*, 182 Colo. 15, 510 P.2d 438 (1973).

**Introduction of evidence and examination of witnesses by employer's representative.** Hearings are sufficiently informal so as to permit the employer's representative to question witnesses and introduce evidence when invited

to do so by a hearing officer. *Ross v. Indus. Comm'n*, 39 Colo. App. 204, 566 P.2d 367 (1977).

**8-1-119. Record of proceedings.** (1) A full and complete record shall be kept of all proceedings had before or under the order of the director on any investigation, and all testimony shall be taken down by a shorthand reporter appointed by the director.

(2) A transcribed copy of the evidence and proceedings, or any specific part thereof, of any investigation or hearing taken by a shorthand reporter appointed by the director, being certified by such shorthand reporter to be a true and correct transcript of the testimony, or a specific part thereof, on the investigation or hearing of a particular witness, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation or hearing so purporting to be taken and subscribed, may be received as evidence by the director or any agent of the division and by any court with the same effect as if such shorthand reporter were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of fifty cents per folio.

**Source:** L. 15: p. 575, § 23. L. 21: p. 836, § 8. C.L. § 4347. CSA: C. 97, § 25. CRS 53: § 80-1-23. C.R.S. 1963: § 80-1-23. L. 69: p. 581, § 37. L. 75: (2) amended, p. 291, § 1, effective July 25. L. 82: Entire section amended, p. 620, § 5, effective April 2. L. 86: (2) amended, p. 466, § 12, effective July 1.

**8-1-120. Depositions.** In any investigation, the director or any other party may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in district courts. All such depositions shall be taken upon commission issued by the director and shall be taken in accordance with the laws and rules of court covering depositions in civil cases in the district courts of this state.

**Source:** L. 15: p. 575, § 24. C.L. § 4348. CSA: C. 97, § 26. CRS 53: § 80-1-24. C.R.S. 1963: § 80-1-24. L. 69: p. 581, § 38.

**Cross references:** For depositions in general, see C.R.C.P. 26-37; for the nonapplicability of this section to the "Labor Peace Act", see § 8-3-123.

**8-1-121. Contempt - punishment - fees.** (1) In case of failure or refusal of any person to comply with an order of the director or subpoena issued by him or his agents, or refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, or refusal to permit an inspection as provided in this article, the judge of the district court for the county in which the person resides or of the county in which said person has been ordered to appear and testify before said director, on application of the director or any person appointed by him, shall compel obedience by attachment proceedings as in the case of disobedience of the requirements of a subpoena issued from such district court or on a refusal to testify therein.

(2) Any person serving a subpoena or order shall receive the same fees as a sheriff for like service. Such subpoena or order may be served by any officer duly authorized to subpoena witnesses, or by any person designated by the director for such purpose, and proof of the serving of such subpoena or order shall be by the return of such person or officer endorsed thereon or attached thereto. Each witness who appears in answer to a subpoena before the director or his agent, if so ordered by the director, shall receive for his attendance the fees and mileage provided for in civil cases in the district court in the county where such witness attends which shall be paid in the same manner as other expenses of the division are paid.

(3) No witness subpoenaed at the instance of a party other than the director or his agent shall be entitled to compensation unless the director in his discretion shall so order.



**Source:** L. 15: p. 575, § 25. L. 21: p. 837, § 9. C.L. § 4349. CSA: C. 97, § 27. CRS 53: § 80-1-25. C.R.S. 1963: § 80-1-25. L. 69: p. 581, § 39. L. 72: p. 605, § 106.

**Cross references:** For contempt proceedings, see C.R.C.P. 107; for sheriff's fees, see § 30-1-104; for witness fees and mileage fees, see §§ 13-33-102 and 13-33-103.

**8-1-122. Inquiries - scope - report.** (1) The director shall inquire into the general condition of labor in the principal industries in the state of Colorado and especially in those which are carried on in corporate forms; into existing relations between employers and employees; into the effect of industrial conditions on public welfare and into the rights and powers of the community to deal therewith; into the conditions of sanitation and safety of employees and the provisions for protecting the life, limb, and health of the employees; into relations existing between lessees of state lands and the state as to production and royalties or rentals paid and the relations between said lessees and their employees with respect to wages paid and conditions of labor; into the growth of associations of employers and wage earners and the effect of such associations upon the relations between employers and employees; into the extent and results of methods of collective bargaining; into any methods which have been tried in any state or in foreign countries for maintaining mutually satisfactory relations between employees and employers; into methods of avoiding or adjusting labor disputes through peaceable and conciliatory mediation and negotiations; and into the scope, methods, and resources of existing bureaus of labor and possible ways of increasing their efficiency and usefulness.

(2) The director shall seek to discover the underlying causes of dissatisfaction in the industrial situation, take all necessary means and methods within the powers of such director as provided by law, to alleviate the same, and report such remedial legislation as in the judgment of the director may be advisable, with his recommendations thereon. Such report shall accompany the annual report required in section 8-1-107 (2) (j).

**Source:** L. 15: p. 576, § 26. C.L. § 4350. CSA: C. 97, § 28. CRS 53: § 80-1-26. C.R.S. 1963: § 80-1-26. L. 64: p. 147, § 81. L. 69: p. 582, § 40.

#### ANNOTATION

**Annotator's note.** The case included in the annotations to this section which refers to the industrial commission was decided prior to the 1969 amendment to this section vesting in the director of the division of labor powers and duties previously exercised by the industrial commission.

**This section contains broad investiture of power in the industrial commission** of its own volition to inquire into the general conditions of labor in the principal industries of the state. *Indus. Comm'n v. People ex rel. Metz*, 86 Colo. 377, 281 P. 742 (1929).

**But powers are limited and decisions may be set aside.** While the commission is invested with broad and comprehensive powers in the investigation, adjustment, and settlement of la-

bor disputes, its powers are limited and its decisions may be set aside by the courts where there is a manifest abuse of discretion, as where the commission has acted in excess of its powers or where its findings are not supported by the evidence. *Indus. Comm'n v. People ex rel. Metz*, 86 Colo. 377, 281 P. 742 (1929).

**The director may inquire into the existing relations between school districts and their teachers,** may collect any information regarding such relationship, and may develop policies aimed at avoiding or adjusting disputes arising within that relationship in order to further the purposes of the Industrial Relations Act. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**8-1-123. Arbitration.** The director shall do all in his power to promote the voluntary arbitration, mediation, and conciliation of disputes arising under an existing written agreement between employers and employees and to avoid the necessity of resorting to strikes, lockouts, boycotts, blacklists, discriminations, and legal proceedings in matters of employment. Arbitration undertaken pursuant to this section shall employ the procedures provided in part 2 of article 22 of title 13, C.R.S.

**Source:** L. 15: p. 577, § 27. C.L. § 4351. CSA: C. 97, § 29. CRS 53: § 80-1-27. C.R.S. 1963: § 80-1-27. L. 69: p. 582, § 41. L. 75: Entire section R&RE, p. 578, § 2, effective July 14.

**Cross references:** For the illegality of blacklists and boycotts, see §§ 8-2-110 and 8-2-112; for the nonapplicability of this section to the "Labor Peace Act", see § 8-3-123.

### ANNOTATION

**Annotator's note.** The case included in the annotations to this section which refers to the industrial commission was decided prior to the 1969 amendment to this section vesting in the director of the division of labor powers and duties previously exercised by the industrial commission.

This section contains broad investiture of power in the industrial commission to promote voluntary arbitration and conciliation of disputes to avoid the necessity of resorting to strikes and lockouts. *Indus. Comm'n v. People ex rel. Metz*, 86 Colo. 377, 281 P. 742 (1929).

Undoubtedly the chief purpose of the exercise of the director's jurisdiction under the

**Industrial Relations Act** is to avoid the necessity of resorting to strikes, lockouts, boycotts, blacklists, discriminations, and legal proceedings in matters of employment. *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237 (Colo. 1992).

**Disputes over written contracts, or the lack thereof, between school districts as employers and teachers as employees may lead to legal proceedings** which the director may seek to avoid by voluntary arbitration and mediation or conciliation. *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237 (Colo. 1992).

### 8-1-124. Witnesses - rules of evidence. (Repealed)

**Source:** L. 15: p. 577, § 28. C.L. § 4352. CSA: C. 97, § 30. CRS 53: § 80-1-28. C.R.S. 1963: § 80-1-128. L. 69: p. 583, § 42. L. 75: Entire section repealed, p. 578, § 3, effective July 14.

**8-1-125. Disputes - jurisdiction - request for intervention - penalty.** (1) The director may exercise jurisdiction over any dispute between employer and employee affecting conditions of employment, or with respect to wages or hours, only when the employer and the employee request such intervention or when the dispute, as determined by the executive director, affects the public interest, and such jurisdiction shall continue until after the final hearing of such dispute and the entry of the final award therein or until said director shall enter an order disposing of or terminating such jurisdiction. The relation of the employer and employee shall continue uninterrupted by the dispute or anything arising out of the dispute until the final determination thereof by said director; and neither the employer nor any employee affected by any such dispute shall alter the conditions of employment with respect to wages or hours or any other condition of said employment; neither shall they, on account of such dispute, do or be concerned in doing directly or indirectly anything in the nature of a lockout or strike or suspension or discontinuance of work or employment.

(2) A request for intervention shall be submitted to the director by both the employer and the employee and shall set forth the facts, issues, or demands involved in the controversy or dispute, and each party to such dispute shall furnish the director such information within the time and as may be requested by the director.

(3) If either party uses this or any other provision of articles 1 to 18 of this title and part 3 of article 34 of title 24, C.R.S., for the purpose of unjustly maintaining a given condition of affairs through delay, such party is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars.

(4) The director shall proceed with reasonable diligence in hearing all disputes and shall render a final award or decision therein without unnecessary delay.

**Source:** L. 15: p. 578, § 29. L. 21: p. 838, § 10. C.L. § 4353. CSA: C. 97, § 31. CRS 53: § 80-1-29. C.R.S. 1963: § 80-1-29. L. 69: p. 583, § 43. L. 77: (7) amended,



p. 414, § 2, effective June 1. **L. 83:** (7) amended, p. 700, § 3, effective June 10. **L. 86:** (7) amended, p. 466, § 13, effective July 1. **L. 90:** Entire section R&RE, p. 461, § 1, effective May 24.

### ANNOTATION

**Law reviews.** For article, "Some Legal Aspects of the Colorado Coal Strike", see 4 Den. B. Ass'n Rec. 22 (Dec. 1927). For article, "The Regional Transportation District Strike and the Colorado Labor Peace Act: A Study in Public Sector Collective Bargaining", see 54 U. Colo. L. Rev. 203 (1983).

**The Industrial Relations Act guarantees that there is no absolute right to strike by public employees in Colorado** and that once the director takes jurisdiction of a labor dispute, the status quo shall be maintained since so long as the director has jurisdiction of a labor dispute, several tiers of substantive and procedural conditions on the right to strike, which determine when public employees may exercise their right to strike, preclude the dangers otherwise inherent to an absolute right to strike. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992).

**"Conditions of employment" does not include matters such as union representation and picketing.** *People ex rel. Shaffer v. Teamsters Local 961*, 175 Colo. 187, 486 P.2d 10 (1971).

**Rather "conditions of employment" refers to conditions existing at "places of employ-**

ment" which directly affect the physical safety, health, and welfare of employees. *People ex rel. Shaffer v. Teamsters Local 961*, 175 Colo. 187, 486 P.2d 10 (1971).

**Director of division of labor and employment had jurisdiction to continue teachers' employment conditions during labor dispute.** The teachers selected their association as their representative and the relationship between the association and the school district is essentially that of employer and employee. *Denver Classroom Teachers Ass'n v. Sch. Dist. No. 1*, 921 P.2d 70 (Colo. App. 1996).

**School district's duty to deduct teachers association dues was a "condition of employment"** and was within the director's order that the school district and teachers association not alter conditions of employment during labor dispute. *Denver Classroom Teachers Ass'n v. Sch. Dist. No. 1*, 921 P.2d 70 (Colo. App. 1996).

**Strike unlawful where workers do not give notice.** *Indus. Comm'n v. People ex rel. Metz*, 86 Colo. 377, 281 P. 742 (1929).

**8-1-126. Lockouts and strikes unlawful - when.** (1) It is unlawful for any employee in the state personnel system or for any labor organization, through formal action or through its agents, to incite, encourage, aid, or participate in a strike, stoppage of work, slowdown, or interruption of operations by employees in the state personnel system.

(2) It is unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during an investigation, hearing, or arbitration of such dispute by the director, or the board, under the provisions of this article. Nothing in this article shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike, or to prohibit the suspension or discontinuance of any industry or of the working of any person therein, which industry is not affected with a public interest. Nothing in this article shall be held to restrain any employer from declaring a lockout, or any employee, except an employee who is in the state personnel system, from going on strike in respect to any dispute after the same has been duly investigated, heard, or arbitrated, under the provisions of this article.

**Source:** **L. 15:** p. 578, § 30. **L. 21:** p. 840, § 11. **C.L.** § 4354. **L. 23:** p. 721, § 2. **CSA:** C. 97, § 32. **L. 41:** p. 531, § 1. **CRS 53:** § 80-1-30. **C.R.S. 1963:** § 80-1-30. **L. 69:** p. 584, § 44. **L. 72:** p. 605, § 107. **L. 2008:** Entire section amended, p. 292, § 2, effective April 3.

### ANNOTATION

**Law reviews.** For article, "Public Employee Strikes in Colorado: The Supreme Court Adopts a New Rule", see 22 Colo. Law. 1 (1993).

**This section is constitutional** only because it excludes from its operation all business "not affected with a public interest" as that phrase is

usually interpreted and applied. *People v. UMW*, Dist. 15, 70 Colo. 269, 201 P. 54 (1921); *People ex rel. Indus. Comm'n v. Aladdin Theater Corp.*, 96 Colo. 527, 44 P.2d 1022 (1935).

**And one reason for holding a business to be affected with a public interest is that it is a practical monopoly.** *People v. UMW*, Dist. 15, 70 Colo. 269, 201 P. 54 (1921).

**Coal mining is affected with a public interest.** *People v. UMW*, Dist. 15, 70 Colo. 269, 201 P. 54 (1921), distinguishing *In re Morgan*, 26 Colo. 415, 58 P. 1071 (1899).

**This section provides for the situation where negotiations between school districts and their teachers over salaries and services may reach an impasse and a strike may appear to the teachers as the only remaining alternative, by forbidding a strike while the director maintains jurisdiction but permitting a strike after that jurisdiction terminates should the employees deem a strike to be in their best interests.** *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237 (Colo. 1992).

**This section provides that nothing in the Industrial Relations Act shall be construed to restrain any employee from striking in any dispute over which the director's jurisdiction is concluded,** and when the director terminated jurisdiction, the teachers were free to exercise their right to strike or not according to their view

of their best interests. *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237 (Colo. 1992).

**While the theater business is not included** in the phrase "affected with a public interest" it is not so easy to say what is included. Many attempts to do so have been made by the courts, but the theater business cannot pass the test of any. Perhaps the best discussion of the subject is to be found in *Wolff Packing Co. v. Court of Indus. Relations* (262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103 (1923)). Such being the correct interpretation of the phrase in question, the entire controversy is disposed of by *Tyson & Bro. v. Banton* (273 U.S. 418, 47 S. Ct. 426, 71 L. Ed. 718 (1927)), holding the theater business not affected with a public interest. *People ex rel. Indus. Comm'n v. Aladdin Theater Corp.*, 96 Colo. 527, 44 P.2d 1022 (1935).

**A charge in the language of the statute is sufficient.** *People v. Fontuccio*, 73 Colo. 288, 215 P. 145 (1923).

**This section was held not pertinent** to determining whether employees were qualified for unemployment compensation benefits when their unemployment was due to a labor dispute where the director of labor was enjoined by a federal court from taking any further action in the proceeding. *Kania v. Shaffer*, 31 Colo. App. 538, 506 P.2d 384 (1972).

### **8-1-127. When findings or awards are binding. (Repealed)**

**Source:** L. 15: p. 579, § 31. L. 21: p. 840, § 12. C.L. § 4355. CSA: C. 97, § 33. CRS 53: § 80-1-31. C.R.S. 1963: § 80-1-31. L. 69: p. 584, § 45. L. 72: p. 605, § 108. L. 75: Entire section repealed, p. 578, § 3, effective July 14.

**8-1-128. Petition - writ - dissolution.** The director of the division of labor, as petitioner, may file in the district court of the city and county of Denver, or of any county in which the place of employment or any part thereof is situated, a verified petition against any employers, or employees, or both, as respondents, and setting forth any violation or threatened or attempted violation of any provisions of section 8-1-125 or 8-1-126, and, thereupon, without bond and without notice, such district court shall issue its mandatory writ enjoining the alleged violations, or attempted or threatened violations of this article, and ordering and requiring such respondents to maintain all the conditions of employment in status quo and without change until after the dispute or controversy between said employers and employees has been investigated and heard by said director and the final findings, decision, order, or award of said director made and entered therein. Any respondent may move such court to dissolve such mandatory writ as to such respondent, and, upon at least five days' previous notice to the director, such motion shall be set down for hearing, but such mandatory writ shall not be dissolved without proof of full compliance by such respondent with all the provisions of this article and orders of the director and that the continuance in effect of such mandatory writ is causing or will cause such respondent great and irreparable injury. The court may require such security of said respondent as the court determines adequate to enforce obedience to the provisions of this article on the part of such respondent before such mandatory writ shall be dissolved.

**Source:** L. 15: p. 579, § 32. L. 21: p. 841, § 13. C.L. § 4356. CSA: C. 97, § 34. L. 41: p. 532, § 2. CRS 53: § 80-1-32. C.R.S. 1963: § 80-1-32. L. 69: p. 584, § 46. L. 72: p. 605, § 109.



## ANNOTATION

**“Conditions of employment” does not include matters such as union representation and picketing.** People ex rel. Shaffer v. Teamsters Local 961, 175 Colo. 187, 486 P.2d 10 (1971).

Rather, “conditions of employment” refers to conditions existing at “places of employment” which directly affect the physical safety,

health, and welfare of employees. People ex rel. Shaffer v. Teamsters Local 961, 175 Colo. 187, 486 P.2d 10 (1971).

**The director of the division of labor has no authority to enjoin peaceful picketing under this section** while unfair labor practice charges are pending. People ex rel. Shaffer v. Teamsters Local 961, 175 Colo. 187, 486 P.2d 10 (1971).

**8-1-129. Strikes and lockouts - penalties.** (1) Any employer declaring or causing a lockout contrary to the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for a term of not more than six months, or by both such fine and imprisonment. Each day or part of a day that such lockout exists shall constitute a separate offense under this section.

(2) Any employee who goes on strike contrary to the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than fifty dollars, or by imprisonment in the county jail for a term of not more than six months, or by both such fine and imprisonment. Each day or part of a day that the employee is on strike shall constitute a separate offense under this section.

(3) Any person who incites, encourages, or aids in any manner any employer to declare or continue a lockout, or any employee to go or continue on strike contrary to the provisions of this article, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for a term of not more than six months, or by both such fine and imprisonment.

**Source:** L. 15: p. 580, § 33. L. 21: p. 842, § 14. C.L. § 4357. CSA: C. 97, § 35. CRS 53: § 80-1-33. C.R.S. 1963: § 80-1-33. L. 72: p. 606, § 110.

## ANNOTATION

**This section is not in violation of § 10 of art. II, Colo. Const.,** concerning freedom of speech. People v. UMW, Dist. 15, 70 Colo. 269, 201 P. 54 (1921).

**Information charging violation of this section in language of statute held sufficient.** People v. Fontuccio, 73 Colo. 288, 215 P. 145 (1923).

**8-1-130. Judicial review.** The director has full power to hear and determine all questions within his jurisdiction, and his findings, award, and order issued thereon shall be final agency action. Any person affected by any finding, order, or award of the director may seek judicial review as provided in section 24-4-106, C.R.S.

**Source:** L. 15: p. 580, § 34. C.L. § 4358. CSA: C. 97, § 36. CRS 53: § 80-1-34. C.R.S. 1963: § 80-1-34. L. 69: p. 585, § 47. L. 72: p. 606, § 111. L. 86: Entire section amended, p. 467, § 14, effective July 1.

## ANNOTATION

**Annotator’s note.** The case included in the annotations to this section which refers to the industrial commission was decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under the workmen’s compensation act to the division of labor.

**Commission not stripped of authority to hold hearings and make findings.** The general assembly did not intend to strip the commission of its general authority to hold hearings and make findings of fact, although such language was deleted from § 8-53-106 (2) by amendment in 1973. There are numerous other references within the workmen’s compensation act to the

commission's general authority to hold hearings and make factual findings. Harrison W. Corp. v. Hicks' Claimants, 185 Colo. 142, 522 P.2d 722 (1974).

**8-1-131. Review - notice - evidence - order. (Repealed)**

**Source:** L. 15: p. 580, § 34. C.L. § 4358. CSA: C. 97, § 36. CRS 53: § 80-1-34. C.R.S. 1963: § 80-1-34. L. 69: p. 585, § 47. L. 72: p. 606, § 111. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

**8-1-132. Final findings and awards - interlocutory orders - modification. (Repealed)**

**Source:** L. 15: p. 581, § 36. C.L. § 4360. CSA: C. 97, § 37. CRS 53: § 80-1-36. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

**8-1-132.5. Fact-finding by commission - workmen's compensation. (Repealed)**

**Source:** L. 81: Entire section added, p. 476, § 1, effective May 26. L. 86: Entire section repealed, p. 1223, § 40, effective July 1.

**8-1-133. Court to modify or vacate - venue. (Repealed)**

**Source:** L. 15: p. 581, § 37. C.L. § 4361. CSA: C. 97, § 39. CRS 53: § 80-1-137. C.R.S. 1963: § 80-1-37. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

**8-1-134. Review - complaint - answer - hearing. (Repealed)**

**Source:** L. 15: p. 582, § 38. C.L. § 4362. CSA: C. 97, § 40. CRS 53: § 80-1-38. C.R.S. 1963: § 80-1-38. L. 69: p. 586, § 50. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

**8-1-135. Cause referred back to director and commission - procedure. (Repealed)**

**Source:** L. 15: p. 582, § 39. C.L. § 4363. CSA: C. 97, § 41. CRS 53: § 80-1-39. C.R.S. 1963: § 80-1-39. L. 69: p. 587, § 51. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

**8-1-136. Setting aside order of director or commission. (Repealed)**

**Source:** L. 15: p. 583, § 40. C.L. § 4364. CSA: C. 97, § 42. CRS 53: § 80-1-40. C.R.S. 1963: § 80-1-40. L. 69: p. 587, § 52. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

**8-1-137. Appellate review. (Repealed)**

**Source:** L. 15: p. 584, § 41. C.L. § 4365. CSA: C. 97, § 43. CRS 53: § 80-1-41. C.R.S. 1963: § 80-1-41. L. 69: p. 588, § 53. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

**8-1-138. Fees - costs - counsel for director or commission. (Repealed)**

**Source:** L. 15: p. 584, § 42. C.L. § 4366. CSA: C. 97, § 44. CRS 53: § 80-1-42. C.R.S. 1963: § 80-1-42. L. 69: p. 588, § 54. L. 72: p. 607, § 113. L. 86: Entire section repealed, p. 502, § 125, effective July 1.



**8-1-139. Failure of witness to appear or testify - penalty.** (1) Any person who fails, refuses, or neglects to appear and testify, or to produce books, papers, and records as required by the subpoena duly served upon him, or as ordered by the director, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail for not more than thirty days for each day or part of day that the person is in default.

(2) The district court of the county wherein such person resides or of the city and county of Denver, or of the county wherein said person has been ordered to appear and testify or to produce such books, papers, and records, upon application of the director or his agent, may issue an order compelling the attendance and testimony of witnesses and the production of books, papers, and records before such director or his agent.

**Source:** L. 15: p. 585, § 43. L. 21: p. 843, § 15. C.L. § 4367. CSA: C. 97, § 45. CRS 53: § 80-1-43. C.R.S. 1963: § 80-1-43. L. 69: p. 588, § 55. L. 86: Entire section amended, p. 467, § 15, effective July 1.

**8-1-140. Violation - penalty.** (1) If an employer, employee, or any other person violates any provision of this article, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined for which no penalty has been specifically provided, such employer, employee, or any other person is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, or by imprisonment in the county jail for not longer than sixty days, or by both such fine and imprisonment for each such offense.

(2) If any employer, employee, or any other person fails, refuses, or neglects to perform any duty lawfully enjoined within the time prescribed by the director or fails, neglects, or refuses to obey any lawful order made by the director or any judgment or decree made by any court as provided in this article, for each such violation, such employer, employee, or any other person shall pay a penalty of not less than one hundred dollars for each day such violation, failure, neglect, or refusal continues.

(3) In the case of a corporation, the violation of any of the provisions of this article, including any violation fixed as a misdemeanor or other crime, is considered a violation of the provisions of this article by all officers, agents, and representatives of said corporation aiding, abetting, advising, encouraging, participating, inciting, or acquiescing in such violation, and they are individually guilty of such violation and subject to the fines, penalties, and punishments provided in this article.

**Source:** L. 15: p. 585, § 44. L. 21: p. 843, § 16. C.L. § 4368. CSA: C. 97, § 46. CRS 53: § 80-1-44. C.R.S. 1963: § 80-1-44. L. 69: p. 589, § 56. L. 72: p. 607, § 114. L. 86: (2) amended, p. 467, § 16, effective July 1.

**8-1-141. Each day separate offense.** Every day during which any employer or officer or agent thereof or any employee fails to comply with any lawful order of the director or to perform any duty imposed by this article constitutes a separate and distinct violation thereof.

**Source:** L. 15: p. 585, § 45. C.L. § 4369. CSA: C. 97, § 47. CRS 53: § 80-1-45. C.R.S. 1963: § 80-1-45. L. 69: p. 589, § 57. L. 72: p. 608, § 115. L. 86: Entire section amended, p. 467, § 17, effective July 1.

**8-1-142. Collection of penalties.** All penalties provided for in this article shall be collected in a civil action brought against the employer or employee in the name of the director. Any fine provided in this article is considered a penalty and recoverable in a civil action as provided in this section unless the violation of this article, for the punishment of which said fine is provided, is designated as a misdemeanor or other crime.

**Source:** L. 15: p. 585, § 46. L. 21: p. 844, § 17. C.L. § 4370. CSA: C. 97, § 48. CRS 53: § 80-1-46. C.R.S. 1963: § 80-1-46. L. 69: p. 589, § 58. L. 72: p. 608, § 116.

**8-1-143. Costs - counsel for director - attorney general and district attorney to enforce.** (1) In proceedings to review any finding, order, or award, costs as between the parties shall be allowed in the discretion of the court, but no costs may be taxed against the director or the division.

(2) In any action for the review of any finding, order, or award and upon appellate review thereof, it is the duty of the district attorney of the county wherein said action is pending, or the attorney general if requested by the director, to appear on behalf of the division, whether any other party defendants should have appeared or been represented in the action or not. Upon request of the director, the attorney general or the district attorney of any district or county shall institute and prosecute the necessary proceedings for the enforcement of any of the provisions of this article, or for the recovery of any money due the division, or any penalty provided for in this article, and shall defend in like manner all suits, actions, or proceedings brought against the director. No district attorney or any assistant or deputy district attorney, nor the attorney general or deputy or assistant attorney general within this state, shall appear in any proceedings, hearing, investigation, arbitration, award, or compensation matter, except as attorney for and on behalf of said director and employees of the division.

**Source:** L. 15: p. 586, § 47. L. 21: p. 845, § 18. C.L. § 4371. CSA: C. 97, § 49. CRS 53: § 80-1-47. C.R.S. 1963: § 80-1-47. L. 69: p. 589, § 59. L. 72: p. 608, § 117. L. 86: Entire section R&RE, p. 467, § 18, effective July 1.

#### ANNOTATION

**Immediate threat of enforcement under this section is not constitutionally required for declaratory judgment.** Resident Participa-

tion, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

**8-1-144. Penalty for false statements.** If, for the purpose of obtaining any order, benefit, or award under the provisions of this article, either for himself or herself or for any other person, anyone willfully makes a false statement or representation, he or she commits a class 5 felony, as defined in section 18-1.3-401, C.R.S.

**Source:** L. 15: p. 586, § 48. C.L. § 4372. CSA: C. 97, § 50. CRS 53: § 80-1-48. C.R.S. 1963: § 80-1-48. L. 72: pp. 561, 608, §§ 26, 118. L. 89: Entire section amended, p. 821, § 4, effective July 1. L. 2002: Entire section amended, p. 1466, § 16, effective October 1.

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**8-1-145. Authority of department of public health and environment not affected.** Nothing in this article shall be construed to affect the authority of the department of public health and environment relative to the public health.

**Source:** L. 15: p. 586, § 50. C.L. § 4373. CSA: C. 97, § 51. CRS 53: § 80-1-49. C.R.S. 1963: § 80-1-49. L. 69: p. 589, § 60. L. 72: p. 609, § 119. L. 94: Entire section amended, p. 2721, § 311, effective July 1.

#### **8-1-146. Effect of transfer of powers, duties, and functions.**

(1) Repealed.

(2) The division of labor, the division of employment and training, the division of unemployment insurance, the state board of pharmacy, and the industrial claim appeals panel in the industrial claim appeals office, which perform any of the powers, duties, and functions performed by the industrial commission prior to its abolishment on July 1, 1986, are the successors in every way with respect to those powers, duties, and functions, except



as otherwise provided in this article or by law. Every act performed in the exercise of those powers, duties, and functions has the same force and effect as if performed by the commission prior to July 1, 1986. Whenever the commission is referred to or designated by any law, contract, insurance policy, bond, or other document, the reference or designation applies to the division of labor, the division of employment and training, the division of unemployment insurance, the state board of pharmacy, or the industrial claim appeals panel in the industrial claim appeals office, as the case may be.

**Source:** L. 69: p. 662, § 252. C.R.S. 1963: § 80-1-50. L. 86: Entire section amended, p. 468, § 19, effective July 1; entire section amended, p. 531, § 26, effective July 1, 1987. L. 91: (1) amended, p. 1907, § 5, effective June 1. L. 2002: (1) repealed, p. 1880, § 22, effective July 1. L. 2012: (2) amended, (HB 12-1120), ch. 27, p. 104, § 9, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**8-1-147. Actions, suits, or proceedings not to abate by reorganization - maintenance by or against successors. (Repealed)**

**Source:** L. 69: p. 662, § 253. C.R.S. 1963: § 80-1-51. L. 86: Entire section amended, p. 469, § 20, effective July 1; entire section amended, p. 531, § 27, effective July 1, 1987. L. 91: (1) amended, p. 1908, § 6, effective June 1. L. 2002: (1) amended, p. 1880, § 23, effective July 1. L. 2012: Entire section repealed, (HB 12-1120), ch. 27, p. 104, § 10, effective June 1.

**Editor's note:** The effective date for the repeal of this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**8-1-148. Rules, regulations, rates, and orders adopted prior to article - abolishment of commission - continued.** (1) All rules, regulations, rates, orders, and awards of the commission lawfully adopted prior to July 1, 1969, shall continue to be effective until revised, amended, repealed, or nullified pursuant to law.

(2) All rules, regulations, rates, orders, and awards of the commission lawfully adopted prior to July 1, 1986, shall continue to be effective until revised, amended, repealed, or nullified pursuant to law.

**Source:** L. 69: p. 662, § 254. C.R.S. 1963: § 80-1-52. L. 86: Entire section amended, p. 469, § 21, effective July 1.

**8-1-149. Transfer of officers, employees, and property. (Repealed)**

**Source:** L. 69: p. 662, § 255. C.R.S. 1963: § 80-1-53. L. 86: Entire section amended, p. 469, § 22, effective July 1; entire section amended, p. 531, § 28, effective July 1, 1987. L. 91: (1) amended, p. 1908, § 7, effective June 1. L. 2002: (1) amended, p. 1880, § 24, effective July 1. L. 2012: Entire section repealed, (HB 12-1120), ch. 27, p. 104, § 10, effective June 1.

**Editor's note:** The effective date for the repeal of this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**8-1-150. Licensing functions subject to periodic review. (Repealed)**

**Source:** **L. 79:** Entire section added, p. 1609, § 1, effective June 7. **L. 83:** Entire section repealed, p. 701, § 5, effective June 10.

**8-1-151. Public safety inspection fund created.** There is hereby created in the state treasury a fund, to be known as the public safety inspection fund, which shall consist of moneys credited thereto pursuant to sections 8-20-104, 8-20-1002, and 9-7-108.5, C.R.S. All moneys in the public safety inspection fund shall be subject to annual appropriation by the general assembly for the public safety inspection activities of the division of oil and public safety. The moneys in the public safety inspection fund shall not be credited or transferred to the general fund or any other fund of the state.

**Source:** **L. 85:** Entire section added, p. 337, § 1, effective July 1. **L. 86:** Entire section amended, p. 470, § 23, effective July 1. **L. 2001:** Entire section amended, p. 1140, § 68, effective June 5. **L. 2008:** Entire section amended, p. 984, § 1, effective May 21; entire section amended, p. 1020, § 1, effective May 21. **L. 2009:** Entire section amended, (HB 09-1151), ch. 230, p. 1060, § 13, effective January 1, 2010.

**Editor's note:** Amendments to this section by Senate Bill 08-051 and House Bill 08-1103 were harmonized.

**8-1-152. Applications for licenses - authority to suspend licenses - rules.** (1) Every application by an individual for a license issued by the department or any authorized agent of the department shall require the applicant's name, address, and social security number.

(2) The department or any authorized agent of the department shall deny, suspend, or revoke any license pursuant to the provisions of section 26-13-126, C.R.S., and any rules promulgated in furtherance thereof, if the department or agent thereof receives a notice to deny, suspend, or revoke from the state child support enforcement agency because the licensee or applicant is out of compliance with a court or administrative order for current child support, child support debt, retroactive child support, child support arrearages, or child support when combined with maintenance or because the licensee or applicant has failed to comply with a properly issued subpoena or warrant relating to a paternity or child support proceeding. Any such denial, suspension, or revocation shall be in accordance with the procedures specified by rule of the department, rules promulgated by the state board of human services, and any memorandum of understanding entered into between the department or an authorized agent thereof and the state child support enforcement agency for the implementation of this section and section 26-13-126, C.R.S.

(3) (a) The department shall enter into a memorandum of understanding with the state child support enforcement agency, which memorandum shall identify the relative responsibilities of the department and the state child support enforcement agency in the department of human services with respect to the implementation of this section and section 26-13-126, C.R.S.

(b) The appropriate rule-making body of the department is authorized to promulgate rules to implement the provisions of this section.

(4) For purposes of this section, "license" means any recognition, authority, or permission that the department or any authorized agent of the department is authorized by law to issue for an individual to practice a profession or occupation or for an individual to participate in any recreational activity. "License" may include, but is not necessarily limited to, any license, certificate, certification, letter of authorization, or registration issued for an individual to practice a profession or occupation or for an individual to participate in any recreational activity.

**Source:** **L. 97:** Entire section added, p. 1262, § 2, effective July 1.

**Cross references:** For the legislative declaration contained in the 1997 act enacting this section, see section 1 of chapter 236, Session Laws of Colorado 1997.



## Labor Relations

### ARTICLE 2

#### Labor Relations, Generally

**Cross references:** For employment practices generally, see part 4 of article 34 of title 24.

**Law reviews.** For article, "Labor Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 61 Den. L.J. 343 (1984); for article, "Labor Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 62 Den. U. L. Rev. 253 (1985); for article, "Federal Preemption Under the NLRA: A Rule in Search of Reason", see 62 Den. U.L. Rev. 531 (1985); for article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 63 Den. U. L. Rev. 395 (1986); for article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 64 Den. U. L. Rev. 271 (1987); for article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 65 Den. U. L. Rev. 565 (1988); for article, "Retaliatory Discharge and the Economics of Deterrence", see 60 U. Colo. L. Rev. 91 (1989); for comment, "Continental Air Lines v. Keenan: Employee Handbooks as a Modification to Employment at Will", see 60 U. Colo. L. Rev. 169 (1989); for a discussion of recent Tenth Circuit decisions dealing with questions of labor law, see 67 Den. U. L. Rev. 751 (1990).

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8-2-111.5.	Certain employment references - exception to blacklisting prohibition.	8-2-121.	Document fraud - penalties. (Repealed)
8-2-111.6.	Health care employers - immunity from civil liability - requirements - exception to blacklisting prohibition - legislative declaration.	8-2-122.	Employment verification requirements - audits - fine for fraudulent documents - cash fund created - definitions.
8-2-111.7.	Employees working with persons with developmental disabilities - immunity from civil liability - requirements - exception to blacklisting prohibition - legislative declaration - definitions.	8-2-123.	Health care workers - retaliation prohibited - definitions.
		8-2-124.	Electronic verification program - availability - notice to employers - definitions.
8-2-112.	Unlawful to publish notice of boycott.	8-2-125.	Identification of workers engaged in off-site work - permissible forms of identification - exceptions - definitions.

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8-2-201.	Damages - fellow servant rule abolished - limitation on admission of criminal history.	8-2-204.	Limitation of actions - limit of damages.
		8-2-205.	Assumption of risk abolished.

PART 1

GENERAL PROVISIONS

**8-2-101. Combination of employees for peaceable objects lawful.** It is not unlawful for any two or more persons to unite, combine, or agree in any manner, to advise or encourage, by peaceable means, any persons to enter into any combination in relation to entering into or remaining in the employment of any person or corporation, or in relation to the amount of wages or compensation to be paid for labor, or for the purpose of regulating the hours of labor, or for the procuring of fair and just treatment from employers, or for the purpose of aiding and protecting their welfare and interests in any other manner not in violation of the constitution of this state or the laws made in pursuance thereof. This section shall not be so construed as to permit two or more persons, by threats of either bodily or financial injury, or by any display of force, to prevent or intimidate any other person from continuing in such employment as he may see fit, or to boycott or intimidate any employer of labor.

**Source:** L. 1889: p. 92, § 1. R.S. 08: § 3924. C.L. § 4150. CSA: C. 97, § 64. CRS 53: § 80-4-1. C.R.S. 1963: § 80-11-1.

**Cross references:** For unfair labor practices, see § 8-3-108.

ANNOTATION

This section limits combinations of employees to lawful purposes, some of which are specifically mentioned, and does not permit an unlawful combination in restraint of trade. *Denver Jobbers' Ass'n v. People ex rel. Dickson*, 21 Colo. App. 326, 122 P. 404 (1912).

In certain circumstances Colorado labor law protections for employees held pre-empted by federal law. *Thayer v. McDonald*, 781 P.2d 190 (Colo. App. 1989).

**8-2-102. Coercion of employees unlawful.** It is unlawful for any individual, company, or corporation or any member of any firm, or an agent, officer, or employee of any company or corporation to prevent employees from forming, joining, or belonging to any lawful labor organization, union, society, or political party, or to coerce or attempt to coerce employees by discharging or threatening to discharge them from their employ or the employ of any firm, company, or corporation because of their connection with such lawful labor organization, union, society, or political party.

**Source:** L. 1897: p. 156, § 1. R.S. 08: § 3925. C.L. § 4151. CSA: C. 97, § 65. CRS 53: § 80-4-2. C.R.S. 1963: § 80-11-2.

ANNOTATION

**Law reviews.** For article, "Punitive Damages in Wrongful Discharge Cases", see 15 Colo. Law. 658 (1986).  
**Section is plain as to limit in its application**

**to particular classes of persons.** *Resident Participation, Inc. v. Love*, 322 F. Supp. 1100 (D. Colo. 1971).  
**Where employment offers were made to**



**commence employment on a certain date and individuals failed to report to work on that date due to union strike, such individuals are**

**not employees protected by this section.** DeJean v. United Airlines, Inc., 839 P.2d 1153 (Colo. 1992).

**8-2-103. Penalty for coercing employees.** Any person or any member of any firm or an agent, officer, or employee of any such company or corporation, violating the provisions of section 8-2-102 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than six months nor more than one year, or by both such fine and imprisonment.

**Source:** L. 1897: p. 156, § 2. R.S. 08: § 3926. C.L. § 4152. CSA: C. 97, § 66. CRS 53: § 80-4-3. C.R.S. 1963: § 80-11-3.

**8-2-104. Obtaining workmen by misrepresentation unlawful.** It is unlawful for any person, company, corporation, society, association, or organization of any kind doing business in this state, by itself or its agents or attorneys, to induce, influence, persuade, or engage workmen to change from one place of employment to another in this state, or to bring workmen of any class or calling into this state to work in any of the departments of labor in this state, through or by means of false or deceptive representations, false advertising, or false pretenses concerning the kind and character of the work to be done, or amount and character of the compensation to be paid for such work, or the sanitary or other conditions of the employment, or as to the existence or nonexistence of a strike or lockout pending between employer and employees, or failure to state in any advertisement, proposal, or contract for the employment that there is a strike, lockout, or other labor trouble at the place of the proposed employment, when in fact such strike, lockout, or other labor trouble then actually exists at such place, and it is deemed false advertisement and misrepresentation for the purposes of sections 8-2-104 to 8-2-107.

**Source:** L. 11: p. 486, § 1. C.L. § 4156. CSA: C. 97, § 71. CRS 53: § 80-4-4. C.R.S. 1963: § 80-11-4.

#### ANNOTATION

**This section authorizes a claim for statutory fraud.** Pittman v. Larson Distrib. Co., 724 P.2d 1379 (Colo. App. 1986).

**No cause of action for misrepresentation where employee lived in Colorado before and after employment with defendant.** Vaske v. DuCharme, McMillan & Assocs., Inc., 757 F. Supp. 1158 (D. Colo. 1990).

**This section contemplates a strike, lockout, or other labor trouble that is in actual existence.** The fact that the potential for such a dispute exists because a new collective bargaining agreement was being negotiated, combined with fact that potential employer told potential employees they were to be hired after new labor agreement was negotiated, does not allow individuals to claim that they were hired under false pretenses concerning employer's relationship

with labor union. DeJean v. United Airlines, Inc., 839 P.2d 1153 (Colo. 1992).

**Because plaintiff was unemployed at the time defendant offered employment, plaintiff was not a "workman" pursuant to statute.** Schur v. Storage Tech. Corp., 878 P.2d 51 (Colo. App. 1994).

**The elements of statutory fraud are the same as those for common law fraud, and, when the statements relied upon were mere predictions of future events rather than commitments or facts and were neither false when made nor made with the intent not to perform, there was no cause of action.** Nelson v. Gas Research Inst., 121 P.3d 340 (Colo. App. 2005).

**Applied in** Roberts v. Conoco, Inc., 717 F. Supp. 724 (D. Colo. 1989).

**8-2-105. Penalty.** Any person, company, corporation, society, association, or organization of any kind doing business in this state, as well as its agents, attorneys, servants, or associates, found guilty of violating section 8-2-104 or any part thereof, is guilty of a

misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than two thousand dollars or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, where the defendants are natural persons.

**Source:** L. 11: p. 487, § 2. C.L. § 4157. CSA: C. 97, § 72. CRS 53: § 80-4-5. C.R.S. 1963: § 80-11-5.

**8-2-106. Armed guards - when lawful.** Any person who hires, aids, abets, or assists in hiring, through agencies or otherwise, persons to guard with arms or deadly weapons of any kind other persons or property in this state, or any person who enters this state armed with deadly weapons of any kind for any such purpose, without a permit in writing from the governor of this state commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S. Nothing in sections 8-2-104 to 8-2-107 shall be construed to interfere with the right of any person, company, corporation, society, association, or organization to guard or protect its private property or private interests as is now provided by law. Sections 8-2-104 to 8-2-107 shall be construed only to apply in cases where workmen are brought into this state, or induced to go from one place to another in this state by any false pretenses, false advertising, or deceptive representations, or brought into this state under arms, or removed from one place to another in this state under arms.

**Source:** L. 11: p. 487, § 3. C.L. § 4158. CSA: C. 97, § 73. CRS 53: § 80-4-6. C.R.S. 1963: § 80-11-6. L. 77: Entire section amended, p. 869, § 19, effective July 1, 1979. L. 89: Entire section amended, p. 821, § 5, effective July 1. L. 2002: Entire section amended, p. 1466, § 17, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**8-2-107. Workman engaged by false representations to recover damages.** Any workman of this state, or any workman of another state who is influenced, induced, or persuaded to engage with any persons mentioned in section 8-2-104, through or by means of any of the things therein prohibited has a right of action for recovery of all damages that each such workman has sustained in consequence of the false or deceptive representations, false advertising, and false pretenses used to induce him to change his place of employment against any person, corporation, company, or association, directly or indirectly, causing such damages. In addition to all actual damages such workmen may have sustained, they shall be entitled to recover such reasonable attorney fees as the court shall fix, to be taxed as costs in any judgment recovered.

**Source:** L. 11: p. 487, § 4. C.L. § 4159. CSA: C. 97, § 74. CRS 53: § 80-4-7. C.R.S. 1963: § 80-11-7.

#### ANNOTATION

No false representation by defendant where, although plaintiff expressed an interest in "permanent" employment at time of interview, defendant never represented employment as "permanent" and handbook provided to plaintiff specifically stated that employment was subject to changing conditions. Further, fact that plaintiff moved to Col-

orado from out-of-state for the job and provided services commensurate with position, alone, without plaintiff providing any extra or special consideration for which a jury might find that plaintiff had purchased the job, inadequate for finding of promise of permanent employment. *Schur v. Storage Tech. Corp.*, 878 P.2d 51 (Colo. App. 1994).



**8-2-108. Unlawful for employer to prevent employees participating in politics.**

(1) It is unlawful for any corporation, company, partnership, association, individual, or any employer of labor, or for any agent thereof to make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics or from becoming a candidate for public office or being elected to and entering upon the duties of any public office. Any person violating any of the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than two thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

(2) Nothing in this section shall be construed to prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this section.

**Source:** L. 29: p. 429, §§ 1-3. CSA: C. 97, § 75. L. 37: p. 795, § 1. CRS 53: § 80-4-8. C.R.S. 1963: § 80-11-8.

**8-2-109. Rights of person charged with contempt.** (1) In all cases where a person is charged with indirect criminal contempt for violation of a protection order or injunction issued by a court, the accused shall enjoy:

(a) The right as to admission to bail that is accorded to persons accused of crime;

(b) The right to be notified of the accusation and a reasonable time to make a defense, if the alleged contempt is not committed in the immediate view or presence of the court;

(c) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt has been committed. This requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, order, or process of the court.

(d) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred otherwise than in open court. Upon the filing of any such demand, the judge shall proceed no further, but another judge shall be designated by the presiding judge of said court. The demand shall be filed prior to the hearing in the contempt proceeding.

**Source:** L. 33: p. 412, § 10. CSA: C. 97, § 85. CRS 53: § 80-4-9. C.R.S. 1963: § 80-11-9. L. 2003: IP(1) amended, p. 1009, § 9, effective July 1.

**8-2-110. Unlawful to publish blacklist.** No corporation, company, or individual shall blacklist, or publish, or cause to be blacklisted or published any employee, mechanic, or laborer discharged by such corporation, company, or individual, with the intent and for the purpose of preventing such employee, mechanic, or laborer from engaging in or securing similar or other employment from any other corporation, company, or individual.

**Source:** L. 1887: p. 58, § 1. R.S. 08: § 396. C.L. § 4160. CSA: C. 97, § 88. CRS 53: § 80-4-10. C.R.S. 1963: § 80-11-10.

**Cross references:** For arbitration to avoid necessity of blacklist, see § 8-1-123.

#### ANNOTATION

Section is plain as to limit in its application to particular classes of persons. Resident Par-

ticipation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

**8-2-111. Penalty for blacklisting.** If any officer or agent of any corporation, company, individual, or other person blacklists, publishes, or causes to be blacklisted or published any

employee, mechanic, or laborer discharged by such corporation, company, or individual with the intent and for the purpose of preventing such employee, mechanic, or laborer from engaging in or securing similar or other employment from any other corporation, company, or individual, or in any manner conspires or contrives by correspondence, or otherwise, to prevent such discharged employee from securing employment, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than two hundred fifty dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or by both such fine and imprisonment.

**Source:** L. 1887: p. 58, § 2. R.S. 08: § 397. C.L. § 4161. CSA: C. 97, § 89. CRS 53: § 80-4-11. C.R.S. 1963: § 80-11-11.

**8-2-111.5. Certain employment references - exception to blacklisting prohibition.**

(1) The general assembly hereby finds, determines, and declares that the intent and purpose of the provisions of sections 8-2-110 and 8-2-111 which prohibit the maintenance or use of blacklists were enacted to protect employees from retribution and harassment in the pursuit of their lawful activities. The general assembly further finds, determines, and declares that these prohibitions against blacklisting have in some instances been abused and have been used as a shield for persons responsible for thefts and other misappropriations of funds from financial institutions regulated under title 11, C.R.S., or under federal law in securing employment from other such financial institutions. These abuses of the antiblacklisting provisions have resulted in pattern and serial criminal activities at great expense and harm to such financial institutions and their customers.

(2) In response to a request by another bank, savings and loan association, credit card or travel and entertainment card company, industrial bank, trust company, credit union, or other state or federally chartered lending institution operating in Colorado, it shall not be unlawful nor a violation of the prohibitions against blacklisting specified in sections 8-2-110 and 8-2-111 for a bank, savings and loan association, credit card or travel and entertainment card company, industrial bank, trust company, credit union, or other state or federally chartered lending institution operating in Colorado, when acting in good faith, to disclose any information about any involvement in a theft, embezzlement, misappropriation, or other defalcation by an employee or former employee.

(3) No bank, savings and loan association, credit card or travel and entertainment card company, industrial bank, trust company, credit union, or other state or federally chartered lending institution operating in Colorado or any officer, director, or employee thereof shall be civilly liable for providing such an employment reference upon request if the information is provided in good faith.

(4) The provision of such employment information shall not constitute a violation of the prohibition against blacklisting as provided in sections 8-2-110 and 8-2-111, nor shall it constitute an unfair labor practice in violation of any provision of article 3 of this title.

(5) A bank, savings and loan association, credit card or travel and entertainment card company, industrial bank, trust company, credit union, or other state or federally chartered lending institution operating in Colorado or any officer, director, or employee thereof who discloses information under this section shall be presumed to be acting in good faith unless it is shown by a preponderance of the evidence that the institution, officer, director, or employee intentionally or recklessly disclosed false information about the employee or former employee.

**Source:** L. 89: Entire section added, p. 373, § 1, effective April 1, 1990. L. 97: (2), (3), and (5) amended, p. 352, § 1, effective April 19.

**8-2-111.6. Health care employers - immunity from civil liability - requirements - exception to blacklisting prohibition - legislative declaration.**

(1) The general assembly hereby finds, determines, and declares that the intent and purpose of sections 8-2-110 and 8-2-111, which prohibit the maintenance or use of blacklists, is to protect employees from retribution and harassment in the pursuit of their lawful activities. The general



assembly further finds, determines, and declares that, in the area of health care, these prohibitions against blacklisting have in some instances been abused and have been used as a shield by persons responsible for drug violations or for patient endangerment.

(2) In response to a request by a prospective or current employer of a health care worker, it is neither unlawful nor a violation of the prohibitions against blacklisting specified in sections 8-2-110 and 8-2-111 for an employer, when acting in good faith, to disclose information known about any involvement in drug diversion, drug tampering, patient abuse, violation of drug or alcohol policies of the employer, or crimes of violence as listed in section 18-1.3-406 (2) (a), C.R.S., by the health care worker who is an employee or a former employee of the responding employer.

(3) (a) (I) An employer who provides information in accordance with subsection (2) of this section is immune from civil liability for providing the information or for any consequences that result from the disclosure of the information unless the health care worker shows by a preponderance of the evidence that the information is false and the employer providing the information knew or reasonably should have known that the information is false.

(II) The provision of employment information in accordance with subsection (2) of this section does not constitute blacklisting under section 8-2-110 or 8-2-111, nor does it constitute an unfair labor practice in violation of article 3 of this title.

(b) This subsection (3) applies to any employee, agent, or other representative of the responding employer who is authorized to provide and provides information to an employer in accordance with subsection (2) of this section.

(4) An employer or any officer, director, employee, or representative of the employer who discloses information under this section shall be presumed to be acting in good faith unless it is shown by a preponderance of the evidence that the facility, officer, director, employee, or representative of the employer intentionally or recklessly disclosed false information about the employee or former employee.

(5) For the purposes of this section, "health care worker" means any person registered, certified, or licensed pursuant to articles 29.5 to 43.2 of title 12, C.R.S., or article 3.5 of title 25, C.R.S., or any person who interacts directly with a patient or assists with the patient care process, who is currently employed by, or is a prospective employee of, the employer making the inquiry.

**Source:** L. 2011: Entire section added, (HB 11-1148), ch. 36, p. 99, § 1, effective July 1. L. 2012: (5) amended, (HB 12-1311), ch. 281, p. 1608, § 6, effective July 1.

**8-2-111.7. Employees working with persons with developmental disabilities - immunity from civil liability - requirements - exception to blacklisting prohibition - legislative declaration - definitions.** (1) The general assembly hereby finds, determines, and declares that the intent and purpose of sections 8-2-110 and 8-2-111, which prohibit the maintenance or use of blacklists, is to protect employees from retribution and harassment in the pursuit of their lawful activities. The general assembly further finds, determines, and declares that these prohibitions against blacklisting have in some instances been abused and have been used as a shield by caregivers responsible for mistreatment, exploitation, neglect, or abuse of persons with developmental disabilities.

(2) In response to a request by a current or prospective employer of a caregiver, it is neither unlawful nor a violation of the prohibitions against blacklisting specified in sections 8-2-110 and 8-2-111 for an employer, when acting in good faith, to disclose information known about any involvement in the mistreatment, exploitation, neglect, or abuse of persons with developmental disabilities as prohibited by section 27-10.5-115, C.R.S., by a caregiver.

(3) (a) (I) An employer who provides information in accordance with subsection (2) of this section is immune from civil liability for providing the information or for any consequences that result from the disclosure of the information unless the caregiver shows by a preponderance of the evidence that the information is false and the employer providing the information knew or reasonably should have known that the information is false.

(II) The provision of employment information in accordance with subsection (2) of this section does not constitute blacklisting under section 8-2-110 or 8-2-111, nor does it constitute an unfair labor practice in violation of article 3 of this title.

(b) This subsection (3) applies to any employee, agent, or other representative of the responding employer who is authorized to provide and provides information to a current or prospective employer in accordance with subsection (2) of this section.

(4) An employer or any officer, director, employee, or representative of the employer who discloses information under this section is presumed to be acting in good faith unless it is shown by a preponderance of the evidence that the facility, officer, director, employee, or representative of the employer intentionally or recklessly disclosed false information about the caregiver.

(5) For the purposes of this section:

(a) "Caregiver" means an individual currently or formerly employed to work with a person with a developmental disability or a person who provides host home services by contract as part of residential services and supports as described in section 27-10.5-104 (1) (f), C.R.S. "Caregiver" does not mean a person who is employed by or who has contracted to work with a school district.

(b) "Person with a developmental disability" has the same meaning as defined in section 27-10.5-102 (11) (b), C.R.S.

**Source: L. 2011:** Entire section added, (SB 11-193), ch. 280, p. 1252, § 1, effective July 1.

**8-2-112. Unlawful to publish notice of boycott.** It is unlawful to print or circulate any notice of boycott, boycott card, sticker, banner, sign, or dodger publishing or declaring that a boycott or ban exists, or has existed or is contemplated against any person, firm, or corporation doing a lawful business, or publish the name of any judicial officer or other public officer upon any notice of boycott, boycott card, sticker, banner, sign, or other similar list because of any lawful act or decision of such official.

**Source: L. 05:** p. 160, § 2. **R.S. 08:** § 399. **C.L.** § 4163. **CSA:** C. 97, § 91. **CRS 53:** § 80-4-12. **C.R.S. 1963:** § 80-11-12.

**Cross references:** For arbitration to avoid necessity of boycott, see § 8-1-123.

#### ANNOTATION

This section applies to everyone and is not confined to labor controversies in general or to employees, employers, and labor organizations

subject to title 8 in particular. Resident Participation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

**8-2-113. Unlawful to intimidate worker - agreement not to compete.** (1) It shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit.

(2) Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to:

- (a) Any contract for the purchase and sale of a business or the assets of a business;
- (b) Any contract for the protection of trade secrets;
- (c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;
- (d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

(3) Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, as defined in section 12-36-106, C.R.S., upon termination of such agreement, shall be void;



except that all other provisions of such an agreement enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement, shall be enforceable. Provisions which require the payment of damages upon termination of the agreement may include, but not be limited to, damages related to competition.

**Source:** L. 05: p. 161, § 3. R.S. 08: § 400. C.L. § 4164. CSA: C. 97, § 92. CRS 53: § 80-4-13. C.R.S. 1963: § 80-11-13. L. 73: p. 940, § 1. L. 82: (3) added, p. 232, § 1, effective April 6.

**Cross references:** For the "Uniform Trade Secrets Act", see article 74 of title 7.

## ANNOTATION

**Law reviews.** For article, "Noncompetition Covenants in Colorado: A Statutory Solution?", see 52 Den. L.J. 499 (1975). For article discussing remedies available in an employee's breach of a confidential relationship with an employer regarding trade secrets, see 48 U. Colo. L. Rev. 189 (1977). For article, "Protecting Technical Information: The Role of the General Practitioner", see 12 Colo. Law. 1215 (1983). For article, "Drafting Noncompete Covenants: Statutory and Common Law Constraints", see 13 Colo. Law. 757 (1984). For article, "Drafting a Noncompetition Clause for the Colorado Contract", see 20 Colo. Law. 703 (1991). For article, "Covenants Not to Compete in the Sale of a Business: Protecting Goodwill", see 26 Colo. Law. 31 (Dec. 1997). For article, "Non-compete by Non-disclosure: The Doctrine of Inevitable Disclosure", see 28 Colo. Law. 73 (September 1999). For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado - Part I", see 30 Colo. Law. 7 (April 2001). For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado - Part II", see 30 Colo. Law. 5 (May 2001).

**This section is directed at what may be termed unlawful picketing.** *People v. Harris*, 104 Colo. 386, 91 P.2d 989 (1939).

**This section is intended to protect employees from noncompetition clauses** except in carefully defined circumstances. *Colo. Accounting Machs., Inc. v. Mergenthaler*, 44 Colo. App. 155, 609 P.2d 1125 (1980); *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546 (Colo. App. 1984).

**Covenants not to compete are contrary to the public policy of Colorado and are void**, except for some narrow exceptions such as a covenant in a contract for the purchase and sale of a business. *DBA Enter., Inc. v. Findlay*, 923 P.2d 298 (Colo. App. 1996).

**A covenant that fails to meet one of the exceptions defined in this section is facially void rather than voidable.** *Management Recruiters of Boulder v. Miller*, 762 P.2d 763 (Colo. App. 1988); *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp.2d 1247 (D. Colo. 2001); *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835 (Colo. App. 2007).

**Even if a noncompetition agreement is not void under this section**, to be enforceable, the clause must satisfy an established rule of reasonableness as to both duration and geographic scope. *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546 (Colo. App. 1984); *Electrical Distribs., Inc. v. SFR, Inc.*, 166 F.3d 1074 (10th Cir. 1999).

**And this established rule of reasonableness is recognized in the legislative history of this section.** *Nat'l Graphics Co. v. Dilley*, 681 P.2d 546 (Colo. App. 1984).

**Broad language of license agreement that would perpetually limit licensee swimming instructors' ability to train other instructors in the widely-known skill of teaching swimming to infants and young children worldwide is an unenforceable covenant not to compete.** *Harvey Barnett, Inc. v. Shidler*, 143 F. Supp.2d 1247 (D. Colo. 2001).

**Noncompetition agreement that is worldwide and perpetual is unduly broad, both as to time and geographic scope, and is thus void.** *Nutting v. RAM Southwest, Inc.*, 106 F. Supp.2d 1121 (D. Colo. 2000).

**Noncompetition covenant in contract between dentist and professional corporation was void as against public policy**, where the contract provided for the dentist's use of the corporation's facilities but stated that the dentist was not an agent or employee of the corporation for any purpose. *Smith v. Sellers*, 747 P.2d 15 (Colo. App. 1987).

**Noncompetition covenant not validated by trade secret provision.** A trade secret provision in an employment agreement does not validate an unrelated restrictive covenant whose sole purpose is to prohibit all competition. *Colo. Accounting Machs., Inc. v. Mergenthaler*, 44 Colo. App. 155, 609 P.2d 1125 (1980); *Dresser Industries, Inc. v. Sandvick*, 732 F.2d 783 (10th Cir. 1984).

**Employer must establish that a restrictive covenant not to compete is not void under this section** before a preliminary injunction will be granted. *Porter Industries, Inc. v. Higgins*, 680 P.2d 1339 (Colo. App. 1984).

**Nothing in the statute itself limits its applicability only to covenants not to compete de-**

**signed to protect buyers**, therefore, given appropriate circumstances, a covenant running in favor of a franchiser is an enforceable covenant under the statute. *Keller Corp. v. Kelley*, 187 P.3d 1133 (Colo. App. 2008).

**Injunctive relief is the most common and generally preferred relief for breach of a covenant not to compete**; however, the conditional language of a bill of sale and covenant not to compete referenced in the promissory note is the equivalent of a liquidated damage provision, which amounts to a penalty and is therefore not enforceable. *DBA Enter., Inc. v. Findlay*, 923 P.2d 298 (Colo. App. 1996).

**Covenant not to compete extinguished when business ceases to exist.** If a covenant not to compete which was binding on the seller of the business were enforced by the buyer after the business had ceased to exist, the covenant would constitute a void and unenforceable restraint of trade. *Gibson v. Eberle*, 762 P.2d 777 (Colo. App. 1988).

**The reasonableness of covenants ancillary to the sale of a business depends on whether the restraint on competition provides fair protection to the buyer's purchase of good will, while imposing restrictions no greater than necessary to protect the value of that good will.** *Reed Mill & Lumber Co. v. Jensen*, 165 P.3d 733 (Colo. App. 2006).

**A covenant not to compete ancillary to the sale of a business is unreasonable if its restrictions are greater than necessary to protect legitimate business interests.** *Reed Mill & Lumber Co. v. Jensen*, 165 P.3d 733 (Colo. App. 2006).

**Evidence established "sale of business" under subsection (2)(a).** *Boulder Medical Center v. Moore*, 651 P.2d 464 (Colo. App. 1982); *King v. PA Consulting Group, Inc.*, 485 F.3d 577 (10th Cir. 2007).

**Under "sale of business" exception, where plain language of covenant prohibited "working" for competitors**, case was reversed and remanded to determine whether activities beyond merely loaning money or leasing property to a competitor materially breached the covenant. *Nat'l Propane Corp. v. Miller*, 18 P.3d 782 (Colo. App. 2000).

**"Sale of business" and "management personnel" exceptions applied to covenant required as part of property disposition in dissolution of marriage.** *In re Fischer*, 834 P.2d 270 (Colo. App. 1992).

**Test for determining whether a covenant fits within the "trade secrets" exception:** (1) Is the restrictive covenant justified at all in light of the facts; and (2) are the specific terms reasonable? *Management Recruiters of Boulder v. Miller*, 762 P.2d 763 (Colo. App. 1988).

**For a covenant not to compete to fit within the trade secret exception of subsection (2), the purpose of the covenant must be the protection of trade secrets, and the covenant must be**

reasonably limited in scope to the protection of those trade secrets. *Gold Messenger, Inc. v. McGuay*, 937 P.2d 907 (Colo. App. 1997).

**Whether a particular group of employees qualifies under the exception of subsection (2)(d) is an issue of fact.** *Occusafe, Inc. v. EG&G Rocky Flats, Inc.*, 54 F.3d 618 (10th Cir. 1995).

**Whether a nonsolicitation clause in a contract fits within the trade secrets exception in subsection (2) is an issue of fact.** *Saturn Sys., Inc. v. Militare*, 252 P.3d 516 (Colo. App. 2011).

**A person who conducts or supervises a business is "management personnel".** A person who supervises 50 employees in a division with a ten million dollar budget is "management personnel" and therefore falls under the management personnel exception, which is broader than covering merely a few key personnel. *DISH Network Corp. v. Altomari*, 224 P.3d 362 (Colo. App. 2009).

**Management exception to the statutory limit on noncompetition clauses does not apply** when an employee does not manage any other employees and there are three levels of management employees above the employee. *Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789 (Colo. App. 2001).

**The "professional staff to executive and management personnel" exception is limited** to those persons who, while qualifying as "professionals" and reporting to managers and executives, primarily serve as key members of the manager's or executive's staff in the implementation of management and executive functions. *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835 (Colo. App. 2007).

**Invalidity of noncompetition agreement also renders invalid an agreement not to solicit customers of former employer.** Agreement not to solicit customers is form of agreement not to compete that has effect of restricting former employee from working in same business for another employer. *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835 (Colo. App. 2007).

**Colorado has not recognized an employer's right to protect good will created by an employee's relationships with the employer's customers.** *Reed Mill & Lumber Co. v. Jensen*, 165 P.3d 733 (Colo. App. 2006).

**Whether industrial hygienists constitute "professional staff to executive and management personnel" is an issue of fact.** *Occusafe, Inc. v. EG&G Rocky Flats Inc.*, 54 F.3d 618 (10th Cir. 1995).

**Section applies to independent contractors as well as employees.** *Colo. Supply Co., Inc. v. Stewart*, 797 P.2d 1303 (Colo. App. 1990).

**Noncompetition provision specifying the amount of damages and setting a fee percentage as liquidated damages in a physician's employment contract violated subsection (3).** The contract requirement that the plaintiff pay



defendant a percentage of his fees for two years provided for damages that were not "reasonably related to the injury suffered" by the defendant by reason of the termination of the contract with plaintiff. Also, the fee percentage set as liquidated damages in the noncompetition provision

was disproportionate to any possible loss incurred by the defendant. *Wojtowicz v. Greeley Anesthesia Servs.*, 961 P.2d 520 (Colo. App. 1997).

**Applied** in *Harrison v. Albright*, 40 Colo. App. 227, 577 P.2d 302 (1977).

**8-2-114. Immunity from civil liability for employer disclosing information - employer shall not maintain blacklist - credit lists excepted.** (1) For purposes of this section, "job performance" means:

(a) The suitability of the employee for reemployment;  
(b) The employee's work-related skills, abilities, and habits as they may relate to suitability for future employment; and

(c) In the case of a former employee, the reason for the employee's separation.

(2) It is unlawful for any employer to maintain a blacklist, or to notify any other employer that any current or former employee has been blacklisted by such employer, for the purpose of preventing such employee from receiving employment. Sections 8-2-112 to 8-2-115 shall not be construed to prevent any merchant or professional person, or any association thereof, from maintaining or publishing a list concerning the credit or financial responsibility of any person dealing with them on credit.

(3) Any employer who provides information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when such employee shows by a preponderance of the evidence both of the following:

(a) The information disclosed by the current or former employer was false; and

(b) The employer providing the information knew or reasonably should have known that the information was false.

(4) This section applies to any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with this section.

(5) Any employer that provides written information to a prospective employer about a current or a former employee shall send, upon the request of such current or former employee, a copy of the information provided to the last-known address of the person who is the subject of the reference. Any person who is the subject of such a reference may obtain a copy of the reference information by appearing at the employer's or former employer's place of business during normal business hours. The employer or former employer may charge a fair and reasonable amount for reproduction costs if multiple copies are requested.

(6) Nothing in this section shall be construed to abrogate or contradict the provisions of part 4 of article 34 of title 24, C.R.S.

**Source:** L. 05: p. 161, § 4. R.S. 08: § 401. C.L. § 4165. CSA: C. 97, § 93. CRS 53: § 80-4-14. C.R.S. 1963: § 80-11-14. L. 92: Entire section amended, p. 1806, § 1, effective April 29. L. 99: Entire section R&RE, p. 210, § 1, effective March 31.

#### ANNOTATION

**Law reviews.** For article, "State Laws: A Growing Minefield for Employers", see 23 Colo. Law. 1089 (1994).

**Section is plain as to limit in its application to particular classes of persons.** Resident Par-

ticipation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

**8-2-115. Violation of sections - misdemeanor.** Any person, firm, or corporation violating any provisions of sections 8-2-112 to 8-2-115 is guilty of a misdemeanor and,

upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than two hundred fifty dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment.

**Source:** L. 05: p. 161, § 5. R.S. 08: § 402. C.L. § 4166. CSA: C. 97, § 94. CRS 53: § 80-4-15. C.R.S. 1963: § 80-11-15.

#### ANNOTATION

**Law reviews.** For article, "Some Legal Aspects of the Colorado Coal Strike", see 4 Den. B. Ass'n Rec. 22 (Dec. 1927). For note, "The Right of a Third Party to Picket Under the Colorado Labor Peace Act", see 20 Rocky Mt. L. Rev. 317 (1948). For article, "Picketing — Free Speech?", see 28 Dicta 61 (1951).

**This section makes it a misdemeanor for "any" person, firm or corporation to violate**

**the boycott statute**, which applies to all persons and not merely to labor controversies in general or to employees, employers, or labor organizations subject to title 8 in particular. Resident Participation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

#### **8-2-116. Age of employee not ground for discharge. (Repealed)**

**Source:** L. 03: p. 307, § 1. R.S. 08: § 3927. C.L. § 4191. CSA: C. 97, § 112. CRS 53: § 80-4-16. C.R.S. 1963: § 80-11-16. L. 86: Entire section repealed, p. 933, § 5, effective May 8.

**Cross references:** For present provisions concerning age discrimination in employment, see part 4 of article 34 of title 24.

#### **8-2-117. Penalty for violation. (Repealed)**

**Source:** L. 03: p. 308, § 2. R.S. 08: § 3928. C.L. § 4192. CSA: C. 97, § 123. CRS 53: § 80-4-17. C.R.S. 1963: § 80-11-17. L. 86: Entire section repealed, p. 933, § 5, effective May 8.

**8-2-118. Cost of medical examination - employer and employee defined.** (1) It is unlawful for any employer, as defined in subsection (2) of this section, to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of employment, except those records necessary to support the applicant's statements in the application for employment.

(2) "Employer", as used in this section, means an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company doing business in or operating within the state.

(3) "Employee", as used in this section, means every person who may be permitted, required, or directed by any employer, as defined in subsection (2) of this section, in consideration of direct or indirect gain or profit, to engage in any employment.

(4) Any employer who violates the provisions of this section is liable to a penalty of not more than one hundred dollars for each violation. It is the duty of the director of the division of labor to enforce this section.

(5) (a) The director of the division of labor shall enforce this section as it applies to an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, or trustee in bankruptcy doing business in or operating within the state.

(b) The public utilities commission shall enforce this section as it applies to any common carrier by rail, motor, water, air, or express company doing business in or operating within the state.



(c) Nothing in this subsection (5) shall be construed as applying to irrigation ditch and water companies.

**Source:** L. 57: p. 491, §§ 1-4. CRS 53: § 80-4-18. L. 59: p. 536, § 1. C.R.S. 1963: § 80-11-18. L. 69: p. 615, § 123.

**8-2-119. Awards of back pay - deduction of unemployment compensation.** (1) In any proceeding in this state in which an award of back pay is made, the employer shall pay any such award in full, subject to the provisions of subsection (3) of this section.

(2) The person ordering an award of back pay shall notify the director of the division of unemployment insurance of the award within five days after the date of the order.

(3) If, during the period for which back pay is awarded, the recipient of the award has been receiving unemployment benefits pursuant to the provisions of articles 70 to 82 of this title, the entity ordering the award shall reduce the amount of the award by the amount of benefits the person received, and the employer shall withhold that amount from the award. The employer shall remit the amount withheld from the back pay award to the division of unemployment insurance, and the division shall credit the amount to the unemployment compensation fund. The employer shall remit the withheld amount within ten days after the award of back pay becomes final.

**Source:** L. 69: p. 666, § 1. C.R.S. 1963: § 80-11-19. L. 76: (2) amended, p. 335, § 1, effective May 10. L. 2012: (2) and (3) amended, (HB 12-1120), ch. 27, p. 104, § 11, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2 p. 2432, Session Laws of Colorado 2012.)

**8-2-120. Residency requirements prohibited for public employment - legislative declaration - definitions.** (1) The general assembly hereby finds, determines, and declares that the imposition of residency requirements by public employers works to the detriment of the public health, welfare, and morale as well as to the detriment of the economic well-being of the state. The general assembly further finds, determines, and declares that the right of the individual to work in or for any local government is a matter of statewide concern and accordingly the provisions of this section preempt any provisions of any such local government to the contrary. The general assembly declares that the problem and hardships to the citizens of this state occasioned by the imposition of employee residency requirements far outweigh any gain devolving to the public employer from the imposition of said requirements.

(2) As used in this section, unless the context otherwise requires:

(a) "Employee" means any person who works for a salary or for hourly wages, whether full-time or part-time and whether temporary or permanent. Such term does not include a local government's elected officials or its key appointed officials such as cabinet members, director of public safety, superintendent of schools, fire chief, or police chief and does not include members of a local government's boards or committees if residency requirements are set forth by any ordinance, charter, resolution, or statute of the local government.

(b) "Local government" means a county, city and county, city, municipality, town, school district, junior college district, a local improvement and service district, special district, or any other independent local entity having the authority under the general laws of this state to levy taxes or impose assessments.

(3) On and after July 1, 1988, any employee of any local government may at his sole option reside and dwell anywhere such employee chooses, whether within or without the territorial boundaries of the local government, except as provided in paragraph (b) of subsection (4) of this section.

(4) (a) On and after July 1, 1988, no residency requirement may be imposed on any employee by any local government. To the extent that any local government ordinance,

charter, resolution, or statute conflicts with this provision, it is hereby preempted by this provision.

(b) Key employees with duties which clearly and demonstrably require them to be close to their place of employment may be subject to reasonable requirements as to the maximum distance the employee's residence may be from the place of work. Such condition may be imposed, after hearing, by ordinance or resolution.

**Source: L. 88:** Entire section added, p. 365, § 1, effective April 11.

#### ANNOTATION

**Unconstitutional interference with power of home rule municipalities.** The residency of municipal employees is a matter of local concern and is therefore governed by charter provision or ordinance of a home rule city; an inconsistent home rule provision preempts this section. *City and County of Denver v. State*, 788 P.2d 764 (Colo. 1990).

**Factors considered in determining whether state statute preempts inconsistent home rule**

**ordinance:** (1) Need for statewide uniformity of regulation; (2) impact of municipal regulation on persons living outside municipal limits; (3) history of legislation of particular matter; and (4) commitment in state constitution of a particular matter to state or local regulation. *City and County of Denver v. State*, 788 P.2d 764 (Colo. 1990).

#### 8-2-121. Document fraud - penalties. (Repealed)

**Source: L. 2006:** Entire section added, p. 1305, § 1, effective May 30. **L. 2008:** (2) amended, p. 2145, § 16, effective June 4. **L. 2011:** Entire section repealed, (SB 11-243), ch. 282, p. 1256, § 1, effective June 2.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (2), see section 1 of chapter 417, Session Laws of Colorado 2008.

**8-2-122. Employment verification requirements - audits - fine for fraudulent documents - cash fund created - definitions.** (1) As used in this section, unless the context otherwise requires:

- (a) "Director" means the director of the division.
- (b) "Division" means the division of labor in the department of labor and employment.
- (c) "Employer" means a person or entity that:
  - (I) Transacts business in Colorado;
  - (II) At any time, employs another person to perform services of any nature; and
  - (III) Has control of the payment of wages for such services or is the officer, agent, or employee of the person or entity having control of the payment of wages.
- (d) "Unauthorized alien" has the same meaning as set forth in 8 U.S.C. sec. 1324a (h) (3).

(2) On and after January 1, 2007, within twenty days after hiring a new employee, each employer in Colorado shall affirm that the employer has examined the legal work status of such newly hired employee and has retained file copies of the documents required by 8 U.S.C. sec. 1324a; that the employer has not altered or falsified the employee's identification documents; and that the employer has not knowingly hired an unauthorized alien. The employer shall keep a written or electronic copy of the affirmation, and of the documents required by 8 U.S.C. sec. 1324a, for the term of employment of each employee.

(3) Upon the request of the director, an employer shall submit documentation to the director that demonstrates that the employer is in compliance with the employment verification requirements specified in 8 U.S.C. sec. 1324a (b) and documentation that the employer has complied with the requirements of subsection (2) of this section. The director or the director's designee may conduct random audits of employers in Colorado to obtain the documentation. When the director has reason to believe that an employer has not



complied with the employment verification and examination requirements, the director shall request the employer to submit the documentation.

(4) An employer who, with reckless disregard, fails to submit the documentation required by this section, or who, with reckless disregard, submits false or fraudulent documentation, shall be subject to a fine of not more than five thousand dollars for the first offense and not more than twenty-five thousand dollars for the second and any subsequent offense. The moneys collected pursuant to this subsection (4) shall be deposited in the employment verification cash fund, which is hereby created in the state treasury. The moneys in the fund shall be appropriated to the department of labor and employment for the purpose of implementing, administering, and enforcing this section. The moneys in the fund shall remain in the fund and not revert to the general fund or any other fund at the end of any fiscal year.

(5) It is the public policy of Colorado that this section shall be enforced without regard to race, religion, gender, ethnicity, national origin, or disability.

**Source: L. 2006, 1st Ex. Sess.:** Entire section added, p. 37, § 1, effective July 31.

#### ANNOTATION

**Law reviews.** For article, “2006 Immigration Legislation in Colorado”, see 35 Colo. Law. 79 (October 2006). For article, “Colorado Among

Leading States to Enact Immigration Enforcement Laws on Employers”, see 38 Colo. Law. 55 (April 2009).

**8-2-123. Health care workers - retaliation prohibited - definitions.** (1) As used in this section:

(a) “Disciplinary action” means any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below-standard performance evaluation, reduction in force, withholding of work, changes in work hours, negative reference, creating or tolerating a hostile work environment, or the threat of any such discipline or penalty. “Disciplinary action” shall not include action taken that is related to staffing or patient care needs.

(b) “Good faith report or disclosure” means a report regarding patient safety information or quality of patient care that is made without malice or consideration of personal benefit and that the health care worker making the report has reasonable cause to believe is true. “Good faith report or disclosure” also includes, with respect to patient care, a report regarding any practice, procedure, action, or failure to act with regard to patient safety that concerns information regarding a generally accepted standard of care; a law, rule, regulation, or declaratory ruling adopted pursuant to law; or compliance with a professional licensure requirement, which report is made without malice or consideration of personal benefit and that the health care worker making the report has reasonable cause to believe is true.

(c) “Health care provider” means any health care facility licensed under section 25-3-101, C.R.S., or any individual who is authorized to practice some component of the healing arts by license, certificate, or registration.

(d) “Health care worker” means any person certified, registered, or licensed pursuant to article 22, 29.5, 32, 33, 35, 36, or 37, or 38 to 43 of title 12, C.R.S., or certified pursuant to section 25-3.5-203, C.R.S.

(2) (a) A health care provider shall not take disciplinary action against a health care worker in retaliation for making a good faith report or disclosure.

(b) Paragraph (a) of this subsection (2) shall not apply to a health care worker who discloses information that the worker knows to be false, who discloses information with disregard for the truth or falsity thereof, or who discloses information without fully complying with subsection (3) of this section.

(c) Nothing in this section shall be construed to grant immunity to a health care worker for his or her own acts of medical negligence, for unprofessional conduct subject to professional review activities authorized by state or federal law, for a breach of a

professional licensure requirement, or for a violation of any state or federal law requiring confidentiality of patient information.

(3) When making a good faith report or disclosure regarding patient safety or quality of patient care, a health care worker shall follow the internal reporting procedures of the health care provider, to the extent such procedures exist and are provided to the health care worker in writing, and shall exhaust such procedures prior to pursuing any further reporting or disclosure activity.

(4) Nothing in this section shall prevent a health care provider from taking disciplinary action against a health care worker for reasons other than those specified in subsection (2) of this section.

(5) Nothing in this section shall be construed to preempt existing laws, regulations, or rules pertaining to patient care, including professional review proceedings for health professionals or for physicians pursuant to part 1 of article 36.5 of title 12, C.R.S., or quality and safety standards for a health care facility licensed pursuant to section 25-3-101, C.R.S.

**Source: L. 2007:** Entire section added, p. 284, § 2, effective March 29.

**Cross references:** For the legislative declaration contained in the 2007 act enacting this section, see section 1 of chapter 67, Session Laws of Colorado 2007.

**8-2-124. Electronic verification program - availability - notice to employers - definitions.** (1) As used in this section:

(a) “Department” means the department of labor and employment.

(b) “Electronic verification program” or “e-verify program” means the electronic employment verification program that is authorized in 8 U.S.C. sec. 1324a and jointly administered by the United States department of homeland security and the social security administration, or its successor program.

(c) “Employer” means a person transacting business in Colorado who, at any time, employs another person to perform services of any nature and who has control of the payment of wages for such services or is the officer, agent, or employee of the person having control of the payment of wages.

(d) “Employment eligibility verification form I-9” means the form developed by the United States citizenship and immigration services in the department of homeland security pursuant to 8 U.S.C. sec. 1324a (b).

(e) “Unauthorized alien” has the same meaning as set forth in 8 U.S.C. sec. 1324a (h) (3).

(2) (a) (I) As part of its quarterly electronic publication distributed to employers, the department shall, at a minimum, notify every employer of the federal law against hiring or continuing to employ an unauthorized alien and of the availability of the optional electronic verification program to verify the work eligibility status of new employees.

(II) (A) In notifying employers of the e-verify program pursuant to subparagraph (I) of this paragraph (a), the department shall include language similar to the following:

As with all current employee verification programs, the e-verify program is not one hundred percent accurate, and an employee has recourse available if the employee is legally documented to work in the United States but the employer receives a final notice of nonconfirmation of work eligibility regarding the employee through the e-verify program.

(B) Additionally, the department shall provide employers information about when, during the hiring process, an employer may lawfully use the e-verify program, specifying that the e-verify program can only be used after an employee is hired and cannot be used to verify the work eligibility status of existing employees. The notice shall also restate the requirements of section 24-34-402, C.R.S., which prohibits employers from engaging in discriminatory or unfair employment practices.

(III) Immediately following the notice required by subparagraph (I) of this paragraph (a), the department shall include in the quarterly electronic publication a link to the portion



of the department's web site where an employer can access additional information about the federal law, the e-verify program and the requirements for participation in the e-verify program, and the following statement, in bold-faced type in a conspicuous location:

**It is unlawful for an employer to:**

**Hire, recruit, or refer for a fee, for employment in the United States, an alien, knowing the alien is an unauthorized alien;**

**Hire, recruit, or refer for a fee, for employment in the United States, an individual without verifying the employment eligibility status of the individual through completion of the Employment Eligibility Verification Form I-9, or its successor form;**

**Continue to employ an alien in the United States, knowing that the alien is or has become an unauthorized alien; or**

**While using the e-verify program, refuse to hire, discharge, promote, or demote a person, harass a person during the course of employment, or discriminate against a person in matters of compensation, on the basis of the person's disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry, pursuant to section 24-34-402, C.R.S.**

**For more specific information regarding the e-verify program and its requirements and use, employers should consult 8 U.S.C. sec. 1324a.**

(IV) The department shall include the notice and web site link required by this paragraph (a) in each quarterly electronic publication distributed to employers on and after August 5, 2008.

(b) The department shall permanently post on its web site the statement and information described in subparagraph (III) of paragraph (a) of this subsection (2), as well as a link to the e-verify web site available through the internet portal for the United States citizenship and immigration services, or its successor agency.

**Source: L. 2008:** Entire section added, p. 894, § 1, effective August 5.

**8-2-125. Identification of workers engaged in off-site work - permissible forms of identification - exceptions - definitions.** (1) (a) When an employer dispatches an employee to an off-site premises to perform work on behalf of the employer for a customer located at the off-site premises, the employee may provide an employer-issued identification card to the custodian of the off-site premises in lieu of a government-issued identification card for purposes of verifying the identity of the employee. Except as provided in paragraph (c) of this subsection (1), the custodian of the off-site premises shall not require the employee to surrender his or her government-issued identification card to the custodian or retain the employee's government-issued identification card while the employee is physically present on the off-site premises engaged in the performance of work on behalf of the employer.

(b) If the employee has an employer-issued identification card, the custodian may require the employee to surrender his or her employer-issued identification card for purposes of verifying the employee's identity, and the custodian may hold the employer-issued identification card at all times while the employee is present on the off-site premises.

(c) Notwithstanding the prohibition in paragraph (a) of this subsection (1), if the employee does not surrender an employer-issued identification card, the custodian may require the employee to surrender the employee's government-issued identification card to verify the employee's identity, and the custodian may hold the government-issued identification card at all times while the employee is present on the off-site premises.

(d) If the employee provides his or her employer-issued identification card to the custodian pursuant to paragraph (b) of this subsection (1), the custodian may require the

employee to allow the custodian to examine a secondary form of identification containing the employee's photograph, including a government-issued identification card.

(2) This section does not apply to a person who enters into a defense contract with the federal government pursuant to the national industrial security program, or its successor program, under which the person is contractually obligated to verify identification using a government-issued identification card.

(3) As used in this section, unless the context otherwise requires:

(a) "Custodian" means the person who is authorized to provide or restrict access to the off-site premises, including security personnel for a commercial building or multi-residential property.

(b) "Employer-issued identification card" means an identification card issued by an employer to an employee that contains, at a minimum, the name of the employer and the employee's name and photograph.

(c) "Government-issued identification card" means a state-issued driver's license or identification card containing the person's photograph, an identification card or passport issued by the federal government containing the person's photograph, a native American tribal document identifying the person and containing the person's photograph, or any other form of identification issued by the federal or a state government that contains the person's photograph and identifying information.

(d) "Off-site premises" means a building or property that is not owned, leased, operated, or otherwise under the control of the employer of the employee who is dispatched to the premises, including:

- (I) A commercial building, other than a federal, state, or local government building; or
- (II) A multi-residential property.

**Source: L. 2011:** Entire section added, (SB 11-179), ch. 185, p. 709, § 1, effective July 1.

## PART 2

### EMPLOYER'S LIABILITY

**Editor's note:** In the original Volume 3, Colorado Revised Statutes 1973, this part 2 was included under article 42 of the "Workmen's Compensation Act of Colorado". It was moved to this article in 1976 for correct location since it was not enacted by the General Assembly as a part of the "Workmen's Compensation Act of Colorado" (see chapter 113, p. 294, Session Laws of Colorado 1911, and chapter 210, p. 700, Session Laws of Colorado 1919, and article 5 of chapter 80 and article 1 of chapter 81, C.R.S. 1963, prior to the recodification of the statutes in 1973).

**8-2-201. Damages - fellow servant rule abolished - limitation on admission of criminal history.** (1) Every corporation or individual who employs agents, servants, or employees, such agents, servants, or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, servant, or employee resulting from the carelessness, omission of duty, or negligence of such employer, or which may have resulted from the carelessness, omission of duty, or negligence of any other agent, servant, or employee of the employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

(2) (a) Information regarding the criminal history of an employee or former employee may not be introduced as evidence in a civil action against an employer or its employees or agents that is based on the conduct of the employee or former employee if:

(I) The nature of the criminal history does not bear a direct relationship to the facts underlying the cause of action; or

(II) Before the occurrence of the act giving rise to the civil action, a court order sealed any record of the criminal case or the employee or former employee received a pardon; or

(III) The record is of an arrest or charge that did not result in a criminal conviction; or



(IV) The employee or former employee received a deferred judgment at sentence and the deferred judgment was not revoked.

(b) This subsection (2) does not supersede any statutory requirement to conduct a criminal history background investigation or consider criminal history records in hiring for particular types of employment.

**Source:** L. 11: p. 294, § 1. C.L. § 4167. CSA: C. 97, § 95. CRS 53: § 80-6-1. C.R.S. 1963: § 80-5-1. L. 2010: Entire section amended, (HB 10-1023), ch. 42, p. 167, § 2, effective August 11.

**Cross references:** (1) For negligence of a fellow servant being no defense under the "Workers' Compensation Act of Colorado", see § 8-41-101; for damages for wrongful death, see article 21 of title 13.

(2) For the legislative declaration in the 2010 act amending this section, see section 1 of chapter 42, Session Laws of Colorado 2010.

## ANNOTATION

- I. General Consideration.
- II. Negligence, Contributory Negligence, and Assumption of Risk.
- III. Actions.
  - A. In General.
  - B. Complaint.
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  - D. Reference to Insurance.
  - E. Questions of Law and Fact.
  - F. Instructions.
  - G. Variance.
  - H. Damages.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "One Year Review of Torts", see 35 Dicta 53 (1958).

**Annotator's note.** Cases decided prior to the earliest source of § 8-2-201 have been included in the annotations to this section.

**At common law, a master is not responsible for negligence of fellow servant.** Portland Gold Mining Co. v. Duke, 164 F. 180 (8th Cir. 1908).

**But under this section the master is liable to a servant for the neglect of a fellow servant, to the same extent as for his own neglects.** Portland Gold Mining Co. v. Duke, 191 F. 692 (8th Cir. 1911); Kett v. Colo. & S. Ry., 58 Colo. 392, 146 P. 245 (1915); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

**For this section and §§ 8-2-202 through 8-2-204 give a right of action in derogation of the common law, and supersede it to the extent necessary to give full force and effect thereto.** Ferguson v. Ringsby Truck Line, 174 F.2d 744 (10th Cir. 1949); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

**But not available remedy under workmen's compensation.** A workmen's compensation claimant cannot rely upon the provisions of §§ 8-2-201 through 8-2-205 as providing an available remedy excepted from abolition by the workmen's compensation act in § 8-42-102,

even though those sections were mistakenly placed within the scope of the latter section by the 1973 revisor. Ryan v. Centennial Race Track, Inc., 196 Colo. 30, 580 P.2d 794 (1978).

**The purpose and effect of this section is not only to abolish the fellow servant doctrine, but also to create in the employee or his survivors a statutory action for the employer's negligence within the time specified therein.** Ferguson v. Ringsby Truck Line, 174 F.2d 744 (10th Cir. 1949); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

**And this section is constitutional.** Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Big Kanawha Leasing Co. v. Jones, 45 Colo. 381, 102 P. 171 (1909); Colo. & S. Ry. v. Davis, 23 Colo. App. 41, 127 P. 249 (1912).

**Because this section is not contrary to the due process clause of the constitution.** Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Rio Grande Sampling Co. v. Catlin, 40 Colo. 450, 94 P. 323 (1907); Colo. & S. Ry. v. Davis, 21 Colo. App. 1, 120 P. 1048, rev'd on other grounds, 23 Colo. App. 41, 127 P. 249 (1912).

**Even though the servant is not required to give notice of the injury.** Lange v. Union P. R. R., 126 F. 338 (8th Cir. 1903), cert. denied, 193 U.S. 671, 24 S. Ct. 853, 48 L. Ed. 841 (1904); Carlock v. Denver & R. G. R. R., 55 Colo. 146, 133 P. 1103 (1913); Kett v. Colo. & S. Ry., 58 Colo. 392, 146 P. 245 (1915).

**Scope of employment may be enlarged by custom known to master.** The servant's scope of employment may be enlarged by a practice sufficiently uniform, open, and long-established, to prove a custom, and knowledge of which is brought home to the master. Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson, 44 Colo. 236, 99 P. 63 (1908).

**And knowledge of foreman is knowledge of master.** Knowledge of the foreman of a mine, as

to the usage and practice of those working under him, is the knowledge of the mine owner. *Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson*, 44 Colo. 236, 99 P. 63 (1908).

**Applied** in *Northwestern Eng'r Co. v. Rooks*, 166 Colo. 297, 443 P.2d 977 (1968).

## II. NEGLIGENCE, CONTRIBUTORY NEGLIGENCE, AND ASSUMPTION OF RISK.

**The test of whether a master was negligent** is whether his conduct was that of an ordinarily prudent man. *Colo. Milling & Elevator Co. v. Bright*, 76 Colo. 338, 231 P. 1111 (1924).

**Master liable for defective appliance causing accident where defect was unknown to servant.** *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**An employee is generally excusable for obeying orders** in and about his employer's business when such orders are given by one in authority over him as a representative of his employer, unless the danger incurred by such obedience is so manifest that a prudent person would not obey even under the penalty of being discharged. *Colo. M. Ry. v. O'Brien*, 16 Colo. 219, 27 P. 701 (1891); *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**And miner is not negligent in failing to anticipate that experienced fellow miner will throw burning fuse toward open can of powder.** *Rapson Coal Mining Co. v. Micheli*, 62 Colo. 330, 164 P. 311 (1916).

**Thus, the doctrine of assumption of risk as to the negligence of a fellow servant has no place under this section.** *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 P. 313 (1906); *Kett v. Colo. & S. Ry.*, 58 Colo. 392, 146 P. 245 (1915).

## III. ACTIONS.

### A. In General.

**Rescission of release given without consideration is not prerequisite to action.** Where, in an action for damages for the death of an employee, defendant pleads a release, and plaintiff pleads that it was given without consideration and the jury so found, defendant cannot object that plaintiff cannot maintain the action without first rescinding the release and tendering a return of the consideration received, as there was neither a contract of release to rescind nor any consideration received by the plaintiff for the alleged release which she could tender back. *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 P. 313 (1906).

### B. Complaint.

**Election not required between counts alleging failure to furnish safe place to work and**

**negligence of fellow servant.** *Cramer v. Oppenstein*, 16 Colo. 504, 27 P. 716 (1891); *Manders v. Craft*, 3 Colo. App. 236, 32 P. 836 (1893); *Leonard v. Roberts*, 20 Colo. 88, 36 P. 880 (1894); *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 P. 313 (1906).

**Allegations that pit was negligently left uncovered held sufficient.** *Colo. Milling & Elevator Co. v. Bright*, 76 Colo. 338, 231 P. 1111 (1924).

**For the sufficiency of allegation of failure to furnish safe appliances,** see *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 P. 39 (1903); *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**For the failure to allege name of negligent fellow servant,** see *Denver & R. G. R. v. Vitello*, 21 Colo. App. 51, 121 P. 112 (1912).

### C. Burden of Proof.

**Defendant alleging contributory negligence has burden of proof.** *Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson*, 44 Colo. 236, 99 P. 63 (1908).

**Likewise, master alleging negligent fellow servant was acting outside scope of employment.** Where, in an action against the master for the death of a servant attributed to negligence of a fellow servant, there is a plea that the offending servant was acting without the scope of employment, the master has the burden of proof; and if the negligence of two working together occasioned the accident, and one of them was acting outside his employment, the defendant must go further and prove that the other did not materially participate in the negligent act. *Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson*, 44 Colo. 236, 99 P. 63 (1908).

### D. Reference to Insurance.

**Asking jurors whether they are interested in insurance company is not error.** *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 P. 313 (1906).

**But statement to juror that suggests insurance company is real party in interest justifies reversal.** *Parkdale Fuel Co. v. Taylor*, 26 Colo. App. 304, 144 P. 1138 (1914).

**Unless great weight of evidence favors plaintiff.** *Tanner v. Harper*, 32 Colo. 156, 75 P. 404 (1904); *Parkdale Fuel Co. v. Taylor*, 26 Colo. App. 304, 144 P. 1138 (1914).

**But comment by counsel on custom of companies to carry insurance is error.** *Coe v. Van Why*, 33 Colo. 315, 80 P. 894 (1905); *Parkdale Fuel Co. v. Taylor*, 26 Colo. App. 304, 144 P. 1138 (1914).

### E. Questions of Law and Fact.

**Whether a servant is acting within the scope of his authority is generally a question**



**of fact** for the jury under proper instructions, and not a question of law for the court. *Ward v. Teller Reservoir & Irrigation Co.*, 60 Colo. 47, 153 P. 219 (1915); *Rapson Coal Mining Co. v. Micheli*, 62 Colo. 330, 164 P. 311 (1916).

**Likewise, question of servant's contributory negligence is for the jury** except in the clearest cases, where the facts are undisputed, and where all intelligent men can draw but one inference, when the question of contributory negligence is for the court, and especially is this true when the measure of duty is ordinary and reasonable care, as in such cases the standard duty is variable. *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 P. 313 (1906); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 P. 460 (1912); *Kett v. Colo. & S. Ry.*, 58 Colo. 392, 146 P. 245 (1915).

**And question of fact for jury as to whose duty it is to keep appliances in repair.** *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**But where there is no room for two opinions as to master's negligence, question is a matter of law**, and court may direct a verdict. *Colo. Milling & Elevator Co. v. Bright*, 76 Colo. 338, 231 P. 1111 (1924).

#### F. Instructions.

**Instructions must be considered as a whole.** And where, in an action by servant against master for negligence in the matter of appliances, the duty of the master is properly and clearly stated in the charge, as that of reasonable care only, objection made to a subsequent passage in which it is declared that the master is liable if the appliances were not of such character as a reasonably prudent person would consider safe, was held to be without merit. *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**Instructions will not be reviewed which trial court was not given opportunity to correct.** Where objection interposed was general, on the subject of damages, it does not avail as against an instruction which contains two or more independent and distinct propositions of law, some of which are right, because it fails to point out that which is incorrect from that which is correct. *Beals v. Cone*, 27 Colo. 473, 62 P. 948

(1900), appeal dismissed, 188 U.S. 184, 23 S. Ct. 275, 47 L. Ed. 435 (1903); *City of Pueblo v. Timbers*, 31 Colo. 215, 72 P. 1059 (1903); *Hasse v. Herring*, 36 Colo. 383, 85 P. 629 (1906); *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

#### G. Variance.

**Evidence of master's negligence sufficient under complaint charging negligence of master and fellow servant.** *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**Charge of failure to supply safe appliance supported by proof that appliance provided was useless.** *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

#### H. Damages.

**Minor may recover for expenses incurred for treatment.** A minor suing for a personal injury may recover not only for the mental and bodily suffering occasioned by the injury, but for liabilities incurred by him in being cured or treated for his injury. That he might avoid liability for the expenses so incurred, by reason of his minority, is no bar to the recovery. His minority is a personal privilege of which no third person can have advantage. *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**But contract to furnish hospital care does not entitle servant to recover money expended for specialist.** Assurances given to the servant at the time of his employment that in case of sickness or injury he will be received into a hospital maintained by the employer, and receive board, bed, medicines, and medical attendance free, do not entitle the servant to recover the expense of a trip to a distant city, and moneys expended there for the services of a specialist, although this was upon the advice of the physician in charge of the hospital. The employer is not even bound to provide a specialist at the hospital. *Miller v. Camp Bird, Ltd.*, 46 Colo. 569, 105 P. 1105 (1909).

**And error in awarding damages to which one is not entitled may be cured by a remittitur** in writing, filed with the clerk of the trial court. *Nat'l Fuel Co. v. Green*, 50 Colo. 307, 115 P. 709 (1911).

**8-2-202. Damages in case of death - limit.** If the death of a person is caused by an act of carelessness, omission of duty, or negligence as provided in section 8-2-201, the corporation or individual who would have been liable if the death had not ensued shall be liable to an action for damages regardless of the death of the party injured. In each such case the jury may award such damages as it deems fair and just, with reference to the necessary injury resulting from such death, to the parties who may be entitled to sue under this part 2; except that, if the decedent left neither a widow, widower, or minor children nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars.

**Source:** L. 11: p. 295, § 2. C.L. § 4168. L. 33: p. 475, § 1. CSA: C. 97, § 96. CRS 53: § 80-6-2. L. 61: p. 488, § 1. C.R.S. 1963: § 80-5-2. L. 67: p. 481, § 2. L. 69: p. 329, § 2.

**Cross references:** For damages in general, see article 21 of title 13.

**8-2-203. Who may sue - consolidation of actions.** (1) Every such action shall in case of death be maintained:

- (a) By the husband or wife of the deceased;
- (b) If there is no husband or wife or if he or she fails to sue within one year after such death, by the children of the deceased or their descendants;
- (c) If such deceased is a minor or unmarried, without issue, by the father or mother or by both jointly; or
- (d) If there is no such person entitled to sue, by such other next of kin of the deceased as may be dependent upon the deceased for support.

(2) Every such action, in case of death, may be maintained by any person entitled to sue for the use and benefit of the others so entitled to sue as well as for the plaintiff so suing, and the verdict of the jury and the judgment of the court shall specify the amount of damages awarded to each person, and, if any such actions are separately brought, the same shall be consolidated with the action first commenced in the court which has jurisdiction of said actions when so consolidated.

**Source:** L. 11: p. 295, § 3. C.L. § 4169. CSA: C. 97, § 97. CRS 53: § 80-6-3. C.R.S. 1963: § 80-5-3.

#### ANNOTATION

**Federal statute regulating liability of interstate carriers precludes death action by widow.** The federal statute regulating the liability of interstate carriers to their employees supercedes and displaces the provisions of the state statute within its purview, and since the former statute confers upon the personal repre-

sentative of the employee the right of action for the death of such employee, attributable to the negligence of the master, the employee's widow is not permitted to maintain an action in her own name. *Denver & R. G. R. v. Wilson*, 62 Colo. 492, 163 P. 857 (1917).

**8-2-204. Limitation of actions - limit of damages.** All actions provided for by this part 2 shall be brought within the time period prescribed in section 13-80-102, C.R.S. The amount of damages recoverable under this part 2 in case of personal injury resulting solely from negligence of a coemployee shall not exceed the sum of twenty-five thousand dollars.

**Source:** L. 11: p. 296, § 4. C.L. § 4170. L. 33: p. 476, § 2. CSA: C. 97, § 98. CRS 53: § 80-6-4. L. 61: p. 488, § 2. C.R.S. 1963: § 80-5-4. L. 86: Entire section amended, p. 702, § 7, effective May 23.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Torts", see 35 Dicta 53 (1958). For article, "In Defense of the Colorado Guest Statute", see 35 Dicta 174 (1958).

**This section imposes a two-year statute of limitations** on all rights of action created by the act. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**Amended answer pleading statute.** After issues are joined and a cause has been set for trial, a court may in the exercise of reasonable discretion and in the interest of justice permit the

filing of an amended answer pleading additional defenses, such as the two-year statute of limitations under this section. 37 C.J. 1227; *Walters v. Webster*, 52 Colo. 549, 123 P. 952 (1912); *Maryland Cas. Co. v. City & County of Denver*, 90 Colo. 20, 6 P.2d 6 (1931).

**And damages may not exceed \$25,000.** Under this section, damages against an employer by an employee for injuries resulting from the negligence of the employer or a fellow employee may not exceed the sum of \$25,000. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975



(1957); *Bein Farms, Inc. v. Dale*, 137 Colo. 424, 326 P.2d 72 (1958).

**This section applies to an action by an employee** to recover for personal injuries sustained while working for his employer, and al-

legedly caused by its negligence in furnishing an "unsafe, insecure and defective" appliance for the performance of his duties. *Ferguson v. Ringsby Truck Line*, 174 F.2d 744 (10th Cir. 1949).

**8-2-205. Assumption of risk abolished.** If any agent, servant, or employee, while in the performance of his duty for his employer, is injured or killed in the employer's service on account of the employer's negligence or any defect or peril connected with ways, works, machinery, or instrumentalities used in the business of the employer which could have been remedied or made safer by the use of ordinary diligence, a recovery for such injury or death may be had. The fact that such employee had knowledge of the defect or peril shall not be a bar to a recovery unless the repairing or remedying of such defect or peril was his principal duty. All stipulations, contracts, or agreements between an employee and his employer or between other persons contrary to the provisions of this section shall be null and void.

**Source:** L. 15: p. 197, § 1. C.L. § 4171. CSA: C. 97, § 99. CRS 53: § 80-6-5. C.R.S. 1963: § 80-5-5.

**Cross references:** For assumption of risk under the "Workers' Compensation Act of Colorado", see § 8-41-101.

#### ANNOTATION

**Law reviews.** For article, "Derogation of the Common Law Rule of Contributory Negligence", see 7 Rocky Mt. L. Rev. 161 (1935). For article, "Employer's Liability for Occupational Diseases", see 16 Rocky Mt. L. Rev. 60 (1943).

**This section, by its terms, is premised upon the negligence of the employer.** *Nitzel v. Austin Co.*, 249 F.2d 710 (10th Cir. 1957).

**But this section does not purport to create any new right of action.** It merely abates a common-law defense to a statutory cause of action. *Ferguson v. Ringsby Truck Line*, 174 F.2d 744 (10th Cir. 1949).

**And this section relieves the employees and workmen from the assumption of risk for injuries or death.** *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**Prior to the enactment of this section, the servant assumed only such risks** as were obvious to a person of ordinary intelligence, ability and experience, and which arose out of the conditions that surrounded him at the time. *Miller v. Camp Bird, Ltd.*, 46 Colo. 569, 105 P. 1105 (1909).

**But workman still assumes risks not created by master's negligence.** Since the enactment of this section, and the workmen's compensation act, the doctrine of assumption of any risk created by the master's negligence has disappeared, but the question of whether the employer was negligent remains, and the workman still assumes, so far as a suit for damages is concerned, the risks not created by the master's negligence. *Colo. Milling & Elevator Co. v. Bright*, 76 Colo. 338, 231 P. 1111 (1924).

**Instruction held correct.** An instruction that if the defendant was negligent, and its negligence was the proximate cause of the injury, there was no assumption of risk was held correct. *Colo. Milling & Elevator Co. v. Bright*, 76 Colo. 338, 231 P. 1111 (1924).

**Evidence of negligence requiring submission of case to jury.** In action by a farm hand to recover for injuries sustained when his hand was caught in a corn husker, it was held that there was a sufficient showing of negligence on the part of the employer to require submission of the case to the jury. *Huddleston v. Ingersoll Co.*, 109 Colo. 134, 123 P.2d 1016 (1942).

#### ARTICLE 2.5

##### Freedom of Legislative and Judicial Access Act

8-2.5-101. Preventing legislative and judicial access to employees - intimidation of legislative witnesses - penalty.

**8-2.5-101. Preventing legislative and judicial access to employees - intimidation of legislative witnesses - penalty.** (1) (a) It is unlawful for any person to adopt or enforce any rule, regulation, or policy forbidding or preventing any of its employees, franchisees, or agents or entities under its control or oversight from, or to take any action against its employees, franchisees, or agents or entities under its control or oversight solely for, testifying before a committee of the general assembly or a court of law or speaking to a member of the general assembly at the request of such committee, court, or member regarding any action, policy, rule, regulation, practice, or procedure of any person or regarding any grievance relating thereto. Any person violating any provision of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars.

(b) The prohibition in paragraph (a) of this subsection (1) shall not apply to testimony before a committee of the general assembly or a court of law that discloses confidential, proprietary, or otherwise privileged information of any person.

(1.5) (a) It is unlawful for any person:

(I) To intimidate a legislative witness, by use of a threat, in order to intentionally influence or induce a legislative witness:

(A) To appear or not appear before a committee of the general assembly;

(B) To give or refrain from giving testimony to a committee of the general assembly;

(C) To testify falsely before a committee of the general assembly; or

(D) To avoid legal process summoning the legislative witness to attend and testify before a committee of the general assembly; or

(II) To take any action against a legislative witness for testifying before a committee of the general assembly.

(b) For the purposes of this subsection (1.5):

(I) "Legislative witness" means any individual that intends to testify or testifies before a committee of the general assembly either voluntarily or pursuant to a subpoena issued by any committee of the general assembly or of either house thereof.

(II) "Threat" means to communicate directly the intent to do any act that is intended to harm the health, safety, property, business, or financial condition of the legislative witness.

(c) Any person violating any provision of this subsection (1.5) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars.

(2) (a) An employee, a franchisee, an agent or an entity under the control of any person, or a legislative witness may recover damages, including reasonable attorney fees, from any person for injuries suffered through a violation of this section.

(b) Nothing in this section shall be construed to prohibit an employee, a franchisee, an agent or an entity under the control of any person, or a legislative witness from pursuing any other right of action permitted pursuant to law for injuries suffered through a violation of this section.

(3) Nothing in this section shall obligate any person to compensate an employee or agent for time spent testifying before a committee of the general assembly or a court of law or speaking to a member of the general assembly at the request or invitation of such committee, court, or member regarding any action, policy, rule, regulation, practice, or procedure of any person or regarding any grievance relating thereto.

(4) For purposes of this section, "person" means a corporation, a limited liability company, a partnership, an association, a firm, a state agency as defined in section 24-50.5-102 (4), C.R.S., a county, a city and county, a municipality, a federal agency, an individual, or any officer or agent thereof.

**Source:** L. 97: Entire article added, p. 1611, § 1, effective June 4. L. 98: (1.5) added and (2) amended, p. 693, § 1, effective August 5.

**Cross references:** For interference with the legislative process, see part 4 of article 2 of title 2; for attempt to influence a public servant, see § 18-8-306; for perjury and related offenses pertaining to governmental operations, see part 5 of article 8 of title 18; for attendance of witnesses before the general assembly, see § 2-2-313.



## ANNOTATION

**There is no basis to conclude that this section clearly expresses a public policy that forbids an employer from terminating an employee for filing a motion for a temporary restraining order or a lawsuit against an employer.** The section does not clearly mandate a general public policy protecting access to the

courts. *Slaughter v. John Elway Dodge S.W./AutoNation*, 107 P.3d 1165 (Colo. App. 2005).

**To bring a successful claim under this section, a plaintiff must establish that any action taken was solely because of plaintiff's testimony.** *Emerson v. Wembley USA Inc.*, 433 F. Supp. 2d 1200 (D. Colo. 2006).

## ARTICLE 3

## Labor Peace Act

**Law reviews:** For article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 63 Den. U. L. Rev. 395 (1986); for article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 64 Den. U. L. Rev. 271 (1987); for article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with labor law, see 65 Den. U. L. 565 (1988); for a discussion of recent Tenth Circuit decisions dealing with labor law, see 67 Den. U. L. Rev. 751 (1990); for article, "The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and its Implications for Public Policy", see 70 U. Colo. L. Rev. 871 (1999).

8-3-101.	Short title.	8-3-112.	Arbitration.
8-3-102.	Legislative declaration - matter of statewide concern - prohibition on local enactments.	8-3-113.	Mediation.
8-3-103.	Construction.	8-3-114.	Duties of attorney general and district attorneys.
8-3-104.	Definitions.	8-3-115.	Employer and employee committees.
8-3-105.	Director to administer - adopt rules and regulations.	8-3-116.	Interference with director - officer of division.
8-3-106.	Rights of employees.	8-3-117.	Existing contracts unaffected.
8-3-107.	Representatives and elections.	8-3-118.	Jurisdiction to issue restraining orders or injunctions.
8-3-108.	What are unfair labor practices.	8-3-119.	Relations contrary to public policy.
8-3-109.	What are not unfair labor practices.	8-3-120.	Conflict of provisions.
8-3-110.	Prevention of unfair labor practices.	8-3-121.	Civil liability for damages.
8-3-111.	Protection of employees when authority acquires certain operations.	8-3-122.	Penalty for violation.
		8-3-123.	Nonapplicability of other statutes.

**8-3-101. Short title.** This article shall be known and may be cited as the "Labor Peace Act".

**Source:** L. 43: p. 417, § 24. CSA: C. 97, § 94(24). CRS 53: § 80-5-21. C.R.S. 1963: § 80-4-21.

## ANNOTATION

**Law reviews.** For article, "Some Legal Aspects of the Colorado Coal Strike", see 4 Den. B. Ass'n Rec. 22 (Dec. 1927). For article, "Governmental Adjustment of Colorado's Industrial Disputes 1915-1930", see 3 Rocky Mt. L. Rev. 223 (1931). For note, "The Constitutionality of the Labor Peace Act", see 18 Rocky Mt. L. Rev. 52 (1945). For article, "An Analysis of the Colorado Labor Peace Act", see 19 Rocky Mt. L. Rev. 359 (1947). For article, "The Extent to Which Taft-Hartley Act Has Superseded State Labor Laws", see 28 Dicta 47 (1951). For arti-

cle, "Picketing — Free Speech?", see 28 Dicta 61 (1951). For article, "One Year Review of Cases on Contracts", see 33 Dicta 57 (1956). For case note, "Uncertain Status of Public Sector Labor Arbitration in Colorado", see 48 U. Colo. L. Rev. 451 (1977). For article, "The Regional Transportation District Strike and the Colorado Labor Peace Act: A Study in Public Sector Collective Bargaining", see 54 U. Colo. L. Rev. 203 (1983).

**The labor peace act, enacted in 1943, is a comprehensive statute regulating the conduct**

of parties to a labor dispute. *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

Consequently, a municipal ordinance insofar as it deals with the conduct of parties to a "labor dispute" in an attempt to cover in a different and sometimes conflicting manner the same field as is covered by the labor peace act must be held without force or effect; for municipalities are creatures of either legislative enactment or constitutional provision, having only powers expressly or impliedly granted to them, and no statute or constitutional provision has expressly given cities power to regulate labor disputes, nor can such be said to be an implied power when the proper conduct of labor activities is a matter of statewide concern. *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

However, the labor peace act is itself inapplicable where preempted by federal labor legislation. *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

Invalidity of such provisions to be determined by federal courts. Questions raised as to the invalidity of such provisions by virtue of the federal constitution and the jurisdiction of the state courts with the passage of federal labor acts must be determined by the federal courts. *Denver Bldg. & Constr. Trades Council v. Shore*, 124 Colo. 57, 234 P.2d 620 (1951).

But this article as a whole is not unconstitutional upon the theory that, as to employees engaged in interstate commerce, it infringes upon the field preempted by the national labor relations act and upon the ground that it is in direct conflict with federal legislation. *Am. Fed'n of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944).

Nor is this article unconstitutional on the ground that the definition of a "labor dispute" in subsection (13) of § 8-3-104 is too narrow. *Denver Milk Producers v. Int'l. Bhd. of Teamsters*, 116 Colo. 389, 183 P.2d 529 (1947).

**8-3-102. Legislative declaration - matter of statewide concern - prohibition on local enactments.** (1) The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this article is enacted, is declared to be as follows:

(a) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(b) Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly, and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever legitimate controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations,

**Employer's alleged violation of act did not foreclose his right to independent remedy.** Where employer alleged in its affirmative defenses and counterclaim that plaintiffs' activities violated the "Colorado labor peace act", such allegation did not foreclose the employer's right to an independent remedy, and the employer was not obliged to first utilize the administrative provisions of the act in seeking a remedy. *Pipeliners Local 798 v. Ellerd*, 503 F.2d 1193 (10th Cir. 1974).

**The labor peace act is not restricted in its application to industry and trade only.** *Indus. Comm'n v. Wallace Vill. for Children*, 165 Colo. 10, 437 P.2d 62 (1968).

**And there is an express recognition of the right of employees to engage in peaceful picketing** throughout the provisions of the labor peace act. *People ex rel. Shaffer v. Teamster Local 961*, 175 Colo. 187, 486 P.2d 10 (1971); *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**If Colorado law is interpreted to allow an action by an employee for violation of a union's duty of fair representation**, in order for employee to sustain the action, he must demonstrate that his claim of wrongful discharge has merit, so that it is probable he would have succeeded in any arbitration proceeding. If the union's invocation of arbitration proceedings would not have provided some relief to the employee, its refusal to take such action did not injure the employee. *Hoff v. Amal. Transit Un., Div. 662*, 758 P.2d 674 (Colo. App. 1987).

**Trial court properly dismissed claim that employee was entitled to protection from retaliation on basis of work-related illness or injury or the filing of a claim for worker's compensation under this act** where complaint did not allege any fact relating to efforts to organize under the labor peace act. *Ferris v. Local 26*, 867 P.2d 38 (Colo. App. 1993).



they should not be permitted in the conduct of their controversy to intrude directly or indirectly into the primary rights of third parties to earn a livelihood, transact business, and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, intimidation, restraint, or coercion.

(c) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation, an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own free choosing without intimidation or coercion from any source.

(d) All rights of persons to join labor organizations or unions and their rights and privileges as members thereof should be recognized, safeguarded, and protected. No person shall be denied membership in a labor organization or union on account of race, creed, color, religion, sex, sexual orientation, marital status, disability, national origin, ancestry, or by any unfair or unjust discrimination. Arbitrary or excessive initiation fees and dues shall not be required, nor shall excessive, unwarranted, arbitrary, or oppressive fines, penalties, or forfeitures be imposed. The members are entitled to full and detailed reports from their officers, agents, or representatives of all financial transactions and shall have the right to elect officers by secret ballot and to determine and vote upon the question of striking, not striking, and other questions of policy affecting the entire membership.

(e) In order to preserve and promote the interests of the public, the employee, and the employer alike, the state shall establish standards of fair conduct in employment relations and provide a convenient, expeditious, and impartial tribunal by which these interests may have their respective rights and obligations adjudicated, without limiting the jurisdiction of the courts to protect property, and to prevent and punish the commission of unlawful acts. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

(f) It is declared to be the common law of the state that no act which if done by one person would constitute a crime under the common law or statutes of this state is any less a crime if committed by two or more persons or corporations acting in concert, and no act which under the common law or statutes of this state is a wrongful act for which any person has a remedy against the wrongdoer if done by one person is any less a remedial wrong if done by two or more persons or corporations in concert, nor shall the injured person be denied relief in the courts of this state in law or equity except as such relief may be expressly limited by statute.

(g) (I) The general assembly hereby finds and determines that the matters contained in this article have important statewide ramifications for the labor force in this state. The general assembly, therefore, declares that the matters contained in this article are of statewide concern.

(II) No unit of local government, whether by acting through its governing body or an initiative, a referendum, or any other process, shall enact any jurisdiction-wide law or ordinance with respect to minimum wages unless specifically authorized to do so by this article; except that a unit of local government may set minimum wages paid to its own employees.

(II.5) Notwithstanding the provisions of subparagraph (II) of this paragraph (g), any local government regulation or law pertaining to minimum wages in effect as of January 1, 1999, shall remain in full force and effect until such law is repealed by the local government entity that enacted the law.

(III) If it is determined by the officer or agency responsible for distributing federal moneys to a local government that compliance with this paragraph (g) may cause denial of federal moneys that would otherwise be available or would otherwise be inconsistent with requirements of federal law, this section shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with federal requirements.

**Source:** L. 43: p. 392, § 1. CSA: C. 97, § 94(1). CRS 53: § 80-5-1. C.R.S. 1963: § 80-4-1. L. 99: (1)(g) added, p. 288, § 1, effective April 14. L. 2008: (1)(d) amended, p. 1598, § 11, effective May 29.

**Cross references:** For the legislative declaration contained in the 2008 act amending subsection (1)(d), see section 1 of chapter 341, Session Laws of Colorado 2008.

### ANNOTATION

**Declarations of policy stated in labor legislation such as the labor peace act are persuasive** in regard to the intended coverage of the act. *St. Luke's Hosp. v. Indus. Comm'n*, 142 Colo. 28, 349 P.2d 995 (1960).

The public policy established by the general assembly precludes courts from imposing a heightened standard of proof on persons seeking remedies against a labor union for allegedly tortious conduct. *Vikman v. Int'l. Broth. of Elec. Workers*, 889 P.2d 646 (Colo. 1995).

**And the purpose of the labor peace act is to restrict the business judgment of both operators and employees in the promotion of the welfare of the industry and of the public.** *UMW v. Sunlight Coal Co.*, 129 Colo. 374, 270 P.2d 776 (1954).

**Employer not required to conform to union rule opposed to policy of this section.** A union does not have the right, based on an employer's contract to conform to any and all rules adopted by the union, to withdraw a shop card upon the employer's refusal to agree to a rule which is opposed to the public policy of the state of Colorado as declared by the general assembly in this section. *Journeyman Barbers Local 205 v. Indus. Comm'n*, 128 Colo. 121, 260 P.2d 941 (1953).

**Such as violation of the principle of collective bargaining.** To require the owner and operator of a business to become a limited or

nonactive member of his employees' union is discriminatory and in violation of the cardinal principle of collective bargaining. *Journeyman Barbers Local 205 v. Indus. Comm'n*, 128 Colo. 121, 260 P.2d 941 (1953).

The isolated use of the term "industrial peace" in the declaration of public policy is not meant to limit the application of the labor peace act only to industry and trade, because the sentence involved goes on to itemize other conditions which the act is designed to promote, including the "uninterrupted production of goods and services". To ascertain the clear meaning of this phrase, it must be viewed in the disjunctive thereby indicating two separate conditions, to wit: uninterrupted production of goods and uninterrupted services. *Indus. Comm'n v. Wallace Vill. for Children*, 165 Colo. 10, 437 P.2d 62 (1968).

**However, a charitable private hospital is not amenable to the collective bargaining provisions of the labor peace act.** *Indus. Comm'n v. Wallace Vill. for Children*, 165 Colo. 10, 437 P.2d 62 (1968).

**But a nonprofit school which works with handicapped children and hires teacher-therapists and counselors for this purpose, but does not provide surgical or medical services and does not employ or have in attendance doctors or nurses, is subject to the provisions of the labor peace act.** *Indus. Comm'n v. Wallace Vill. for Children*, 165 Colo. 10, 437 P.2d 62 (1968).

**8-3-103. Construction.** Except as specifically provided in this article, nothing in this article shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work, nor shall anything in this article be so construed as unlawfully to invade the right to freedom of speech. Nothing in this article shall be so construed or applied as to deprive any employee of any unemployment benefit which he might otherwise be entitled to receive under any other laws of the state of Colorado. The fact that any provisions of this article have been adopted from other states, or the language of the statutes of other states has been used in the preparation of this article shall not be taken to adopt as the construction of such provisions the decisions of other states construing such statutes of other states. It is not the intention of the legislature in adopting this article necessarily to adopt the construction that may have been placed upon similar provisions by the courts of other states.

**Source:** L. 43: p. 417, § 24. CSA: C. 97, § 94(24). CRS 53: § 80-5-21. C.R.S. 1963: § 80-4-21.

### ANNOTATION

The words "nor shall anything in this article be so construed as unlawfully to invade the right to freedom of speech", pertinent as they may be to the application of such regula-

tory provisions of the labor peace act as are not predicated upon the prerequisite of compulsory incorporation of a labor union, do not salvage those provisions which were enacted upon the



assumption of the imposed corporate form on unions found to be unconstitutional. Am. Fed'n of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944).

**This section does not confer eligibility for unemployment compensation benefits upon a**

claimant who is otherwise ineligible. McClaffin v. Indus. Claim Appeals Office, 126 P.3d 288 (Colo. App. 2005).

**8-3-104. Definitions.** As used in this article, unless the context otherwise requires:

(1) "All-union agreement" means a contractual provision between an employer or group of employers and a collective bargaining unit representing some or all of the employees of the employer or group of employers providing for any type of union security and compelling an employee's financial support or allegiance to a labor organization. "All-union agreement" includes, but is not limited to, contractual provision for a union shop, a modified union shop, an agency shop (meaning a contractual provision which provides for periodic payment of a sum in lieu of union dues but does not require union membership), a modified agency shop, a prehire agreement, maintenance of dues, or maintenance of membership.

(2) "Authority" means the state of Colorado; any board, commission, agency, or instrumentality thereof; or any district, municipality, city and county, county, or combination thereof, which acquires or operates a mass transportation system.

(3) "Collective bargaining" means negotiation by an employer and the representative of a majority of his employees who are in a collective bargaining unit or their representatives concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

(4) "Collective bargaining unit" means an organization selected by secret ballot, as provided in section 8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit; except that, where a majority of such employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department, or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in section 8-3-107.

(5) and (6) Repealed.

(7) "Company union" means an organization of employees, the members of which are the employees of only one employer.

(8) "Director" means the director of the division of labor.

(9) "Division" means the division of labor in the department of labor and employment.

(10) "Election" means a proceeding in which the employees authorized by this article cast a secret ballot to select a collective bargaining unit or for any other purpose specified in this article, including elections conducted by the division of labor or by any tribunal having competent jurisdiction or whose jurisdiction has been accepted by the parties.

(11) (a) "Employee" includes any person, other than an independent contractor, domestic servants employed in and about private homes, and farm and ranch labor, working for another for hire in the state of Colorado in a nonexecutive or nonsupervisory capacity, and shall not be limited to the employees of a particular employer and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer; and

(b) Who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative;

(c) Who has not been found to have committed or to have been a party to any unfair labor practice under this article;

(d) Who has not obtained regular and substantially equivalent employment elsewhere;

or

(e) Who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased, except by an employer's unlawful refusal to bargain, and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the federal "Railway Labor Act".

(f) For purposes of this subsection (11), "farm" means stock, dairy, poultry, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, orchards, and other structures used for the raising of agricultural or horticultural commodities, provided such structures are utilized for at least fifty percent of the total output produced.

(12) "Employer" means a person who regularly engages the services of eight or more employees, other than persons within the classes expressly exempted under the terms of subsection (11) of this section, and includes any person acting on behalf of any such employer within the scope of his authority, express or implied. The term does not include the state or any political subdivision thereof, except where the state or any political subdivision thereof acquires or operates a mass transportation system, or any carrier by railroad, express company, or sleeping car company subject to the federal "Railway Labor Act", 45 U.S.C. sec. 151 et seq., or any labor organization or anyone acting in behalf of such organization other than when he is acting as an employer-in-fact.

(13) (a) "Labor dispute" means any controversy between an employer and such of his employees as are organized in a collective bargaining unit concerning the rights or process or details of collective bargaining. The entering into of a contract for an all-union agreement or the refusal of an employer to enter into an all-union agreement shall not constitute a labor dispute. It shall not be a labor dispute where the disputants do not stand in the proximate relation of employer and employee. No jurisdictional dispute or controversy between two or more unions as to which of them has or shall have jurisdiction over certain kinds of work; or as to which of two or more bargaining units constitutes the collective bargaining unit as to which the employer stands impartial or ready to negotiate or bargain with whichever is legally determined to be such bargaining unit, shall constitute a labor dispute.

(b) The general right of an employer to select his own employees is recognized and shall be fully protected. It shall not constitute a labor dispute if an employer discharges or refuses to employ an employee on account of incompetence, neglect of work, unsatisfactory service, or dishonesty; but the discharge of an employee or the refusal to employ an employee shall constitute a labor dispute only when such discharge or refusal to employ is founded upon membership in a union or labor organization or activity therein or when such discharge or failure to employ is in violation of a contract.

(c) No controversy between an employer and his employee shall constitute a labor dispute until after a bargaining unit in accordance with this article is created and a dispute arises between the bargaining unit and the employer.

(d) No labor dispute shall arise from the refusal of an employer to join a union or to cease work in his own business.

(14) "Local union" means an organization of employees employed in this state, the membership of which includes employees of one or more employers, whether or not they are affiliated with an organization of employees employed in one or more other states.

(15) "Mass transportation system" means any system which transports the general public by bus, rail, or any other means of conveyance moving along prescribed routes, except any railroad subject to the federal "Railway Labor Act", 45 U.S.C. sec. 151 et seq.

(16) "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers.

(17) "Representative" includes any person who is the duly authorized agent of a collective bargaining unit.

(18) "Secondary boycott" includes causing or threatening to cause, and combining or conspiring to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by:

(a) Withholding patronage, labor, or other beneficial business intercourse;

(b) Picketing;



(c) Refusing to handle, install, use, or work on particular materials, equipment, or supplies; or

(d) Any other unlawful means in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom the labor dispute exists to comply with any particular demands.

**Source:** L. 43: p. 394, § 2. CSA: C. 97, § 94(2). CRS 53: § 80-5-2. C.R.S. 1963: § 80-4-2. L. 65: p. 810, § 1. L. 69: pp. 594, 731, §§ 72, 2. L. 77: (1) R&RE, p. 419, § 1, effective June 29. L. 86: (5) and (6) repealed, p. 502, § 125, effective July 1. L. 96: (11)(f) added, p. 293, § 1, effective April 12.

## ANNOTATION

- I. General Consideration.
- II. All-union Agreement.
- III. Collective Bargaining Unit.
- IV. Employee and Employer.
- V. Labor Dispute.
- VI. Person.
- VII. Mass Transportation System.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Labor Injunctions Under the Colorado Labor Peace Act", see 26 Dicta 63 (1949). For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L.J. 82 (1970).

**Applied** in *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

### II. ALL-UNION AGREEMENT.

**Regulation not limited to closed shop agreements.** In view of the emphatic language contained in the legislative declaration of rights of employees in § 8-3-106, regulation of "all-union agreements" is not limited to closed shop agreements. *Comm'n Workers of Am. v. W. Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

**Any financial obligation imposed upon employees pursuant to a collective bargaining agreement** executed and sought to be enforced in Colorado has features of compulsory unionism and as such is to be considered an "all-union agreement" under subsection (1). *Comm'n Workers of Am. v. W. Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

Compulsory monetary support of a union is the "practical equivalent" of compulsory membership. *Comm'n Workers of Am. v. W. Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

**Procedures for establishment are incident to state's power.** The procedures for establishing a collective bargaining unit under this article are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in section 14(b) of the federal Taft-Hartley act. *Comm'n Workers of Am. v. W. Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

**"Collective bargaining unit" for purposes of § 8-3-108 (1)(c).** In Colorado a "collective bargaining unit", for purposes of the union security agreement provision of this article, may be something different than a collective bargaining unit for other purposes of labor-management relations. *Comm'n Workers of Am. v. W. Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

**Such unit must be established pursuant to requirements of subsection (4).** In the context of § 8-3-108 (1)(c), a collective bargaining unit is a unique entity which may only be established pursuant to the requirements of subsection (4). *Comm'n Workers of Am. v. W. Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

**Condition precedent to right to enter into all-union agreement with employer.** A collective bargaining unit, as defined by subsection (4), is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. *Comm'n Workers of Am. v. W. Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

**Application of subsection (4) is severable.** The application of subsection (4) to the union security provisions of this article is severable from its application in other contexts of the act.

Comm'n's Workers of Am. v. W. Elec. Co., 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed. 2d 602 (1977).

### III. COLLECTIVE BARGAINING UNIT.

The words "craft, division, department or plant" of subsection (4) are drawn out of custom and usage of industrial and business organization. Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry, 146 Colo. 31, 360 P.2d 446 (1961).

And determinations of what constitutes a "craft, division, department or plant" is left to the discretion of the fact finder. Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry, 146 Colo. 31, 360 P.2d 446 (1961).

### IV. EMPLOYEE AND EMPLOYER.

In defining the terms "employer", and "employee", this section does not exclude an employer such as a nonprofit school for handicapped children nor its employees from the labor peace act. Indus. Comm'n v. Wallace Vill. for Children, 165 Colo. 10, 437 P.2d 62 (1968).

Furthermore, none of the phraseology of this section premises an interpretation of exclusion of nonindustrial employers and employees. Indus. Comm'n v. Wallace Vill. for Children, 165 Colo. 10, 437 P.2d 62 (1968).

**Public employees.** There is no state legislation concerning the rights of public employees to engage in collective bargaining. This article, with an exception, excludes the state or any political subdivision thereof. Greeley Police Union v. City Council, 191 Colo. 419, 553 P.2d 790 (1976).

Coming within the statutory definition of an "employer" is a necessary basis for jurisdiction under the labor peace act. UMW v. Sunlight Coal Co., 129 Colo. 374, 270 P.2d 776 (1954).

For the labor peace act does not apply where an employer employs less than eight employees. Associated Master Barbers Local 115 v. Journeymen Barbers Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

However, it is not necessary that eight employees should be employed during the entire year, but it is sufficient if such employment continues through a reasonably definite period of time and is not casual. UMW v. Sunlight Coal Co., 129 Colo. 374, 270 P.2d 776 (1954).

Since this section does not define an "employer" as one who has an average employment of eight or more employees through the preceding year or as one who has regularly engaged the services of eight or more employees for any specified period of time, as the term

"regularly engages" is not further defined in this section. UMW v. Sunlight Coal Co., 129 Colo. 374, 270 P.2d 776 (1954).

Rather, "regularly", as used in subsection (12), refers to the question whether the occurrence is or is not in an established mode or plan in the operation of the business and has no reference to the constancy of the occurrence. UMW v. Sunlight Coal Co., 129 Colo. 374, 270 P.2d 776 (1954).

As the word "regularly" is not synonymous with constantly or continuously; the work may be intermittent and yet regular, and men may be regularly but not continuously employed. UMW v. Sunlight Coal Co., 129 Colo. 374, 270 P.2d 776 (1954).

**Labor Peace Act does not limit or constrain the law on metropolitan sewage disposal districts concerning the determination of prevailing rates of pay.** Such a district is not required to negotiate or engage in collective bargaining in fixing employee compensation at prevailing rates for equivalent work. Local 1 v. Metro Wastewater Reclamation, 876 P.2d 82 (Colo. App. 1994).

### V. LABOR DISPUTE.

The definition of a "labor dispute" in subsection (13) is not invalid on the ground that it is too narrow. Denver Milk Producers v. Int'l. Bhd. of Teamsters, 116 Colo. 389, 183 P.2d 529 (1947); Amalgamated Meat Cutters & Butcher Workmen v. Green, 119 Colo. 92, 200 P.2d 924 (1948).

One need not be in a "labor dispute" as defined by this section to have a right under the fourteenth amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive. Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co., 134 Colo. 469, 307 P.2d 468 (1957).

For the right of free speech does not depend in such a case on whether or not a "labor dispute" as defined in this section is involved. Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co., 134 Colo. 469, 307 P.2d 468 (1957).

And forbidding resort to peaceful persuasion through picketing because there is no immediate employer-employee dispute is such a ban of free communications as to be inconsistent with the guarantee of freedom of speech. Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co., 134 Colo. 469, 307 P.2d 468 (1957).

As union members have a right to picket a nonunion employer in the absence of a "labor dispute" as defined by subsection (13), because a state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition



between employers and workers so small as to contain only an employer and those directly employed by him. the interdependence of economic interest of all engaged in the same industry has become a commonplace, and so the right of free communication cannot, therefore, be mutilated by denying it to workers, in a "dispute" with an employer, even though they are not in his employ. Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co., 134 Colo. 469, 307 P.2d 468 (1957).

**Moreover, a labor dispute as defined in this section may exist even though there is no controversy between an employer and his own employees.** Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co., 134 Colo. 469, 307 P.2d 468 (1957).

**But a bona fide dispute must exist to allow picketing.** Where the record shows the absence of any negotiations having taken place, or a dispute having occurred, or a statement of grievances having been submitted by the individuals striking and picketing to the individuals against whom the strike is called and against whom the pickets are picketing, it is against public interest to allow such picketing because a bona fide dispute has not been shown to exist. Int'l. Bhd. of Teamsters v. Publix Cab Co., 119 Colo. 208, 202 P.2d 154 (1949).

**Subsection (13)(d), which cannot give rise to a legal labor dispute, cannot become the basis of a rupture of harmonious labor relations** which admittedly existed prior to it. A labor union, or an employer cannot use such a provision as the basis for disturbing preexisting labor relations. To attempt any other construction would be to abandon all logic and reason, to ignore the plain meaning of words, and to discard all fundamental rules of statutory construction. Journeymen Barbers Local 205 v. Indus. Comm'n, 128 Colo. 121, 260 P.2d 941 (1953).

**8-3-105. Director to administer - adopt rules and regulations.** The director shall enforce and administer the provisions of this article and may adopt reasonable rules and regulations relative to its administration and to the conduct of all elections and hearings pertaining to mass transportation as defined in section 8-3-104 (15). Such rules and regulations shall not be effective until ten days after the date thereof.

**Source:** L. 43: p. 397, § 3. CSA: C. 97, § 94(3). CRS 53: § 80-5-3. C.R.S. 1963: § 80-4-3. L. 64: p. 148, § 82. L. 65: p. 811, § 2. L. 69: p. 594, § 73. L. 86: Entire section R&RE, p. 470, § 24, effective July 1.

**Cross references:** For rule-making by state agencies in general, see article 4 of title 24.

**A suit for an injunction to restrain a union from picketing and engaging in a secondary boycott for the purpose of forcing an employer to sign a union contract** does not arise out of a "labor dispute" as defined in subsection (13) of this section. Denver Milk Producers v. Int'l. Bhd. of Teamsters, 116 Colo. 389, 183 P.2d 529 (1947); Amalgamated Meat Cutters & Butcher Workmen v. Green, 119 Colo. 92, 200 P.2d 924 (1948).

**No "labor dispute" as defined by this section found to exist.** Amalgamated Meat Cutters & Butcher Workmen v. Green, 119 Colo. 92, 200 P.2d 924 (1948).

**For "labor dispute" under former provision,** see Local 13, Teamsters v. Perry Truck Lines, Inc., 106 Colo. 25, 101 P.2d 436 (1940); Local 13, Teamsters v. Buckingham Transp. Co., 108 Colo. 419, 118 P.2d 1088 (1941).

**Applied in** People ex rel. Shaffer v. Teamsters Local 961, 175 Colo. 187, 486 P.2d 10 (1971).

## VI. PERSON.

**Definition of "person" does not exclude nonprofit school for handicapped children.** Indus. Comm'n v. Wallace Vill. for Children, 165 Colo. 10, 437 P.2d 62 (1968).

## VII. MASS TRANSPORTATION SYSTEM.

**City-operated bus company is considered a "mass transportation system" operated by a political subdivision of the state for purposes of the "Labor Peace Act".** Hoff v. Amal. Transit Un., Div. 662, 758 P.2d 674 (Colo. App. 1987).

**Regional Transportation District is an "authority" within meaning of this section.** Reg'l Transp. Dist. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992).

## ANNOTATION

### I. Administration.

### II. Rules and Regulations.

## I. ADMINISTRATION.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment to this section which placed the duty of enforcing and administering the "Labor Peace Act" on the director of the division of labor instead of the industrial commission.

**The labor peace act confers jurisdiction** on the industrial commission only in cases where the number of employees is eight or more. *Int'l. Bhd. of Teamsters v. Publix Cab Co.*, 119 Colo. 208, 202 P.2d 154 (1949).

**The commission has jurisdiction to enforce the provisions of the labor peace act against a nonprofit school** for handicapped children which does not provide medical services of any sort. *Indus. Comm'n v. Wallace Vill. for Children*, 165 Colo. 10, 437 P.2d 62 (1968).

## II. RULES AND REGULATIONS.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred rule-

making authority under this section to the director of the division of labor.

**Rules and regulations adopted by the commission, unless expressly or impliedly authorized by statute, are without force or effect** if they add to, change, or modify existing statutes. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**For the commission's authority to regulate does not include the authority to legislate**, but is strictly limited by the law under which it is pursued. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**Hence, when a statute clearly provides a method for accomplishing a desired result, the commission cannot set up a regulation which is contrary thereto**, as its regulations must fit within the framework of the statute itself. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**Regulations protecting right to petition for election to ratify all-union agreement.** The director of the division of labor does not have the authority to adopt rules protecting employees' right to petition for an election to ratify an all-union agreement; the authority to promulgate such regulations is with the industrial commission. *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

**8-3-106. Rights of employees.** In accordance with the provisions of this article, employees have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own free choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Each employee also has the right to refrain from any of such activities. The rights of each employee are essential rights, and nothing contained in this article shall be so construed as to infringe upon or have any operation against or in conflict with such rights.

**Source:** L. 43: p. 397, § 4. CSA: C. 97, § 94(4). CRS 53: § 80-5-4. C.R.S. 1963: § 80-4-4.

## ANNOTATION

**Law reviews.** For article, "The Regional Transportation District Strike and the Colorado Labor Peace Act: A Study in Public Sector Collective Bargaining", see 54 U. Colo. L. Rev. 203 (1983).

**State legislative policy concerning employer-employee relations is declared in this section.** *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**Legislative intent.** The language of the third sentence of this section evinces an intent on the part of the general assembly to protect the working man's right to freely chart his own course with regard to labor organization activities. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50

L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Labor Peace Act does not limit or constrain the law on metropolitan sewage disposal districts concerning the determination of prevailing rates of pay.** Such a district is not required to negotiate or engage in collective bargaining in fixing employee compensation at prevailing rates for equivalent work. *Local 1 v. Metro Wastewater Reclamation*, 876 P.2d 82 (Colo. App. 1994).

**Section held preempted by federal labor legislation since the labor management relations act contains a provision** (29 U.S.C. § 157) which is the equivalent of this section. *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).



**Regulation of all-union agreements not limited to closed shop agreements.** In view of the emphatic language contained in the legislative declaration of rights of employees in this section, regulation of "all-union agreements" is not limited to closed shop agreements. *Comm'n's Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), ap-

peal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Applied in** *City & County of Denver v. Indus. Comm'n*, 195 Colo. 431, 579 P.2d 80 (1978); *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

**8-3-107. Representatives and elections.** (1) A unit chosen for the purpose of collective bargaining shall be the exclusive representative of all of the employees in such unit, if the majority of the employees of one employer, or the majority of the employees of one employer in a craft, vote at an election. But employees individually have the right at any time to present grievances to their employer in person or through representatives of their own free choosing, and the employer shall confer with them in relation thereto.

(2) When a question arises concerning the selection of a collective bargaining unit, it shall be determined by secret ballot, and the director, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employees in any craft, division, department, or plant as to the selection of the collective bargaining unit.

(3) When a question arises concerning the selection of a collective bargaining unit, the director shall determine the question thereof by taking a secret ballot of employees and certifying in writing the results thereof to the bargaining units involved and to their employer. There shall be included on any ballot for the selection of a bargaining unit the names or suitable description of each bargaining unit submitted to the director and claimed to be the appropriate unit by an employee or group of employees participating in the election; except that the director, in his discretion, may exclude from the ballot any bargaining unit which, at the time of the election, stands deprived of its rights under this article by reason of a prior adjudication of its having engaged in an unfair labor practice. The ballot shall be so prepared as to permit a vote against representation by any unit named on the ballot. The director's certification of the results of any election shall be conclusive as to the findings included therein, unless reviewed in the manner provided by section 8-3-110 (8), for review of orders of the director.

(4) Questions concerning the selection of collective bargaining units may be raised by petition of any employee or his employer or the representative of either of them. Where it appears by the petition that any emergency exists requiring prompt action, the director shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employees, if it appears to the director that sufficient reason therefor exists.

(5) The director shall investigate and determine which persons shall be qualified and entitled to vote at any election held by him and shall prepare and certify a poll list of such qualified voters and shall file the same in the office of the director not later than twenty-four nor earlier than forty-eight hours preceding the time of such balloting. The list shall be available to the collective bargaining units whose interests are involved in the election. On request of any employee, the list shall be prepared so as to show separately which employees are entitled to vote for general representation of the employees and which employees are entitled to vote separately for craft representation or representation of any one of several plants of a common employer. No person whose name is not so certified shall be entitled to vote at such election. The director shall protect the secrecy of the ballot and shall take all proper measures for the accurate counting thereof and shall certify the result thereof and immediately file such certificate in the records of the division and make the same available for the inspection of any person interested. The bargaining units so elected and certified shall be the respective representatives of the employees so electing them and recognized as such under this article. The names of all persons voting at the election for the selection of a bargaining unit shall be certified to the division and filed in its records and shall constitute the voting roll for said bargaining unit for all purposes under this article. The name of any person leaving such employment shall be removed from the roll; except that any employee whose name appears on said voting roll may have his name withdrawn from said roll by notice in writing to the division.

**Source:** L. 43: p. 398, § 5. CSA: C. 97, § 94(5). CRS 53: § 80-5-5. C.R.S. 1963: § 80-4-5. L. 69: p. 595, § 74. L. 86: (3) amended, p. 470, § 25, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Selection of Collective Bargaining Unit.
- III. Determination of Qualified Voters.

### I. GENERAL CONSIDERATION.

**Law reviews.** For notes, "Evolving Standards for Duty of Fair Representation Cases Under Section 301", see 62 Den. U. L. Rev 627 (1985). For comment, "Local No. 82 Furniture Movers v. Crowley: Title I Relief When Title IV Claims Are at Issue Under the LMRDA", see 62 Den. U. L. Rev. 675 (1985).

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment to this section which placed the duty of enforcing and administering the "Labor Peace Act" on the director of the division of labor instead of the industrial commission.

### II. SELECTION OF COLLECTIVE BARGAINING UNIT.

**There is a strong policy in this section in favor of fractional representation** of the employees of one employer. *Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 360 P.2d 446 (1961).

**And the determination of the proper group of employees to be represented** in a collective bargaining unit is a matter for the industrial commission. *Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 360 P.2d 446 (1961).

**Moreover, absent a showing that such determination is unlawful, a court of review is not justified in voiding his ruling**, as determinations of this nature have been left by this section to the informed discretion of the director empowered to administer the law. *Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 360 P.2d 446 (1961).

**This section does not specify any particular point in time when a request** for a separate election among a certain craft, division, or department must be made. *Dry Cleaners & Laun-*

*dry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 360 P.2d 446 (1961).

### III. DETERMINATION OF QUALIFIED VOTERS.

**The procedure for certifying election lists by the industrial commission is specifically set forth** in this section. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**And this section is complete as to how one attains the status of an eligible voter.** *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**Hence, a commission regulation providing for challenges at voting is of no effect.** To hold that the clear words of this section can be circumvented by a regulation adopted by the industrial commission providing for challenges at the time of voting is to ignore their plain meaning and confer legislative powers on the commission, and such a regulation is without legal force or effect. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**Nor are regulations of the NLRB.** The rules and regulations of the national labor relations board relating to challenges at elections have no application in view of the precise wording of this section, which does not permit challenges at the time of voting. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**This section, as thus construed, preserves the secrecy of the ballot** to those who vote in an election. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**However, the union, or those employees, who sought the election have the right to make challenges prior to final certification** of the polling list, and it is at that time that any evidence which it is contended affects the eligibility of any person on the voting list must be presented. *Graham Furn. Co. v. Indus. Comm'n*, 138 Colo. 244, 331 P.2d 507 (1958).

**But challenging change in polling list after its approval cannot be raised for first time on appeal.** *Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 360 P.2d 446 (1961).

**8-3-108. What are unfair labor practices.** (1) It is an unfair labor practice for an employer, individually or in concert with others, to:

(a) Interfere with, restrain, or coerce his employees in the exercise of the rights guaranteed in section 8-3-106;

(b) Initiate, create, dominate, or interfere with the formation or administration of any



labor organization or contribute financial support to it; except that an employer shall not be prohibited from reimbursing employees at their prevailing wage rate for time spent conferring with him, nor from cooperating with representatives of at least a majority of his employees in a collective bargaining unit, at their request, by permitting employee organizational activities on employer premises or the use of employer facilities where such activities or use create no additional expense to the employer;

(c) (I) Encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit if such all-union agreement is approved by the affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater, by secret ballot in favor of such all-union agreement in an election provided for in this paragraph (c) conducted under the supervision of the director. Where the collective bargaining unit involved is currently recognized under sections 8 or 9 of the "National Labor Relations Act", as amended, (49 Stat. 449; 61 Stat. 136), or where the collective bargaining unit involved is currently recognized by reason of certification by the director or the national labor relations board, or where such units were so recognized at the time of an election provided for in this paragraph (c), there is and shall be deemed to have been no need for a certification election as a precedent to an election provided for in this paragraph (c) in such collective bargaining unit on the issue of an all-union agreement. The employees in such a recognized or certified unit within this state shall be the only employees eligible to vote in an election provided for in this paragraph (c) held in such unit.

(II) (A) Any agreement as defined in section 8-3-104 (1) between an employer and a labor organization in existence on June 29, 1977, which has not been voted upon by the employees covered by it may, by written mutual agreement of such employer and labor organization, be ratified and upon such ratification shall be filed with the director. Any agreement as defined in section 8-3-104 (1) between an employer and a labor organization in existence on June 29, 1977, which has not been ratified and filed, as provided in this subparagraph (II), shall not be legal, valid, or enforceable during the remaining term of that labor contract unless and until either the employer, the labor organization, or at least twenty percent of the employees covered by such agreement file a petition upon forms provided by the division, demanding an election submitting the question of the all-union agreement to the employees covered by such agreement and said agreement is approved by the affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater, by secret ballot in favor of such all-union agreement in an election provided for in this paragraph (c) conducted under the supervision of the director.

(B) Upon filing of such instrument of ratification with the director, the director shall certify that such agreement complies with the provisions of section 8-3-104 (1) notwithstanding the absence of any other election requirements of this article, and by virtue of such ratification and certification, such agreement shall be deemed legal, valid, and enforceable to the extent permitted under the provisions of this article, subject to the provisions of sub-subparagraph (D) of this subparagraph (II).

(C) Within two weeks after the certification by the director provided for in sub-subparagraph (B) of this subparagraph (II), the employer which is a party to such agreement shall post or give written notice to all employees covered by such agreement on the date of ratification of the fact that the agreement has been ratified and certified pursuant to the provisions of this subparagraph (II) and of the right of such employees to file a petition demanding an election as provided in sub-subparagraph (D) of this subparagraph (II). Proof of giving of notice shall be filed with the director within twenty days after the certification by the director provided for in sub-subparagraph (B) of this subparagraph (II).

(D) Within forty-five days after the certification by the director provided for in sub-subparagraph (B) of this subparagraph (II) twenty percent of the employees covered by such agreement may file a petition, upon forms provided by the division, demanding an election submitting the question of ratification of such agreement to the employees covered

by such agreement. If ratification of the agreement is approved by the affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater, in said election, the agreement shall be conclusively deemed ratified. Such election shall be held as promptly as possible following the filing of the petition. In the event that a certified contract expires or is terminated prior to the conducting of such an election, such certification shall be applicable to any subsequent agreement between the same parties until such election may be held.

(III) The director shall declare any such all-union agreement terminated whenever:

(A) He finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and any person interested may come before the director, as provided in section 8-3-110, and ask the performance of this duty; or

(B) The employer or twenty percent of the employees covered by such agreement file a petition with the director on forms provided by the division seeking to revoke such all-union agreement and, in an election conducted under the supervision of the director, there is not an affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater, in such election by secret ballot in favor of such all-union agreement. Such petition may only be filed within a time period between one hundred twenty and one hundred five days prior to the end of the collective bargaining agreement or prior to a triennial anniversary of the date of such agreement, and the division must complete said election within sixty days prior to the termination or triennial anniversary of said collective bargaining agreement. The director may conduct an election within a collective bargaining unit no more often than once during the term of any collective bargaining agreement or once every three years in the case of agreements for a period longer than three years.

(IV) The director shall provide a means by which employees may submit confidential petitions for an election under this paragraph (c), a means for verifying the employment, status, and eligibility of petitioners, and a means for determining the sufficiency of such petitions with respect to the twenty percent signature requirement, all of which shall be accomplished without disclosing the identification of such petitioners, except as allowed under subparagraph (V) of this paragraph (c). This duty shall apply to petitions filed pursuant to subparagraph (II) (A), (II) (D), or (III) (B) of this paragraph (c).

(V) No officer or employee of the division shall disclose the names of any signers to a petition or disclose how any person voted in an election to any person outside the division except pursuant to a court order or subpoena issued by a governmental authority or a court, and any such officer or employee who violates such nondisclosure provisions or who refuses to call an election pursuant to this paragraph (c) or prevents or conspires to prevent such call of an election commits a class 2 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.

(d) Refuse to bargain collectively with the representatives of his employees in any collective bargaining unit; except that where an employer with reasonable cause files with the division a petition requesting a determination as to bargaining unit representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the director;

(e) Enter into an all-union agreement except in the manner provided in paragraph (c) of this subsection (1);

(f) Violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award;

(g) Refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination, after appeal, if any, of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer has accepted;

(h) Discharge or otherwise discriminate against an employee because he has filed charges or given information or testimony in good faith under the provisions of this article;

(i) Deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally and terminable at any time by the employee's giving at least thirty days' written notice of such termination;



(j) Employ any person to spy upon employees or their representatives respecting their exercise of any right created or approved by this article;

(k) Make, circulate, or cause to be circulated a blacklist as described in section 8-2-110;

(l) Commit any crime or misdemeanor in connection with any controversy as to employment relations;

(m) Require a potential employee to furnish preemployment application information regarding said applicant's record of civil or military disobedience, unless any such matters resulted in a plea of guilty or a conviction by a court of competent jurisdiction.

(2) It is an unfair labor practice for an employee, individually or in concert with others, to:

(a) Coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 8-3-106, or to intimidate his family or any member thereof, picket his domicile, or injure the person or property of such employee or his family or of any member thereof;

(b) Coerce, intimidate, or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 8-3-106, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative;

(c) Violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award;

(d) Refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination, after appeal, if any, of any tribunal having competent jurisdiction of the same or whose jurisdiction the employees or their representatives accepted;

(e) Cooperate in engaging in, promoting, or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike;

(f) Hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind, the pursuit of any lawful work or employment; or to obstruct or interfere with entrance to or egress from any place of employment; or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance;

(g) Engage in a secondary boycott, or to hinder or prevent, by threats, intimidation, force, coercion, or sabotage, the obtaining, use, or disposition of materials, equipment, or services, or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use, or disposition of materials, equipment, or services;

(h) Take, retain, or remain in unauthorized possession of property or any part thereof of the employer, or to engage in any concerted effort to interfere with production, except by leaving the premises in an orderly manner for the purpose of going on strike;

(i) Engage in a sit-down strike on the premises or property of the employer;

(j) Fail to give the notice of intention to strike provided in section 8-3-113;

(k) Commit any crime or misdemeanor in connection with any controversy as to employment relations;

(l) Demand or require any stand-in employee to be hired or employed by an employer, or to demand or require that the employer employ or pay for an employee to stand by or stand in for work being done by other employees, or to require the employer to employ or pay for any employee not required by the employer or necessary for the work of the employer;

(m) Do or cause to be done, on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1) and (2) of this section.

(3) It is an unfair labor practice for an employee, individually or in concert with others, or for a labor organization or any of its agents to:

(a) Induce or encourage the employees of an employer to engage in a strike or concerted refusal in the course of their employment, or by any means to force or require an

employer or any one or more employees to refrain from or prevent the use of any material, device, tool, or equipment intended or calculated to reduce the cost of the work;

(b) Require or force an employer to use any materials or do any work or render any service in connection with any task, job, work, or service as a condition of using any labor-saving device, equipment, tool, or instrument in the performance of such task, job, work, or service;

(c) Impose on any employee any fine, penalty, or forfeiture because such employee has used, is using, or has attempted to use a labor-saving device;

(d) (I) Engage in or induce or encourage employees of any employer to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service where an object thereof is forcing or requiring any employer to assign particular work to employees in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order of the director or certification determining the bargaining representative for employees performing such work; but nothing contained in this subsection (3) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer). Whenever a complaint is filed charging that any person or labor organization is engaged in the unfair labor practice defined in this paragraph (d), the director shall hear and determine the dispute concerning the assignment of work out of which such complaint arises, unless within ten days the parties to the dispute provide evidence to the director that the dispute is properly adjusted, in which case the complaint shall be dismissed by the director.

(II) Upon the filing of a complaint under this paragraph (d), the director shall make a preliminary investigation, and, if he finds that there is reasonable cause that the complaint is true, he may issue an order directing that the employees or labor organization cease and desist from striking, picketing, or refusing to handle or work on goods pending a resolution by the director of the dispute out of which the complaint arises.

(III) Upon the failure or refusal of any person or labor organization against whom such order is issued to comply with this order or direction, the district court of the district wherein the strike, picketing, or refusal to handle or work on goods takes place may, upon application of the director, issue injunctive relief in the manner provided in the Colorado rules of civil procedure for courts of record in Colorado.

(e) With regard to the entirety of this subsection (3), the following shall apply: Such material, device, tool, or equipment is germane to the employees' craft and not injurious to the employees' health and safety or the public generally, and nothing in this subsection (3) shall negate the rights of an employer and a labor organization to bargain collectively pursuant to subsection (1) (d) of this section.

(4) It is an unfair labor practice to do or cause to be done, on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1), (2), and (3) of this section.

**Source:** L. 43: p. 400, § 6. CSA: C. 97, § 94(6). CRS 53: § 80-5-6. L. 63: p. 619, § 1. C.R.S. 1963: § 80-4-6. L. 69: p. 596, § 75. L. 71: p. 887, § 1. L. 77: (1)(c) amended, p. 419, § 2, effective June 29. L. 2002: (1)(c)(V) amended, p. 1466, § 18, effective October 1.

**Cross references:** For the legislative declaration contained in the 2002 act amending subsection (1)(c)(V), see section 1 of chapter 318, Session Laws of Colorado 2002.

## ANNOTATION

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## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Extent to Which Taft-Hartley Act Has Superseded State Labor Laws", see 28 Dicta 47 (1951). For article; "The Regional Transportation District Strike and the Colorado Labor Peace Act: A Study in Public Sector Collective Bargaining", see 54 U. Colo. L. Rev. 203 (1983).

**This section lists a number of things denominated "unfair labor practices".** Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co., 134 Colo. 469, 307 P.2d 468 (1957).

**These may arise because of conduct on the part of management as well as on the part of employees of a particular employer, or on the part of third parties.** Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co., 134 Colo. 469, 307 P.2d 468 (1957); Bldg. Constr. Trades Council v. Am. Bldrs., Inc., 139 Colo. 236, 337 P.2d 953 (1959).

**The labor management relations act (29 U.S.C. § 158) has as its facsimile parts of this section.** Bldg. Constr. Trades Council v. Am. Bldrs., Inc., 139 Colo. 236, 337 P.2d 953 (1959).

**Private right of action against criminal labor statute violator.** The general assembly's broad definition of unfair labor practices indicates an intent to create a private right of action to anyone who can prove by a preponderance of the evidence that a defendant has violated a criminal labor statute. Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982); Bennett v. Furr's Cafeterias, Inc., 549 F. Supp. 887 (D. Colo. 1982).

**Not exception to rule of employment at will.** Statutory pronouncement which makes it unlawful "to coerce or intimidate an employee in the enjoyment of his legal rights" is a broad, general statement of policy which is inadequate to justify adoption of an exception to the rule that an indefinite general hiring is terminable at will by either party to the employment. Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo. App. 1984).

## II. UNFAIR LABOR PRACTICES FOR EMPLOYERS.

- A. Interference with Right of Self-organization.

**Law reviews.** For comment on Bennett's Restaurant v. Indus. Comm'n appearing below, see 30 Dicta 307 (1953).

**Subsections (1)(a) and (1)(c) do not interfere with the normal exercise of the right of**

**the employer to select its employees or to discharge them.** Bennett's Restaurant v. Indus. Comm'n, 127 Colo. 271, 256 P.2d 891 (1953).

**But an employer may not, under cover of this right, intimidate or coerce its employees with respect to their self-organization and representation.** Bennett's Restaurant v. Indus. Comm'n, 127 Colo. 271, 256 P.2d 891 (1953).

**And on the other hand, the labor board is not entitled to make its authority a pretext for interfering with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.** Bennett's Restaurant v. Indus. Comm'n, 127 Colo. 271, 256 P.2d 891 (1953).

**Evidence held to show that employees were wrongfully discharged for organizational activities.** UMW v. Sunlight Coal Co., 129 Colo. 374, 270 P.2d 776 (1954).

- B. Contribute Financial Support.

**An employer cannot be compelled to join a union if contributions in the form of dues and initiation fees are required,** since the financial support of unions consists chiefly, if not wholly, of the dues paid by its members, and if dues paid by members would constitute financial support for a union, there is no reason why dues paid by employers would not also constitute financial support of a union. Journeymen Barbers Local 205 v. Indus. Comm'n, 128 Colo. 121, 260 P.2d 941 (1953).

**However, the term "financial support" is much broader than the mere payment of dues and covers and includes financial support of any kind, character, or description, whether large or small in amount.** Journeymen Barbers Local 205 v. Indus. Comm'n, 128 Colo. 121, 260 P.2d 941 (1953).

- C. All-union Agreements.

**Colorado does not have a right-to-work law.** Bldg. Constr. Trades Council v. Am. Bldrs., Inc., 139 Colo. 236, 337 P.2d 953 (1959).

**So an agreement requiring membership in a labor organization as a condition of employment is under certain circumstances permitted by this section.** Bldg. Constr. Trades Council v. Am. Bldrs., Inc., 139 Colo. 236, 337 P.2d 953 (1959).

**The regulation of union security provisions is not a matter of exclusive federal concern, but states are free to pursue their own more restrictive policies.** Commc'ns Workers of Am. v. Western Elec. Co., 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**The provisions of this section are an important incident of the state's power to prohibit**

the application of certain union security provisions, which power has not been supplanted by federal law. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

The procedures for establishing a collective bargaining unit under this article are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in section 14(b) of the federal Taft-Hartley act. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Subsection (1)(c) is a manifestation of the legislative intent** to protect the working man's right to freely chart his own course with regard to labor organization activities in that it severely restricts the circumstances in which an employee may be subjected to "all-union agreements". *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Application of section.** This section applies to union security clauses in collective bargaining agreements negotiated and executed by multi-state employers engaged in interstate commerce and doing business in Colorado. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Regulation of all-union agreements not limited to closed shop agreements.** In view of the emphatic language contained in the legislative declaration of rights of employees in § 8-3-106, regulation of "all-union agreements" is not limited to closed shop agreements. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**What is considered "all-union agreement".** Any financial obligation imposed upon employees pursuant to a collective bargaining agreement executed and sought to be enforced in Colorado has features of compulsory unionism and as such is to be considered an "all-union agreement" under § 8-3-104 (1). *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

Compulsory monetary support of a union is the "practical equivalent" of compulsory membership. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**The application of § 8-3-104 (4) to the union security provisions of this article is severable** from its application in other contexts of the act. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**"Collective bargaining unit" for purposes of subsection (1)(c).** In Colorado a "collective bargaining unit", for purposes of the union security agreement provision of this article, may be something different than a collective bargaining unit for other purposes of labor-management relations. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Such unit is condition precedent to right to enter into all-union agreement.** A collective bargaining unit, as defined by § 8-3-104 (4), is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**And must be established pursuant to § 8-3-104 (4).** In the context of subsection (1)(c), a collective bargaining unit is a unique entity which may only be established pursuant to the requirements of § 8-3-104 (4). *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Collective bargaining unit recognized only by secret ballot election.** A secret ballot election, as described by § 8-3-104 (4), is the exclusive method by which a collective bargaining unit subject to the "all-union" referendum [now election] provisions of subsection (1)(c) may be recognized. *Comm'ns Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Where election to be conducted.** Subsection (1)(c) plainly directs that the referendum [now election] should be conducted among the employees of a collective bargaining unit. *Comm'ns Workers of Am. v. Western Elec.*



Co., 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

**Regulations protecting right to petition for ratification election.** The director of the division of labor does not have the authority to adopt rules protecting employees' right to petition for a ratification election under subsection (1)(c)(II)(D); the authority to promulgate such regulations is with the industrial commission. *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

**Required employer conduct in all-union agreement election.** While subsection (1)(c) specifies notice to the employees, a period of time for circulating petitions requiring an election, and the number of signatures which must be obtained before an election concerning ratification of an all-union agreement will be required, it does not require any course of action by the employer, let alone such specific conduct as the provision of bulletin board space or access to lists of employees. *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

**Withholding of access to employee lists.** Where access to company bulletin boards is subject to federal determination because of a collective bargaining agreement and access to lists of employees is restricted by National Labor Relations Board procedures, an employer's withholding of such access from petitioners for a ratification election is not an unfair labor practice under this section. *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

**Clauses of collective bargaining agreements were invalid** where they were not approved through an all-union referendum [now election] by an appropriately designated employee group. *Comm'n Workers of Am. v. Western Elec. Co.*, 191 Colo. 128, 551 P.2d 1065 (1976), appeal dismissed, 429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed.2d 785, reh'g denied, 430 U.S. 923, 97 S. Ct. 1341, 51 L. Ed.2d 602 (1977).

### III. UNFAIR LABOR PRACTICES FOR EMPLOYEES.

#### A. In General.

**Provisions restricting mass picketing are contained in subsection (2).** *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

#### B. Intimidation of Employees.

**Harassment incidents insufficient basis to enjoin agreement.** Three relatively isolated incidents of harassment during the first 10 days of petitioning activity, none of which was shown to

have had a widespread impact on the willingness of employees to sign the petitions, and none of which was physically violent, are not sufficient basis for enjoining operation of an all-union agreement after failure to obtain sufficient petition signatures for a separate ratification election. *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

**Subsection (2)(a) of this section, when read together with §§ 8-3-118(1) and 8-3-110(1),** allows the trial court to enjoin the union and its members from engaging in an unfair labor practice. *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124 (Colo. App. 1999), aff'd, 23 P.3d 1197 (Colo. 2001).

#### C. Picketing.

**Law reviews.** For article, "Mass Picketing and the Constitutional Guarantee of Freedom of Speech", see 22 Rocky Mt. L. Rev. 28 (1949). For article, "A Review of the 1959 Constitutional and Administrative Law Decisions", see 37 *Dicta* 81 (1960).

**Picketing may be lawful or unlawful** depending upon the purpose of the picketing and the manner in which it is conducted. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**And subsection (2)(e) declaring that to cooperate in, engaging in, or inducing picketing is an unfair labor practice must be construed in harmony with §§ 8-3-103 and 8-3-109 (2) as to the right of free speech,** if possible; and so construed, the work "picketing" as employed in the labor peace act must be held as intended in its coercive and not in its persuasive, sense. Otherwise the limitation on picketing constitutes a limitation on the right to express views concerning labor relationships and invades the right to freedom of speech, contrary to the explicit provisions of these sections. *Denver Milk Producers v. Int'l. Bhd. of Teamsters*, 116 Colo. 389, 183 P.2d 529 (1947).

**Hence, it is not an unfair labor practice for members of a labor union to peacefully picket an employer of nonunion labor** even though there is no immediate employer-employee dispute, inasmuch as § 8-3-109 (2) preserves the right of free speech concerning "any labor relationship" and one need not be in a "labor dispute" as defined by § 8-3-104 (13)(a) to have a right under the fourteenth amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**Injunction against peaceful residential picketing held unconstitutional** under federal

first amendment and equal protection guarantees. *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124 (Colo. App. 1999), *aff'd* on other grounds, 23 P.3d 1197 (Colo. 2001).

**But picketing that is not peaceful may be enjoined** as a valid exercise of the state's police power. *CF&I Steel, L.P. v. United Steel Workers of Am.*, 23 P.3d 1197 (Colo. 2001).

**Blanket prohibition against residential picketing in subsection (2)(a) is unconstitutional** under federal first amendment and equal protection guarantees. *CF&I Steel, L.P. v. United Steel Workers of Am.*, 23 P.3d 1197 (Colo. 2001).

**"Peaceable picketing"** means simply, tranquil conduct, conduct devoid of noise or tumult, the absence of a quarrelsome demeanor, a course of conduct that does not violate or disturb the public peace. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**One cannot be convicted of violating a municipal ordinance regulating picketing**, inasmuch as the general assembly has enacted comprehensive legislation regulating picketing in

situations where labor disputes are involved and this legislation completely covers the field. *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

#### D. Hindering Place of Employment by Mass Picketing, etc.

**Subsection (2)(f) makes an unfair labor practice of mass picketing**, threats, intimidation, force, or coercion to hinder or prevent any lawful work or employment. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**"Illegal picketing" as by "mass picketing", defined.** Boisterous conduct, the use of vile language, bellicose demeanor, threats, violence, coercion, intimidation, shouting and interference with the use of premises or impeding a public highway, as by mass picketing, which is the use of a large number of pickets, is not peaceable picketing, but is illegal picketing. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**8-3-109. What are not unfair labor practices.** (1) It is not an unfair labor practice for any employer to refuse to grant a closed shop or all-union agreement or to accede to any proposal therefor as provided in this article.

(2) The right of both employer and employee freely to express, declare, and publish their respective views and proposals concerning any labor relationship shall not be abrogated or limited by this article, nor shall the exercise of such right constitute an unfair labor practice. No strike shall be lawful unless it is authorized by a majority vote of the employees in the union involved taken by secret ballot such as is provided in this article.

(3) It shall not be an unfair labor practice for an employer engaged primarily in the building and construction industry to enter into an all-union agreement, except an agreement providing for an agency shop or modified agency shop, with a labor organization, which agreement is limited in its coverage to employees who, upon their employment, will be engaged in the building and construction industry, if a copy of such agreement is filed with the director and certified by him as provided in section 8-3-108 (1) (c) (II) (B). Such agreement may be ratified as provided in section 8-3-108 (1) (c) (II) (C) or terminated by the director as provided in section 8-3-108 (1) (c) (III).

**Source: L. 43:** p. 403, § 7. **CSA:** C. 97, § 94(7). **CRS 53:** § 80-5-7. **C.R.S. 1963:** § 80-4-7. **L. 77:** (3) added, p. 422, § 3, effective June 29.

#### ANNOTATION

**Subsection (2) of this section excludes from the category of "unfair labor practice" the right of both employer and employee freely to express, declare, and publish their respective views and proposals concerning any labor relationship.** *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**Subsection (2) is a recognition of the constitutional right of every citizen.** *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**Peaceful picketing is a form of free speech and as such protected** by constitutional guaranty, for to hold otherwise would be to fix a limitation on the right to express views concerning a labor relationship, and invade the right of freedom of speech contrary to the explicit provisions of this section. *People v. Harris*, 104 Colo. 386, 91 P.2d 989 (1939); *Local 13, Teamsters v. Perry Truck Lines, Inc.*, 106 Colo. 25, 101 P.2d 436 (1940); *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).



Moreover, this right of free communication cannot be mutilated by denying it to workers in a "dispute" with an employer even though they are not in his employ, inasmuch as a state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him, for the interdependence of economic interest of all engaged in the same industry has become a commonplace. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

Therefore, this section does not prohibit picketing by a labor union of an employer of nonunion labor even though there is no immediate employer-employee dispute, as such a ban

of free communication is inconsistent with the guarantee of freedom of speech. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

However, picketing must be "peaceful", and "peaceful picketing" means simply, tranquil conduct, conduct devoid of noise or tumult, the absence of a quarrelsome demeanor, a course of conduct that does not violate or disturb the public peace. As a necessary corollary, boisterous conduct, the use of vile language, bellicose demeanor, threats, violence, coercion, intimidation, shouting and interference with the use of premises or impeding a public highway, as by mass picketing, which is the use of a large number of pickets, is not peaceable picketing, but is illegal picketing. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**8-3-110. Prevention of unfair labor practices.** (1) Any controversy concerning unfair labor practices may be submitted to the division in the manner and with the effect provided in this article; but nothing in this article shall prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this article before the division have not been exhausted.

(2) Upon the filing with the division by any party in interest of a complaint in writing on a form provided by the division charging any person with having engaged in any specific unfair labor practice, the division shall mail a copy of such complaint to all persons so charged. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or representative thereof, shall be made a party upon application. The director may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the director at any time prior to the issuance of a final order based thereon. The persons so complained of have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the notice of hearing. The director shall fix a time for the hearing on such complaint, which shall not be less than ten nor more than forty days after the filing of such complaint. Notice shall be given to the complainant and to each party named in the pleadings by service on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. In case a party in interest is located without the state and has no known post office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon the party located within this state. Such hearing may be adjourned from time to time in the discretion of the director and hearings may be held at such places as the director designates. The director may initiate and file any such complaint of his own motion or at the request of any interested person. Should the director file such a complaint on request, he shall not disclose the name or interest of the person upon whose request the complaint is filed, if in his judgment such disclosure would tend to prejudice the interest of any person who may be affected by any order that the director may enter upon such complaint.

(3) The director has the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by the Colorado rules of civil procedure, and all such depositions shall be taken upon commissions issued by the director. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the director on the ground that the testimony or evidence required of him may tend to incriminate him or subject him

to a penalty or forfeiture under the laws of the state of Colorado. No individual shall be prosecuted or subjected to any penalty or forfeiture for any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before the director in obedience to a subpoena issued by him. An individual so testifying shall not be exempt from prosecution and punishment for perjury in the first degree committed in so testifying.

(4) Any person who willfully and unlawfully fails or neglects to appear or testify or to produce books, papers, and records as required, upon application to a district court, shall be ordered to appear before the director to testify or produce evidence if so ordered, and failure to obey such order of the court may be punished by the court as a contempt thereof.

(5) Each witness who appears before the director by his order or subpoena shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon presentation of properly verified vouchers approved by the director and charged to the proper appropriation for the division.

(6) A complete record shall be kept of all proceedings had before the director, and all testimony and proceedings shall be taken down by the reporter appointed by the director. Such proceedings shall not be governed by the technical rules of evidence, but by such rules as are prescribed by the director for administrative hearings.

(7) After the final hearing the director shall promptly make and file his findings of fact upon all of the issues involved in the controversy and his order which shall state his determination as to the rights of the parties. Pending the final determination of any controversy before him, the director, after hearing, may make interlocutory findings and orders, which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed; suspend his rights, immunities, privileges, or remedies granted or afforded by this article as the director may specify, but not more than one year; and require an employer to take such affirmative action, including reinstatement of employees with or without pay, as the director may deem proper. Any order may further require such person to make reports from time to time showing the extent to which he has complied with the order.

(8) The director may authorize a deputy, referee, or administrative law judge appointed pursuant to part 10 of article 30 of title 24, C.R.S., to take evidence and to make findings and report them to the director. Any party in interest who is dissatisfied with the findings or order of the director may seek judicial review pursuant to section 24-4-106, C.R.S.

(9) The director, on his own motion, may set aside, modify, or change any of his findings or orders at any time within twenty days from the date thereof if he discovers any mistake therein or upon the ground of newly discovered evidence.

(10) If any party fails or neglects to obey an order of the director while the same is in effect, the director may file a complaint in the district court of the county wherein such person resides or usually transacts business for the enforcement of such order for appropriate temporary relief or restraining order, and shall certify and file in the court the record in the proceedings, including all documents and papers on file in the matter, and pleadings and testimony upon which such order was entered, and the findings and order of the director. Upon the filing the director shall cause notice thereof to be served upon such party by mailing a copy to his last known post office address, and thereupon the court has jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing upon such order by the director serving ten days' written notice upon the respondent, subject, however, to the Colorado rules of civil procedure for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the director and enter an appropriate decree. No objection that was not urged before the director shall be considered by the court unless the failure or neglect to urge such objection is excused because of extraordinary circumstances. The findings of fact made by the director, if supported by credible and competent evidence in the record, shall be conclusive. The court in its discretion may grant leave to adduce additional evidence before the court where such evidence appears to be material and reasonable cause is shown for failure to have adduced



such evidence in the hearing before the director. The director may modify his findings as to facts, or make new findings by reason of such additional evidence, and he shall file such modified or new findings with the same effect as his original findings and shall file his recommendations, if any, for the modification or setting aside of his original order. The court's judgment and decree shall be final; except that the same shall be subject to appellate review as provided by law.

(11) to (14) Repealed.

(15) Substantial compliance with the procedures of this article is sufficient to give effect to the orders of the director, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

(16) The right of any person to proceed under this section and section 8-3-121 shall not extend beyond six months from the date of the specific act or unfair labor practice alleged.

(17) The director also has the power by himself and on his own motion to initiate proceedings in the manner provided in this section. It is likewise the duty of the director to so initiate a proceeding in his own name whenever complaint is made to him by any party in interest if it appears to the director that the disclosure of the name of the complainant, either as an employee or group of employees or as an employer or agent or representative of the employer, would jeopardize the rights or interests or standing of any party in interest. The proceedings so initiated by the director shall be conducted in the same manner and have the same effect as provided for in this section.

(18) (a) The director has the power and it is his duty in carrying out the public policy of the state, either upon his own initiative or upon the complaint of any party in interest or any organization or persons representing any public interests, if there is picketing which in the opinion of the director might tend to lead to riots, disturbances, or assaults or disturb public peace or injure the property or persons of individuals, to limit the number of pickets that may be permitted; and to prescribe the distance from any plant, entrance, or exit where such picketing may be permitted; and to otherwise prescribe limits to such picketing, including not only the number of persons picketing but also the manner or method thereof; and to prevent the use of weapons of any kind or threats or intimidation.

(b) Upon the failure or refusal of any person against whom any such order or direction is issued to comply with such order or direction, the district court of the district wherein the picketing takes place or the violation occurs, upon application of the director, may issue injunctive relief in the manner provided in the Colorado rules of civil procedure for courts of record in Colorado.

**Source:** L. 43: p. 403, § 8. CSA: C. 97, § 94(8). CRS 53: § 80-5-8. C.R.S. 1963: § 80-4-8. L. 69: p. 596, § 76. L. 72: p. 561, § 27. L. 77: (8) amended, p. 305, § 1, effective June 10; (16) amended, p. 423, § 4, effective June 29. L. 86: (6), (8), and (15) amended, p. 471, § 26, effective July 1; (11), (12), (13), and (14) repealed, p. 502, § 125, effective July 1. L. 87: (8) amended, p. 937, § 6, effective March 13.

**Cross references:** For fees and mileage of witnesses, see §§ 13-33-102 and 13-33-103; for the taking of depositions, see C.R.C.P. 26-37; for punishment of contempt, see C.R.C.P. 107; for issuance of injunctions, see C.R.C.P. 65.

## ANNOTATION

- I. General Consideration.
- II. Federal Preemption.
- III. Complaints.
  - A. Initiation of Complaint.
  - B. Hearing.
  - C. Remedies.
- IV. Post Hearing.
- V. Regulation of Picketing.
  - A. In General.
  - B. Injunctions.

## I. GENERAL CONSIDERATION.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment to this section which placed the duty of enforcing and administering the labor peace act on the director of the division of labor instead of the industrial commission.

**Municipalities do not have the power to adopt ordinances regulating activities con-**

nected with labor disputes. *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

**This act does not contain a comprehensive administrative scheme that precludes assertion of claim for wrongful discharge in violation of public policy;** accordingly, the filing of a claim under this act does not preclude litigation of other causes of action arising out of the same circumstances. *Ferris v. Local 26*, 867 P.2d 38 (Colo. App. 1993).

## II. FEDERAL PREEMPTION.

**Law reviews.** For article, "The Extent to Which Taft-Hartley Act Has Superseded State Labor Laws", see 28 *Dicta* 47 (1951). For article, "Federal Preemption Under the NLRA: A Rule In Search of A Reason", see 62 *Den. U. L. Rev.* 531 (1985).

**Federal authority is solitary and exclusive in situations where both state and federal laws forbid certain labor conduct and provide machinery for enforcement.** *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**Thus the state cannot supply a congruous yet rival remedy to that furnished by the federal act.** *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**And there can be no concurrency of remedy,** because the federal remedy, when applicable, is preemptive and solitary. *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**The labor management relations act in essence establishes exclusion of state power in matters involving an unfair labor practice affecting commerce.** *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**And exclusive primary jurisdiction to pass on a union's picketing is delegated by the Taft-Hartley Act to the national labor relations board.** *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**Notwithstanding, power is vested in the national labor relations board to "cede" jurisdiction to a state agency of a case having to do with a labor dispute affecting commerce if the state has a statute applicable to the problem not inconsistent with the federal act.** *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**But until cession is made, the state is without such power.** *Bldg. Constr. Trades Council v. Am. Bldrs., Inc.*, 139 Colo. 236, 337 P.2d 953 (1959).

**But there remains in the state power to regulate picketing.** Although much of the area of control and regulation of labor disputes has been preempted by federal legislation, there remains in the states, within the confines of con-

stitutional limitations, certain power to regulate picketing and to protect public safety in so doing. *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

**For Taft-Hartley Act is not exclusive in controlling violence.** With the passage of the Taft-Hartley Act in 1947, Congress recognized that labor unions also might commit unfair labor practices to the detriment of employees, and prohibited, among other practices, coercion of employees who wish to refrain from striking; but this amendment did not eliminate a state's power to control picketing activities through state labor statutes, as section 8 (b)(1) of the Taft-Hartley Act is not the exclusive method of controlling violence even against employees, much less violence interfering with others approaching an area where a strike is in progress. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent state from taking steps to stop the violence;** for the states are the natural guardians of the public against violence, and it is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. Hence, an act of congress cannot be interpreted to leave them powerless to avert such emergencies without compelling directions to that effect. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**Furthermore, where union activity is not protected by the federal act, it is not immunized from state action.** *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**State laws adopted pursuant to 29 U.S.C. § 164(b)** represent an area where state laws will control. *Ruff v. Kezer*, 199 Colo. 182, 606 P.2d 441 (1980).

## III. COMPLAINTS.

### A. Initiation of Complaint.

**The industrial commission is authorized to investigate every charge which alleges an unfair labor practice.** *People ex rel. Shaffer v. Teamsters Local 961*, 175 Colo. 187, 486 P.2d 10 (1971).

### B. Hearing.

**In ascertaining whether an employee was discharged because of union activities the industrial commission may consider circumstantial, as well as direct, evidence,** but when circumstantial evidence is relied on there must be evidence of circumstances from which the commission may conclude with reasonable certainty that the employee was discharged because



of union activity. *Bennett's Restaurant v. Indus. Comm'n*, 127 Colo. 271, 256 P.2d 891 (1953).

**And the fact that some of the evidence relating to a discriminatory discharge is hearsay affords no basis for objecting to the finding.** *Bennett's Restaurant v. Indus. Comm'n*, 127 Colo. 271, 256 P.2d 891 (1953).

**However, mere suspicion or conjecture alone is not sufficient** on which to base a finding of discriminatory discharge. *Bennett's Restaurant v. Indus. Comm'n*, 127 Colo. 271, 256 P.2d 891 (1953).

**The division of labor's duty to hold hearings and to make decisions determining the rights of parties necessarily and implicitly includes the authority to interpret statutes pertinent to the dispute.** *Denver Local 2-477 v. Metro Wastewater Reclamation Dist.*, 7 P.3d 1042 (Colo. App. 1999).

#### C. Remedies.

**Reinstatement of employees wrongfully discharged will not compel an employer to operate in a manner that would be contrary to business judgment** with a totalitarian result of confiscation where no such result appears from the record, for the business judgment of employers must always be limited by the applicable requirements of statutes and the very purpose of the labor peace act is to restrict the business judgment of both employers and employees in the promotion of the welfare of industry and of the public. *UMW v. Sunlight Coal Co.*, 129 Colo. 374, 270 P.2d 776 (1954).

**However, an order for reinstatement of such employees does not necessarily require their continuance** for any specified time in future employment. Rather, they are to return to the same status which existed at the time of their discharge, subject to termination of their employment upon valid grounds not contrary to the provisions of the labor peace act at any time thereafter. *UMW v. Sunlight Coal Co.*, 129 Colo. 374, 270 P.2d 776 (1954).

#### IV. POST HEARING.

**A complaint for review has to be filed within 30 days under former provisions of section unless the time was extended by reason of prejudice** "because of exceptional delay in the receipt of a copy of order of the commission". *Indus. Comm'n v. Sheard*, 170 Colo. 76, 459 P.2d 127 (1969).

**And misadvice of attorney that there is 60 days to seek review was not a ground for extension under this section.** *Indus. Comm'n v. Sheard*, 170 Colo. 76, 459 P.2d 127 (1969).

**By failing to seek review within 30 days the right of appeal was lost.** *Indus. Comm'n v. Sheard*, 170 Colo. 76, 459 P.2d 127 (1969).

**On appeal the question to be resolved was whether the findings were supported by any credible and competent evidence in the record.** *Bennett's Restaurant v. Indus. Comm'n*, 127 Colo. 271, 256 P.2d 891 (1953).

**And court errs in making its own findings.** The court erred in making its own findings where the matter was not one in which the testimony was short and undisputed. *Indus. Comm'n v. Sheard*, 170 Colo. 76, 459 P.2d 127 (1969).

#### V. REGULATION OF PICKETING.

##### A. In General.

**The state, through its general assembly and courts, can reasonably regulate picketing** and rights of assembly with proper constitutional safeguards for those affected thereby, for picketing is not an absolute right at all times and places. *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

**And a bona fide dispute must be shown to exist to allow picketing.** *Int'l. Bhd. of Teamsters v. Publix Cab Co.*, 119 Colo. 208, 202 P.2d 154 (1949).

**Declaratory judgment as to validity of subsection (18) refused absent a concrete situation.** *Am. Fed'n of Labor v. Reilly*, 113 Colo. 90, 115 P.2d 145 (1944).

##### B. Injunctions.

**Law reviews.** For article, "Labor Injunctions Under the Colorado Labor Peace Act", see 26 *Dicta* 63 (1949).

**While investigating unfair labor practices, the director has jurisdiction to issue restraining orders or injunctions** to enjoin strikes and lockouts, but not peaceful picketing. *People ex rel. Shaffer v. Teamsters Local 961*, 175 Colo. 187, 486 P.2d 10 (1971).

**For this section does not provide for issuance of injunctions to restrain peaceful picketing.** *People ex rel. Shaffer v. Teamsters Local 961*, 175 Colo. 187, 486 P.2d 10 (1971); *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124 (Colo. App. 1999), *aff'd*, 23 P.3d 1197 (Colo. 2001).

**Subsection (1) of this section, when read together with §§ 8-3-108(2)(a) and 8-3-118(1), allows the trial court to enjoin the union and its members from engaging in an unfair labor practice.** *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124 (Colo. App. 1999), *aff'd*, 23 P.3d 1197 (Colo. 2001).

#### 8-3-111. Protection of employees when authority acquires certain operations.

(1) Before any authority may acquire and operate any property of a privately or publicly

owned mass transportation system, fair and equitable protective arrangements, as determined by the director, shall be made to insure certain rights of employees. Such protective arrangements shall include, without being limited to, such provisions as may be necessary to accomplish the following objectives:

(a) The preservation of existing rights, privileges, and benefits of employees under existing collective bargaining agreements between the mass transportation system and the employees thereof, including the continuation of all pension rights and benefits of the employees and their beneficiaries;

(b) The continuation of all collective bargaining in any situation existing at the time of such acquisition and the assurance of employment of all the employees of such mass transportation system so acquired;

(c) The protection of all individual employees with respect to their employment, including priorities, seniorities, and right of advancement when in agreement with any existing collective bargaining agreement;

(d) Training and retraining programs of employees and managing personnel.

(2) The contract whereby an authority acquires any property of a privately or publicly owned mass transportation system shall specify with particularity, the terms and conditions of all the protective arrangements set forth in this section, including all other protective arrangements which may be added through collective bargaining or by direction of the director.

(3) The determination of the sufficiency of protective arrangements shall be made by the director in accordance with such rules and regulations as the commission may from time to time establish.

**Source:** L. 43: p. 409, § 9. CSA: C. 97, § 94 (9). CRS 53: § 80-5-9. L. 65: p. 811, § 3. C.R.S. 1963: § 80-4-9. L. 69: p. 600, § 77.

**8-3-112. Arbitration.** (1) Parties to a labor dispute may agree in writing to have the director act as arbitrator or to name arbitrators to arbitrate all or any part of such dispute, and thereupon the director shall have the power so to act. The director shall appoint as arbitrators only competent, impartial, and disinterested persons. Proceedings in any such arbitration shall be as provided by the rules of arbitration under the Colorado rules of civil procedure.

(2) All parties to any labor dispute when the employer is an authority shall submit to arbitration upon written order of the director when such written order is the result of the procedure set forth in section 8-3-113 (3). Any order so given shall be subject to appeal within five days of the receipt of such order by either the employee's representative or the authority, who are parties in interest. Appeal of the order shall be made to the district court in the judicial district where the most substantial number of the employees concerned are employed. Such court shall either confirm, deny, amend, or continue the order within sixty days following the application for appeal. The results of any arbitration conducted in accordance with the procedure set forth in this article shall be binding upon all parties in interest with the right of appeal to any court of competent jurisdiction on the grounds that the director or arbitration board has been unfair, capricious, or unjust in its conduct, determinations, or award.

**Source:** L. 43: p. 409, § 10. CSA: C. 97, § 94(10). CRS 53: § 80-5-10. C.R.S. 1963: § 80-4-10. L. 65: p. 812, § 4. L. 69: p. 600, § 78.

**Cross references:** For director's duty in relation to arbitration, see § 8-1-123.

#### ANNOTATION

**Law reviews.** For note, "Judicial Intervention in Arbitration Enforcement Cases - The Tenth Circuit Expands Upon the Limited Judi-

cial Review Standard of Enterprise Wheel", see 62 Den. U. L. Rev. 593 (1985).

**This section is constitutional.** Reg'l Transp.



Dist. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992).

**Provisions for an arbitrator do not constitute too broad a delegation of legislative authority** since arbitrator's discretion to set terms and conditions of employment is limited by sufficient standards of judicial review. Reg'l Transp. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992).

**Availability of judicial review of arbitrator's award and of director's decision to order arbitration under this section imposed**

**sufficient standards and safeguards.** Therefore, no unlawful delegation of legislative authority occurred. Reg'l Transp. Dist. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992).

**RTD is not a municipality** and is not performing a municipal function within the meaning of section 35 of article V and therefore, the nondelegation requirement does not prevent the general assembly from requiring binding interest arbitration pursuant to this section. Reg'l Transp. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992).

**8-3-113. Mediation.** (1) The director has power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon his own initiative or upon the request of one of the parties to the dispute. It is the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the director has any power of compulsion in mediation proceedings. The director shall provide necessary expenses and order reasonable compensation for such mediators as he may appoint.

(2) Where, as provided by this article, the exercise of the right to strike by the employees of any employer engaged in the state of Colorado in the production, harvesting, or initial processing, the latter after leaving the farm, of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employees shall give to the division at least thirty days' notice of their intention to strike, and, in the case of employees in all other industries or occupations, at least twenty days' notice of their intention to strike. The division shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the director shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the director shall endeavor to induce the parties to arbitrate the controversy. Any strike called or made effective before the expiration of twenty days from the date of such notice shall constitute an unfair labor practice.

(3) Where the exercise of the right to strike is desired by the employees of any authority, the employees or their representatives shall file with the division written notice of intent to strike not less than forty calendar days prior to the date contemplated for such strike. Within twenty days of the filing of the notice, the director shall enter an order allowing or denying the strike based on the grounds of whether or not such strike would interfere with the preservation of the public peace, health, and safety in accordance with rules and regulations of the division. Any order denying a strike under this section shall include an order to arbitrate in accordance with section 8-3-112. Such arbitration shall be entered into not later than one hundred days from the filing of the notice of intent to strike. Immediately upon receipt of a notice of intent to strike, the director shall take steps to effect mediation, if possible. In the event of failure to mediate, the director shall endeavor to induce the parties to arbitrate the controversy. Any strike before the expiration of forty days from the giving of notice of intent to strike or in violation of an order of the director, unless such order is changed on appeal or otherwise, shall constitute an unfair labor practice.

(4) The division shall prescribe reasonable rules of procedure for mediation under this section.

**Source:** L. 43: p. 410, § 11. CSA: C. 97, § 94(11). CRS 53: § 80-5-11. C.R.S. 1963: § 80-4-11. L. 65: p. 813, § 5. L. 69: p. 601, § 79. L. 86: (3) and (4) amended, p. 471, § 27, effective July 1.

#### ANNOTATION

**This section is constitutional.** Reg'l Transp. Dist. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992).

**The Labor Peace Act provides that the director may deny the right to strike under circumstances that would interfere with the pub-**

lic peace, health, and safety, but balances the denial with the provision for mandatory arbitration. *Reg'l Transp. v. Dept. of Labor*, 830 P.2d 942 (Colo. 1992).

The reference to "employees in all other industries or occupations" in this section is so clear and so unambiguous as to the intention of the general assembly not to restrict the labor peace act to only industry and trade that it is

unnecessary to even consider the usual rules of construction where ambiguities and uncertainties are found in statutory provisions. *Indus. Comm'n v. Wallace Vill. for Children*, 165 Colo. 10, 437 P.2d 62 (1968).

**Declaratory judgment as to validity of subsection (2) refused in absence of concrete situation.** *Am. Fed'n of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944).

**8-3-114. Duties of attorney general and district attorneys.** Upon the request of the director, the attorney general or the district attorney of the county in which a proceeding is brought before the district court for the purpose of enforcing or reviewing an order of the director shall appear and act as counsel for the director in such proceeding and in any proceeding to review the action of the district court affirming, modifying, or reversing such order.

**Source:** L. 43: p. 410, § 12. CSA: C. 97, § 94(12). CRS 53: § 80-5-12. C.R.S. 1963: § 80-4-12. L. 69: p. 602, § 80. L. 86: Entire section amended, p. 471, § 28, effective July 1.

**8-3-115. Employer and employee committees.** The director, from time to time, may appoint joint, standing, or special committees composed in equal numbers of representatives of employees and employers. The director may refer to any such committee for its study and advice any matters concerning the relations of employers and employees or the operation of this article.

**Source:** L. 43: p. 410, § 13. CSA: C. 97, § 94(13). CRS 53: § 80-5-13. C.R.S. 1963: § 80-4-13. L. 69: p. 602, § 81.

**8-3-116. Interference with director - officer of division.** Any person who willfully assaults, resists, prevents, impedes, or interferes with the director or any officer, deputy, agent, or employee of the division or any of its agencies in the performance of duties pursuant to this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

**Source:** L. 43: p. 411, § 14. CSA: C. 97, § 94(14). CRS 53: § 80-5-14. C.R.S. 1963: § 80-4-14. L. 69: p. 602, § 82. L. 86: Entire section amended, p. 472, § 29, effective July 1.

**8-3-117. Existing contracts unaffected.** Nothing in this article shall operate to abrogate, annul, or modify any valid agreement respecting employment relations existing on or before April 1, 1943.

**Source:** L. 43: p. 411, § 15. CSA: C. 97, § 94(15). CRS 53: § 80-5-15. C.R.S. 1963: § 80-4-15.

**8-3-118. Jurisdiction to issue restraining orders or injunctions.** (1) Except as otherwise provided in this article, no court has jurisdiction to issue in any case involving or growing out of a labor dispute any restraining order or temporary or permanent injunction which in specific or general terms prohibits any person from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment, regardless of any promise, undertaking, contract, or agreement to do such work or to remain in such employment;



(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any undertaking or promise as is described in section 8-3-119;

(c) Paying or giving to or withholding from any person any strike or unemployment benefits or insurance or other moneys or things of value;

(d) Aiding, by all lawful means, any person who is being proceeded against in, or is prosecuting any action or suit in, any court of this state;

(e) Giving publicity to and obtaining or communicating information regarding the existence of or the facts involved in any dispute, whether by advertising, speaking, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing as an organization to patronize any person with whom the organization has a labor dispute or requiring it to employ any person;

(g) Assembling peaceably to do or to organize to do any of the acts specified in this section or to promote lawful interests;

(h) Advising or notifying any person of an intention to do any of the acts specified in this section;

(i) Agreeing with other persons to do or not to do any of the acts specified in this section;

(j) Advising, urging, or inducing, without fraud, violence, or threat thereof, others to do the acts specified in this section, regardless of any such undertaking or promise as is described in section 8-3-119;

(k) Doing in concert any acts specified in this section on the ground that the persons engaged therein constitute an unlawful combination or conspiracy.

**Source:** L. 43: p. 411, § 16. CSA: C. 97, § 94(16). CRS 53: § 80-5-16. C.R.S. 1963: § 80-4-16.

## ANNOTATION

I. General Consideration.

II. Federal Preemption.

III. Publicizing Labor Disputes.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Labor Injunctions Under the Colorado Labor Peace Act", see 26 Dicta 63 (1949).

**Annotator's note.** Since § 8-3-118 is similar to repealed CSA, C. 97, §§ 76-84, relevant cases construing those provisions have been included in the annotations to this section.

**This section does not take away any rights from employees and unions, but bestows upon them additional rights** in "labor disputes" not theretofore possessed, as it creates a defense in labor disputes against actions for restraining orders and injunctions not permitted in other disputes. *Denver Milk Producers, Inc. v. Int'l. Bhd. of Teamsters*, 116 Colo. 389, 183 P.2d 529 (1947).

**And it is only in cases involving labor disputes that a court does not have jurisdiction to grant such orders.** *Denver Milk Producers, Inc. v. Int'l. Bhd. of Teamsters*, 116 Colo. 389, 183 P.2d 529 (1947).

**For, in the absence of any statute on this subject matter, there is no restriction on the courts in granting restraining orders or injunc-**

tions in any case. *Denver Milk Producers, Inc. v. Int'l. Bhd. of Teamsters*, 116 Colo. 389, 183 P.2d 529 (1947).

**However, where there is no "labor dispute",** as defined in § 8-3-104 (13), between employer and his employees, there is no restraint on the court by virtue of this section to issue an injunction restraining a union's picketing and other acts. *Amalgamated Meat Cutters & Butcher Workmen v. Green*, 119 Colo. 92, 200 P.2d 924 (1948).

**Earlier provision held constitutional.** *Local 13, Teamsters v. Perry Truck Lines, Inc.*, 106 Colo. 25, 101 P.2d 436 (1940).

**But other section which made picketing unlawful held unconstitutional.** *People v. Harris*, 104 Colo. 386, 91 P.2d 989 (1939).

**However, provisions protecting activities that are normal incidents of picketing are contained in this section.** *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

### II. FEDERAL PREEMPTION.

**Law reviews.** For article, "The Extent to Which Taft-Hartley Act Has Superseded State Labor Laws", see 28 Dicta 47 (1951).

**The state may not enjoin conduct which has been made an unfair labor practice under the federal statutes.** *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956);

Bldg. Constr. Trades Council v. Am. Bldrs., Inc., 139 Colo. 236, 337 P.2d 953 (1959).

**But this rule does not take from the state power to prevent mass picketing, violence, and overt threats of violence,** for the dominant interest of the state in preventing violence and property damage cannot be questioned; it is a matter of genuine local concern. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**And such conduct is not subject to the federal board.** The state is allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of the homes of employees, as such conduct is not subject to the federal board, either by prohibition or protection. *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

**Therefore, state courts do have jurisdiction to enjoin threats of personal injury and property damage to employees and management.** *UMW v. Golden Cycle Corp.*, 134 Colo. 140, 300 P.2d 799 (1956).

### III. PUBLICIZING LABOR DISPUTES.

**Law reviews.** For note, "Colorado's Anti-Picketing Law is Scrapped", see 11 Rocky Mt. L. Rev. 255 (1939).

**Courts are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing.** *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

**But this section does not provide for issuance of injunctions to restrain peaceful picketing.** *People ex rel. Shaffer v. Teamsters Local 961*, 175 Colo. 187, 486 P.2d 10 (1971).

**Freedom of speech in labor disputes is guaranteed by the federal constitution.** That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic, but not even these essential powers are unfettered by the requirements of the bill of rights; and the scope of the fourteenth amendment is not confined by the notion of the state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. Consequently, members of a union might, without special statutory authorization by the state, make known the facts of a labor dispute for freedom of speech is guaranteed by the federal constitution. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**Even though the dispute is not an immediate employer-employee one,** peaceful picketing in connection with a labor dispute has its basic

roots in the constitutional guaranties of liberty and freedom of speech, and a state may not by its common-law or statutory policy prohibit persuasion, through peaceful picketing, notwithstanding the occasioning labor dispute is not an immediate employer-employee one; inasmuch as a state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him, the interdependence of economic interest of all engaged in the same industry has become a commonplace. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**However, "nonpeaceful" picketing may constitutionally be enjoined.** When picketing is not peaceful or where, while peaceful in itself, it is set against a background of acts of violence, injunctive relief may be granted constitutionally. *Local 13, Teamsters v. Buckingham Transp. Co.*, 108 Colo. 419, 118 P.2d 1088 (1941); *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124 (Colo. App. 1999), *aff'd*, 23 P.3d 1197 (Colo. 2001).

**As such does not infringe the fourteenth amendment.** Where a controversy is attended by peaceful picketing and by acts of violence, and the violence is such that continuation of the picketing will operate coercively by exciting fear that violence will be resumed, an injunction by a state court forbidding the picketing as well as the violence does not infringe the fourteenth amendment. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**This section must be considered with § 8-3-109 (2).** *Amalgamated Meat Cutters & Butcher Workmen v. Green*, 119 Colo. 92, 200 P.2d 924 (1948).

**When so considered and taken together, these sections mean** that courts are divested of all jurisdiction to grant restraining orders or injunctions which prohibit any person from doing certain specific things therein mentioned, in any case involving or growing out of a labor dispute. *Amalgamated Meat Cutters & Butcher Workmen v. Green*, 119 Colo. 92, 200 P.2d 924, (1948).

**Subsection (1) of this section, when read together with §§ 8-3-108(2)(a) and 8-3-110(1),** confers jurisdiction upon the trial court to enjoin the union and its members from engaging in an unfair labor practice. *CF&I Steel, L.P. v. United Steel Workers of Am.*, 990 P.2d 1124 (Colo. App. 1999), *aff'd*, 23 P.3d 1197 (Colo. 2001).

**A labor union cannot legally be enjoined from peaceful picketing or restrained in their conduct.** *Local 13, Teamsters v. Perry Truck Lines, Inc.*, 106 Colo. 25, 101 P.2d 436 (1940).



In “any dispute”. Subsection (1)(e) of this section provides that no court may issue an injunction in any case involving a labor dispute to restrain giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in “any dispute”,

whether by advertising, speaking, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof. *Pueblo Bldg. & Constr. Trades Council v. Harper Constr. Co.*, 134 Colo. 469, 307 P.2d 468 (1957).

**8-3-119. Relations contrary to public policy.** (1) The following is declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise or against any other persons who may advise, urge, or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of the undertaking or promise: Every undertaking or promise made on or after April 1, 1943, whether written or oral, express or implied, between any employee or prospective employee and his employer, prospective employer, or any other individual, firm, company, association, or corporation, whereby:

(a) Either party thereto undertakes or promises to join or to remain a member of some specific labor organization or to join or remain a member of some specific employer organization or any employer organization; or

(b) Either party thereto undertakes or promises not to join or not to remain a member of some specific labor organization or of some specific employer organization or any employer organizations; or

(c) Either party thereto undertakes or promises that he will withdraw from an employment relation in the event that he joins or remains a member of some specific labor organization or any labor organization or of some specific employer organization or any employer organization.

**Source:** L. 43: p. 412, § 17. CSA: C. 97, § 94(17). CRS 53: § 80-5-17. C.R.S. 1963: § 80-4-17.

**8-3-120. Conflict of provisions.** Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this article, this article shall prevail; except that, in any situation where the provisions of this article cannot be validly enforced, the provisions of such other statutes or laws shall apply.

**Source:** L. 43: p. 413, § 18. CSA: C. 97, § 94(18). CRS 53: § 80-5-18. C.R.S. 1963: § 80-4-18.

#### ANNOTATION

**Labor Peace Act does not limit or constrain the law on metropolitan sewage disposal districts concerning the determination of prevailing rates of pay.** Such a district is not required to negotiate or engage in collective bargaining in fixing employee compensation at

prevailing rates for equivalent work. *Local 1 v. Metro Wastewater Reclamation*, 876 P.2d 82 (Colo. App. 1994).

**Applied in** *People ex rel. Shaffer v. Teamsters Local 961*, 175 Colo. 187, 486 P.2d 10 (1971).

**8-3-121. Civil liability for damages.** (1) Any person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the injured person thereby.

(2) If, in accordance with this article or otherwise, persons otherwise unwilling to do so are induced to violate contracts of employment or for services or materials, any person injured thereby shall be entitled to recover and have judgment therefor at law against the persons, jointly and severally, so inducing the violation of such obligations.

**Source:** L. 43: p. 416, § 22. CSA: C. 97, § 94(22). CRS 53: § 80-5-19. C.R.S. 1963: § 80-4-19.

## ANNOTATION

- I. General Consideration.
- II. Unfair Labor Practices.
- III. Violation of Contract.
- IV. Damages.

## I. GENERAL CONSIDERATION.

**Liability for damages existed prior to legislation.** Prior to the enactment of legislation, state and national, designed for the peaceful settlement of labor disputes and controversy, one interfering with a work project of another would be held liable to the extent of all damages caused by such intrusion, and unless by the enactment of legislation the right to be so protected has been eliminated, modified, or otherwise circumscribed, it still exists. *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**But there is nothing under the labor peace act which allows either interest or attorney fees.** *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**Applied in** *Bennett v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982).

## II. UNFAIR LABOR PRACTICES.

**Damages for tortious labor conduct are recoverable in any court of competent jurisdiction,** whether state or federal. *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**Even where the national labor relations board establishes a violation, recovery of damages for the resulting injury is left to any court of competent jurisdiction.** *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**Violation of § 8-2-116 is an unfair labor practice** and thus damages are recoverable under this section. *Rawson v. Sears, Roebuck & Co.*, 530 F. Supp. 776 (D. Colo. 1982).

## III. VIOLATION OF CONTRACT.

**There is nothing inherently illegal in requiring a labor organization to live up to its**

**written contracts.** *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**And so where the members of a union violate their contract** and walk off a job, individually refuse to cross a picket line, and, supported by the union, refuse to furnish union members to operate machines, completely immobilize and render entirely useless all of the machinery to the same extent as though it had been retained in their possession and actually impounded, it is simply a method of depriving the employer of the use of his property and is ineffective to relieve them of liability for their breach of contract. *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

## IV. DAMAGES.

**Damages, as used in this section, includes those damages recoverable in a common law tort action.** *Rawson v. Sears, Roebuck & Co.*, 585 F. Supp. 1393 (D. Colo. 1984).

**Damages where heavy equipment is kept idle is its fair rental value.** It is impossible to allocate to each of several heavy machines on a job the proportion of the overall profit attributable to the agency of each thereof, and so where, through unlawful or wrongful acts, heavy equipment is kept idle and the work expected to be accomplished thereby delayed, the fair rental value of such equipment during the period of prevention of its use is generally adopted as a proper measure for determination of the extent of damage. This loss of use rule is in keeping with the general rule that damages should be calculated in such manner as is most favorable to the party liable, and it is logical that the rental cost or value of a machine would be less than the amount expected to be derived from its use - if it can be rented for a sum equal to the amount it will return in use, why use it; if one should rent a machine to do a specific job, would he not expect to make a profit for himself over and above the rental he would have to pay? *Denver Bldg. & Constr. Trades Council v. Shore*, 132 Colo. 187, 287 P.2d 267 (1955).

**8-3-122. Penalty for violation.** Any person, firm, or corporation who violates any of the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined for the first offense not less than fifty dollars nor more than one hundred dollars and for the second and subsequent offenses not less than one hundred dollars nor more than five hundred dollars, together with costs.

**Source:** L. 43: p. 417, § 23. CSA: C. 97, § 94(23). CRS 53: § 80-5-20. C.R.S. 1963: § 80-4-20. L. 64: p. 389, § 25.



## ANNOTATION

**Law reviews.** For article, "Labor Injunctions Under the Colorado Labor Peace Act", see 26 Dicta 63 (1949).

**8-3-123. Nonapplicability of other statutes.** The provisions of sections 8-1-108, 8-1-120, and 8-1-123 shall not apply to this article, but this article and the administration thereof are governed and controlled as to all matters contained in sections 8-1-108, 8-1-120, and 8-1-123 by the special provisions of this article.

**Source:** L. 43: p. 417, § 25. CSA: C. 97, § 94(25). CRS 53: § 80-5-22. C.R.S. 1963: § 80-4-22. L. 76: Entire section amended, p. 297, § 12, effective May 20.

## ARTICLE 3.5

Nonimmigrant Agricultural Seasonal  
Worker Pilot Program

**Cross references:** For the legislative declaration contained in the 2008 act enacting this article, see section 1 of chapter 447, Session Laws of Colorado 2008.

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|------------|---|--|
| 8-3.5-101. | Short title.  | sonal worker pilot program cash fund.                            |
| 8-3.5-102. | Legislative declaration.  |  |
| 8-3.5-103. | Definitions.  | 8-3.5-109. Identification cards issued by department of revenue. |
| 8-3.5-104. | Pilot program - creation - powers of department - advisory council. | 8-3.5-110. Penalties - hearing - court action - civil actions.   |
| 8-3.5-105. | Application process - screening.                                    | 8-3.5-111. Report to general assembly.                           |
| 8-3.5-106. | Visa violation notification - employee compliance.                  | 8-3.5-112. Rules.  |
| 8-3.5-107. | Retaliation prohibited.   | 8-3.5-113. Severability.   |
| 8-3.5-108. | Nonimmigrant agricultural sea-                                      | 8-3.5-114. Repeal of article.                                    |

**8-3.5-101. Short title.** This article shall be known and may be cited as the "Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program Act".

**Source:** L. 2008: Entire article added, p. 2299, § 2, effective August 5.

**8-3.5-102. Legislative declaration.** It is the intent of the general assembly to establish a nonimmigrant agricultural seasonal worker pilot program to expedite the seasonal worker application and approval process in compliance with the existing federal H-2A visa certification process so that eligible workers may come to Colorado legally, safely, and in a timely manner to meet the demands of Colorado producers.

**Source:** L. 2008: Entire article added, p. 2299, § 2, effective August 5.

**8-3.5-103. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Agent" means a person or entity in the business of:
  - (a) Developing and submitting appropriate application materials to the state employment security agency and the department responsible for issuing labor certifications for a specific employer and job;
  - (b) Coordinating local recruitment with the employer and state employment security agency;
  - (c) Developing appropriate documentation of employer requirements and employment terms for use in selecting foreign workers; and
  - (d) Filing for visa petition approval and coordinating visa issuance by the United States consulate or embassy in the worker's country of origin.

(2) "Commissioner" means the commissioner of the Colorado department of agriculture or his or her designee.

(3) "Department" means the Colorado department of labor and employment.

(4) "Director" means the executive director of the department of labor and employment or his or her designee.

(5) "Employee" means a person who works for an employer and is an active participant in the program.

(6) "Employer" means a person or entity that has applied and been accepted to participate in the program and employs one or more employees.

(7) (a) "H-2A visa" means a temporary agricultural nonimmigrant visa that allows foreign nationals to enter into the United States to perform agricultural labor or services of a temporary or seasonal nature and that is issued pursuant to the federal "Immigration Reform and Control Act of 1986", 8 U.S.C. sec. 1101 et seq.

(b) An H-2A visa allows for the admission of nonimmigrant foreign workers into the United States to perform agricultural work that is temporary in nature, such as harvesting crops. Nonimmigrants are persons legally admitted into the United States for a specific purpose and time period and who do not intend to make the United States their permanent residence. H-2A visas are administered jointly by the United States department of labor and the United States citizenship and immigration services.

(8) "Labor certification" means the process by which the United States department of labor is permitted to issue certification that there are not sufficient United States workers who are able, willing, and qualified to perform agricultural services on a temporary basis, and that the employment of foreign workers in the labor or services will not adversely affect the wages and working conditions of workers in the United States. Employers who anticipate a shortage of available United States workers needed to perform agricultural labor on a temporary basis may apply to the United States department of labor for certification. The application for certification must include a copy of the job offer that will be used by each employer for the recruitment of United States and H-2A workers, the estimated number of workers needed by the employer, and the date by which the workers are needed. Employers are required to apply for certification at least forty-five days in advance of their estimated date of need.

(9) "Program" means the nonimmigrant agricultural seasonal worker pilot program established in section 8-3.5-104.

**Source: L. 2008:** Entire article added, p. 2299, § 2, effective August 5.

#### **8-3.5-104. Pilot program - creation - powers of department - advisory council.**

(1) There is hereby established in the department the nonimmigrant agricultural seasonal worker pilot program. The purpose of the program shall be to expedite the application and approval of the federal H-2A visa certification process established as part of the federal "Immigration Reform and Control Act of 1986", 8 U.S.C. sec. 1101 et seq. Upon the promulgation of rules pursuant to section 8-3.5-112, the director or his or her designee, in cooperation with the commissioner or his or her designee, shall implement the program.

(2) The program shall include sectors of the agriculture industry identified by the director in cooperation with the commissioner, shall be limited to one thousand employees in the first year, and shall increase by one thousand additional employees annually for four years thereafter.

(3) The director and the commissioner, in conjunction with the director of the governor's office of economic development and international trade, may seek agreements between Colorado and foreign countries to assist in the recruiting and selection of eligible H-2A workers and in the maintenance of a pool of workers to depart for work in Colorado upon the approval of the employees' federal H-2A visas and employer approval for participation in the program. A family member of an employee may participate in the program only if the family member also qualifies for and is issued a current H-2A visa.

(4) There is hereby established the nonimmigrant agricultural seasonal worker pilot program advisory council. The advisory council members shall be the commissioner of the department of agriculture or his or her designee, the executive director of the department of



labor and employment or his or her designee, the chairs of the house business affairs and labor committee and the senate business, labor, and technology committee, the chairs of the house and senate agriculture, livestock, and natural resources committees, or their successor committees, and three appointees of the governor, one who is a representative of the agriculture industry, one who has experience in immigration services, and one who is a representative of a migrant worker advocacy group. Members of the advisory council are entitled to reimbursement for actual and necessary expenses incurred in the performance of their duties. The advisory council shall make recommendations for the adoption of rules pursuant to section 8-3.5-112 and shall assist in the preparation of the report to the general assembly pursuant to section 8-3.5-111. The advisory council shall consult with health insurance carriers in this state to determine the availability of health insurance plans for employees participating in the program. The advisory council shall include in the report to the general assembly any legislative recommendations deemed necessary to make health insurance available to seasonal agricultural workers.

**Source: L. 2008:** Entire article added, p. 2300, § 2, effective August 5.

**8-3.5-105. Application process - screening.** (1) The department shall work with employers participating in the program to expedite the H-2A visa application, approval, and recruitment process so that the seasonal agricultural needs of the employers are met in a timely manner.

(2) The department is authorized to charge employers a fee necessary to cover the costs of the program. The fees collected shall be transferred to the state treasurer who shall deposit the moneys into the nonimmigrant agricultural seasonal worker pilot program cash fund established in section 8-3.5-108.

(3) The director may retain agents to assist identified workers making applications for H-2A visas through the United States embassy or consulate, to coordinate a medical screening of workers prior to their departure to the United States, to coordinate travel to Colorado, and to document each employee's return to his or her country of origin.

(4) The employer shall:

(a) Reimburse the employee for the costs of transportation and subsistence from the site of recruitment to the place of employment when half of the contract period is complete;

(b) Provide free transportation to the employee between the employee's local housing and the work site;

(c) Pay for the costs of return transportation and subsistence to the place of recruitment when the contract period is complete;

(d) Provide free housing for each employee that meets safety and health standards established by federal law, which shall be subject to inspection by the department;

(e) Provide United States workers and employees the same benefits, wages, and working conditions;

(f) Pay the employee wages that are in compliance with the federal requirements established pursuant to the federal "Immigration Reform and Control Act of 1986", 8 U.S.C. sec. 1101 et seq.;

(g) Provide workers' compensation insurance;

(h) Provide all tools, supplies, and equipment required to perform the duties assigned, without charge, to the employee;

(i) In compliance with federal law, provide each employee with three low-cost meals per day and disclose the cost in the employment contract or provide free cooking and kitchen facilities;

(j) Guarantee employment for at least three-fourths of the work days during the work contract period;

(k) Guarantee that the employee will be paid at least twice per month; and

(l) Provide to the employee a copy of the work contract between the employer and the employee.

(5) An employer seeking to employ employees through the program shall make the following assurances:

- (a) That the employer will comply with applicable federal, state, and local employment laws;
- (b) That no United States worker will be rejected for or terminated from employment other than for a lawful job-related reason; and
- (c) That the employer will, in a timely manner, pay the fees associated with the program.

**Source: L. 2008:** Entire article added, p. 2301, § 2, effective August 5.

**8-3.5-106. Visa violation notification - employee compliance.** (1) Each employer shall notify the department within the time period specified in, and in accordance with, section 8 CFR 214.2 (h) (5) (vi) (A) if an employee absconds from his or her employment.

(2) If an employer, with reckless disregard, fails to notify the department as required in subsection (1) of this section, the department may:

- (a) Deny the employer future participation in the program; or
- (b) Impose a fine on the employer for each violation, not to exceed two hundred dollars per day per violation, that shall be deposited into the nonimmigrant agricultural seasonal worker pilot program cash fund created in section 8-3.5-108.

(3) The department shall notify the United States citizenship and immigration services of any known violations of the conditions for the issuance of an H-2A visa.

(4) An employee who complies with the conditions of the program shall have the opportunity and be given priority to participate in the program the following year.

**Source: L. 2008:** Entire article added, p. 2303, § 2, effective August 5.

**8-3.5-107. Retaliation prohibited.** An employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has, with just cause, performed any act enumerated in 20 CFR 655.103 (g).

**Source: L. 2008:** Entire article added, p. 2303, § 2, effective August 5.

**8-3.5-108. Nonimmigrant agricultural seasonal worker pilot program cash fund.** There is hereby established the nonimmigrant agricultural seasonal worker pilot program cash fund in the state treasury, referred to in this section as the "fund". Moneys in the fund shall consist of any fees or fines collected pursuant to this article. The moneys in the fund shall be annually appropriated to the department for the administrative costs associated with the program. Any moneys remaining in the fund at the end of any fiscal year shall remain in the fund and shall not revert to the general fund or any other fund.

**Source: L. 2008:** Entire article added, p. 2303, § 2, effective August 5.

**8-3.5-109. Identification cards issued by department of revenue.** Within two weeks after an employee's arrival in Colorado, the employee shall apply for an identification card issued by the department of revenue pursuant to part 3 of article 2 of title 42, C.R.S. The employer shall provide free transportation to the employee in order for the employee to meet this requirement.

**Source: L. 2008:** Entire article added, p. 2303, § 2, effective August 5.

**8-3.5-110. Penalties - hearing - court action - civil actions.** (1) A person who, with reckless disregard, violates any provisions of this article, or who, with reckless disregard, causes or induces another to violate any provisions of this article, may be assessed a fine by the director of not more than five thousand dollars. Any moneys collected pursuant to this section shall be transferred to the state treasurer who shall deposit the same into the



nonimmigrant agricultural seasonal worker pilot program cash fund established in section 8-3.5-108.

(2) The person shall be afforded the opportunity for a hearing upon request to the director made within thirty days after the date of issuance of the notice of assessment.

(3) If any person fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the department, the director shall refer the matter to the state attorney general, who shall recover the amount assessed by action in the appropriate court of competent jurisdiction. In such action, the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

**Source:** L. 2008: Entire article added, p. 2303, § 2, effective August 5.

**8-3.5-111. Report to general assembly.** On or before February 1, 2010, the director, in cooperation with the commissioner, shall report to the senate business, labor, and technology committee, the senate agriculture, natural resources, and energy committee, the house business affairs and labor committee, and the house agriculture, livestock, and natural resources committee of the general assembly, or their successor committees, regarding the progress of the program. The report shall include any recommended legislative changes.

**Source:** L. 2008: Entire article added, p. 2304, § 2, effective August 5.

**8-3.5-112. Rules.** On or before January 1, 2009, the department, in consultation with the commissioner and the advisory council created in section 8-3.5-104 (4), shall promulgate rules as necessary for the delineation of oversight responsibilities to the department under, and for the implementation of, this article.

**Source:** L. 2008: Entire article added, p. 2304, § 2, effective August 5.

**8-3.5-113. Severability.** If any provision of this article or its application to any person or circumstance is held illegal, invalid, or unenforceable, no other provisions or applications of this article shall be affected that can be given effect without the illegal, invalid, or unenforceable provision or application, and to this end the provisions of this article are severable.

**Source:** L. 2008: Entire article added, p. 2304, § 2, effective August 5.

**8-3.5-114. Repeal of article.** This article is repealed, effective January 1, 2014.

**Source:** L. 2008: Entire article added, p. 2304, § 2, effective August 5.

## Wages

### ARTICLE 4

## Wages

**Editor's note:** This article was numbered as article 8 of chapter 80, C.R.S. 1963. The substantive provisions of this article were amended with relocations in 2003, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2003, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

**Law reviews:** For article, "An Overview of Federal and State Wage-Hour Laws — Part II", see 14 Colo. Law. 781 (1985); for article, "State Laws: A Growing Minefield for Employers", see 23

Colo. Law. 1089 (1994); for article, "Civil Actions Under the Colorado Wage Claim Act", see 28 Colo. Law. 65 (February 1999); for article, "New Age Employee Compensation Issues: Or, It Used To Be So Simple . . .", see 29 Colo. Law. 5 (June 2000); for article, "New Developments in Colorado Wage Law", see 33 Colo. Law. 67 (January 2004); for article, "The Colorado Wage Act, Employee Status, and Terms of Compensation", see 36 Colo. Law. 63 (May 2007); for article, "2007 Amendments to the Colorado Wage Claim Act", see 36 Colo. Law. 47 (December 2007).

8-4-101.	Definitions.	8-4-111.	Enforcement - duty of director - duties of district or city attorneys.
8-4-102.	Proper payment - record of wages.	8-4-112.	Enforcement of director subpoenas.
8-4-103.	Payment of wages - insufficient funds - pay statement - record retention - tip notification.	8-4-113.	Penalties pursuant to enforcement.
8-4-104.	Funds available to pay wages - mining industry.	8-4-114.	Criminal penalties.
8-4-105.	Payroll deductions permitted.	8-4-115.	Certificate of registration required.
8-4-105.5.	Automatic enrollment in retirement plans - relief from liability - conditions - definitions.	8-4-116.	Issuance of certificate of registration.
8-4-106.	Early payment of wages permitted.	8-4-117.	Additional obligations.
8-4-107.	Post notice of paydays.	8-4-118.	Authority to obtain information.
8-4-108.	Payment in the event of strike.	8-4-119.	Penalty provisions.
8-4-109.	Termination of employment - payments required - civil penalties - payments to surviving spouse or heir.	8-4-120.	Discrimination prohibited - employee protections.
8-4-110.	Disputes - fees.	8-4-121.	Nonwaiver of employee rights.
		8-4-122.	Limitation of actions.
		8-4-123.	Termination of occupancy pursuant to contract of employment - legislative declaration.

**8-4-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Credit" means an arrangement or understanding with the bank or other drawee for the payment of an order, check, draft, note, memorandum, or other acknowledgment of indebtedness.

(2) "Director" means the director of the division of labor or his or her designee.

(3) "Division" means the division of labor in the department of labor and employment.

(4) "Employee" means any person, including a migratory laborer, performing labor or services for the benefit of an employer in which the employer may command when, where, and how much labor or services shall be performed. For the purpose of this article, an individual primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is not an "employee".

(5) "Employer" means every person, firm, partnership, association, corporation, migratory field labor contractor or crew leader, receiver, or other officer of court in Colorado, and any agent or officer thereof, of the above mentioned classes, employing any person in Colorado; except that the provisions of this article shall not apply to the state or its agencies or entities, counties, cities and counties, municipal corporations, quasi-municipal corporations, school districts, and irrigation, reservoir, or drainage conservation companies or districts organized and existing under the laws of Colorado.

(6) "Field labor contractor" means anyone who contracts with an employer to recruit, solicit, hire, or furnish migratory labor for agricultural purposes to do any one or more of the following activities in this state: Hoeing, thinning, topping, sacking, hauling, harvesting, cleaning, cutting, sorting, and other direct manual labor affecting beets, onions, lettuce, potatoes, tomatoes, and other products, fruits, or crops in which labor is seasonal in this state. Such term shall not include a farmer or grower, packinghouse operator, ginner, or warehouseman or any full-time regular and year-round employee of the farmer or grower, packinghouse operator, ginner, or warehouseman who engages in such activities, nor shall it include any migratory laborer who engages in such activities with regard to such migratory laborer's own children, spouse, parents, siblings, or grandparents.



(7) "Migratory laborer" means any person from within or without the limits of the state of Colorado who offers his or her services to a field labor contractor, whether from within or from without the limits of the state of Colorado, so that said field labor contractor may enter into a contract with any employer to furnish the services of said migratory laborers in seasonal employment.

(8) (a) "Wages" or "compensation" means:

(I) All amounts for labor or service performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculating the same or whether the labor or service is performed under contract, subcontract, partnership, subpartnership, station plan, or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment. No amount is considered to be wages or compensation until such amount is earned, vested, and determinable, at which time such amount shall be payable to the employee pursuant to this article.

(II) Bonuses or commissions earned for labor or services performed in accordance with the terms of any agreement between an employer and employee;

(III) Vacation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee.

(b) "Wages" or "compensation" does not include severance pay.

**Source: L. 2003:** Entire article amended with relocations, p. 1850, § 1, effective August 6.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under this section as it existed prior to the 2003 amendment to article 4, which resulted in the relocation of provisions.

**The provisions of the Wage Claim Act should be liberally construed** to carry out its purpose of assuring timely payment of wages and providing adequate judicial relief when wages are not paid. *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114 (1975); *Cusimano v. Metro Auto, Inc.*, 860 P.2d 532 (Colo. App. 1992).

Therefore, construing the Act to impose personal liability for wages on high ranking corporate officers furthers that legislative purpose. *Cusimano v. Metro Auto, Inc.*, 860 P.2d 532 (Colo. App. 1992).

**Wage Claim Act provides a clear, comprehensive statutory scheme** designed to require an employer to pay wages earned by their employees in a timely manner. *Lambdin v. Dist. Ct. of Arapahoe Cty.*, 903 P.2d 1126 (Colo. 1995).

**Timely compensation or judicial relief intended.** The beneficial purpose of the general assembly in drafting this section was to assure that employees would be timely compensated for labor or services and that when not so compensated they would be entitled to adequate judicial relief. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**A plaintiff may bring claims under both the federal Fair Labor Standards Act and the state Wage Claim Act.** *Redmond v. Chains, Inc.*, 996 P.2d 759 (Colo. App. 2000).

**Real estate salesman not "employee"** within definition of subsection (5). *Hyland v. Pikes Peak Capital Corp.* 714 P.2d 914 (Colo. App. 1985).

**Association of counties and municipal corporations excepted from "employer".** Since counties and municipal corporations are excepted from the definition of "employer", an association which consists of counties and municipal corporations is also excepted. *Paulu v. Lower Ark. Valley Council of Gov'ts*, 655 P.2d 1391 (Colo. App. 1982).

**Definition of "employer" in subsection (6)** does not include individual officers and agents of a corporation. *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003) (disagreeing with *Cusimano v. Metro Auto., Inc.*, cited below).

**Corporate officers not individually liable for wages.** The officers and agents of a corporation are not jointly and severally liable for payment of employee wages and other compensation the corporation owes its employees under the employment contract and the Colorado Wage Claim Act. *Leonard v. McMorris*, 63 P.3d 323 (Colo.) (disagreeing with *Cusimano v. Metro Auto., Inc.*, cited below), 320 F.3d 1116 (10th Cir. 2003).

**Definition of "employer" in subsection (6)** clearly discloses an intent to impose personal liability for wages on at least high ranking corporate officers based solely on their status as officers, and the definition is not expressly limited to corporate officers with duties in relation

to the unpaid employee. *Cusimano v. Metro Auto, Inc.*, 860 P.2d 532 (Colo. App. 1992); *Major v. Chons Bros., Inc.*, 53 P.3d 781 (Colo. App. 2002).

A general manager whose duties included scheduling of overtime work but who had been given no authority or responsibility over wage payment policies was not subject to personal liability under the Wage Claim Act. *Major v. Chons Bros., Inc.*, 53 P.3d 781 (Colo. App. 2002).

**Federal Bankruptcy Code does not preempt claims against corporate officers under the Wage Claim Act.** Claims under the Wage Claim Act would be preempted if brought against the corporation because the corporation filed a bankruptcy petition. The Bankruptcy Code does not, however, extend its protections to individuals or entities that have not filed a bankruptcy petition. In the absence of such a statutory provision, no direct conflict exists between the Bankruptcy Code and the Wage Claim Act. *Leonard v. McMorris*, 106 F. Supp.2d 1098 (D. Colo. 2000), rev'd on other grounds, 320 F.3d 1116 (10th Cir. 2003).

**The term "corporation" in subsection (6) refers to private corporations**, since municipal and quasi-municipal corporations are mentioned separately as exceptions. *Paulu v. Lower Ark. Valley Council of Gov'ts*, 655 P.2d 1391 (Colo. App. 1982).

**The term "employer" in subsection (6) does not include the state of Colorado.** The Wage Claim Act does not apply to the state or state agencies. *Lang v. Colo. Mental Health Inst. in Pueblo*, 44 P.3d 262 (Colo. App. 2001).

**Vacation pay is within the definition of "wages or compensation".** *Hartman v. Freedman*, 197 Colo. 275, 591 P.2d 1318 (1979); *Thompson v. Cheyenne Mtn. Sch. Dist.*, 844 P.2d 1235 (Colo. App. 1992).

**Payments under employer's growth bonus program were "wages"** where plan replaced existing commission programs, provided for cash payments to supplement employees' regular earnings based on their efforts in areas of sales and company growth, no components of

the fund were based on net profit, and only one component was based on "gross profit". *Gray v. Empire Gas, Inc.*, 679 P.2d 610 (Colo. App. 1984).

**Bonus is "wages or compensation"** where it is both vested and determinable as of the date of termination, where the bonus is disproportionately large in relation to the base salary, and where bonus was owed as compensation for services performed by individual employee rather than pursuant to profit-sharing plan. *Rohr v. Ted Neiters Motor Co.*, 758 P.2d 186 (Colo. 1988).

**There is an implied right to compensation for unused vacation time** upon termination of contract with school district absent an express agreement to the contrary. *Thompson v. Cheyenne Mtn. Sch. Dist.*, 844 P.2d 1235 (Colo. App. 1992).

**This section was amended to specifically exclude severance pay as wages or compensation**, effective August 6, 2003, however the general assembly appears to acknowledge that a severance payment could constitute wages or compensation under the previous version of the statute. *Fang v. Showa Entetsu Co.*, 91 P.3d 419 (Colo. App. 2003).

**Liability of corporate officers for wages.** Subsection (6) is at least susceptible to the interpretation that corporate officers are personally liable for wages due employees. *Fischer v. District Court*, 561 P.2d 1266 (1977); *Cusimano v. Metro Auto, Inc.*, 860 P.2d 532 (Colo. App. 1992); *Major v. Chons Bros., Inc.*, 53 P.3d 781 (Colo. App. 2002).

**Labor Peace Act does not limit or constrain the law on metropolitan sewage disposal districts concerning the determination of prevailing rates of pay.** Such a district is not required to negotiate or engage in collective bargaining in fixing employee compensation at prevailing rates for equivalent work. *Local 1 v. Metro Wastewater Reclamation*, 876 P.2d 82 (Colo. App. 1994).

**Applied** in *Cavic v. Pioneer Astro Indus., Inc.*, 825 F.2d 1421 (10th Cir. 1987); *Olsen v. Bondurant and Co.*, 759 P.2d 861 (Colo. App. 1988).

**8-4-102. Proper payment - record of wages. (1) Negotiable instrument required.** No employer or agent or officer thereof shall issue, in payment of or as an evidence of indebtedness for wages due an employee, any order, check, draft, note, memorandum, or other acknowledgment of indebtedness unless the same is negotiable and payable upon demand without discount in cash at a bank organized and existing under the general banking laws of the state of Colorado or the United States or at some established place of business in the state. The name and address of the drawee shall appear upon the face of the order, check, draft, note, memorandum, or other acknowledgment of indebtedness; except that such provisions shall not apply to a public utility engaged in interstate commerce and otherwise subject to the power of the public utilities commission. At the time of the issuance of same, the maker or drawer shall have sufficient funds in or credit with the bank or other drawee for the payment of same. Where such order, check, draft, note, memorandum, or other acknowledgment of indebtedness is protested or dishonored on the ground of



insufficiency of funds or credit, the notice of memorandum of protest or dishonor thereof shall be admissible as proof of presentation, nonpayment, and protest.

(2) **Direct deposit.** Nothing in this article shall prohibit an employer from depositing wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association, credit union, or other financial institution authorized by the United States or one of the several states to receive deposits in the United States if the employee has voluntarily authorized such deposit in the financial institution of the employee's choice.

(2.5) **Paycard.** (a) Nothing in this article shall prohibit an employer from depositing an employee's wages on a paycard, so long as the employee:

(I) Is provided free means of access to the entire amount of net pay at least once per pay period; or

(II) May choose to use other means for payment of wages as authorized in subsections (1) and (2) of this section.

(b) As used in this section, "paycard" means an access device that an employee uses to receive his or her payroll funds from his or her employer.

(3) **Scrip prohibited.** No employer or agent or officer thereof shall issue in payment of wages due, or wages to become due an employee, or as an advance on wages to be earned by an employee any scrip, coupons, cards, or other things redeemable in merchandise unless such scrip, coupons, cards, or other things may be redeemed in cash when due, but nothing contained in this section shall be construed to prohibit an employer from guaranteeing the payment of bills incurred by an employee for the necessities of life or for the tools and implements used by such employee in the performance of his or her duties.

**Source: L. 2003:** Entire article amended with relocations, p. 1852, § 1, effective August 6. **L. 2008:** (2.5) added, p. 150, § 1, effective August 5.

**Cross references:** For wage equality regardless of sex, see article 5 of this title; for minimum wages of workers, see article 6 of this title.

**8-4-103. Payment of wages - insufficient funds - pay statement - record retention - tip notification.** (1) (a) All wages or compensation, other than those mentioned in section 8-4-109, earned by any employee in any employment, other than those specified in subsection (3) of this section, shall be due and payable for regular pay periods of no greater duration than one calendar month or thirty days, whichever is longer, and on regular paydays no later than ten days following the close of each pay period unless the employer and the employee shall mutually agree on any other alternative period of wage or salary payments.

(b) An employer is subject to the penalties specified in section 8-4-113 (1) if, two or more times within any twenty-four-month period, the employer causes an employee's check, draft, or order to not be paid because the employer's bank does not honor an employee's paycheck upon presentment. The director may investigate complaints regarding alleged violations of this paragraph (b).

(2) (a) In agricultural, horticultural, and floricultural pursuits and in stock or poultry raising, when the employee in such employments is boarded and lodged by the employer, all wages or compensation earned by any employee in such employment shall be due and payable for regular periods of no greater duration than one month and on paydays no later than ten days following the close of each pay period.

(b) Nothing in paragraph (a) of this subsection (2), as amended by House Bill 05-1180, as enacted at the first regular session of the sixty-fifth general assembly, shall be construed as changing the property tax classification of property owned by a floricultural operation.

(3) Nothing in this article shall apply to compensation payments due an employee under a profit-sharing plan, a pension plan, or other similar deferred compensation programs.

(4) Every employer shall at least monthly, or at the time of each payment of wages or compensation, furnish to each employee an itemized pay statement in writing showing the following:

(a) Gross wages earned;  
 (b) All withholdings and deductions;  
 (c) Net wages earned;  
 (d) The inclusive dates of the pay period;  
 (e) The name of the employee or the employee's social security number; and  
 (f) The name and address of the employer.  
 (5) Each field labor contractor shall keep, for a period of three years on each migratory laborer, records of wage rates offered, wages earned, number of hours worked, or, in the case of contractual or piecework where a field labor contractor pays the employee, the aggregate amount earned and all withholdings from wages on a form furnished by and in the manner prescribed by the division. In addition, in each pay period, each field labor contractor shall provide to each migratory laborer engaged in agricultural employment a statement of the gross earnings of the laborer for the period and all deductions and withholdings therefrom. The director may prescribe appropriate forms for use pursuant to this subsection (5). All such payroll records shall be filed with the division quarterly or at any time said labor contractor leaves this state or terminates his or her contract. The director is charged with the responsibility of making periodic reports to the governor's committee on migrant labor.

(6) It is unlawful for any employer engaged in any business where the custom prevails of the giving of presents, tips, or gratuities by patrons thereof to an employee of said business to assert any claim to, or right of ownership in, or control over such presents, tips, or gratuities; and such presents, tips, or gratuities shall be the sole property of the employee of said business unless the employer posts in his or her place of business in a conspicuous place a printed card, at least twelve inches by fifteen inches in size, containing a notice to the general public in letters at least one-half inch high that all presents, tips, or gratuities given by any patron of said business to an employee thereof are not the property of said employee but belong to the employer. Nothing in this section shall prevent an employer covered hereby from requiring employees to share or allocate such presents, tips, or gratuities on a preestablished basis among the employees of such business.

**Source:** L. 2003: Entire article amended with relocations, p. 1853, § 1, effective August 6. L. 2005: (2) amended, p. 347, § 1, effective August 8. L. 2009: (1) amended, (HB 09-1108), ch. 161, p. 696, § 1, effective August 5.

**Editor's note:** This section is similar to former §§ 8-4-102 (3), 8-4-105, and 8-4-115, as they existed prior to 2003, and the former § 8-4-103 was relocated to § 8-4-104.

#### ANNOTATION

**Annotator's note.** Since § 8-4-103 is similar to § 8-4-105 as it existed prior to the 2003 amendment to article 4, which resulted in the relocation of provisions, relevant cases construing that provision have been included in the annotations to this section.

**A contract to pay wages "when convenient to pay"** must be construed as imposing an obligation to pay at some time. *Royal Tiger Mines Co. v. Ahearn*, 97 Colo. 116, 47 P.2d 692 (1935) (decided under repealed CSA, C. 97, § 200).

**Section 8-4-104 and this section are mutually exclusive.** *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**And distinguishable.** Section 8-4-104 creates a right in an employee under one set of circumstances together with a cause of action for a penalty, while this section creates a right in an employee under a different set of circumstances, and does not provide for a penalty.

*Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**Entitlement to attorney fees.** If plaintiff were required to bring a claim for both wages and penalties under § 8-4-104 and this section in order to be entitled to attorney fees, the reference to this section in § 8-4-114 would be meaningless, contrary to the other language of the statute, and inconsistent with the rules of statutory construction which require that the "entire statute is intended to be effective", and that every word must be given effect, if possible. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**Section 8-4-114 applies to recovery under either.** Even though it is not clear from the judgment, based on the jury verdict, whether the employee's recovery was under § 8-4-104 or this section, § 8-4-114 applies to either. *Keeton v. Rike*, 38 Colo. App. 505, 559 P.2d 262 (1977).



**“Deferred compensation programs” do not encompass vacation pay.** Hartman v. Freedman, 197 Colo. 275, 591 P.2d 1318 (1979).

**Applied** in Lampley v. Celebrity Homes, Inc., 42 Colo. App. 359, 594 P.2d 605 (1979); Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981).

**8-4-104. Funds available to pay wages - mining industry.** Every person, firm, association, corporation, or agent, manager, superintendent, or officer thereof engaged in the business of extracting or of extracting and refining or reducing metals or minerals other than petroleum, or other than parties having a free unencumbered title to the fee simple of the property being worked, and also other than mining partnerships in respect to the members of the partnerships, shall, before commencing work in any period for which a single payment of wages is to be made, have on hand, either physically or by deposit with a bank or trust company in the county where such property is located or, if there is no bank or trust company in the county, in the bank or trust company nearest the property, cash or readily salable securities of a market value equivalent to such cash, or accounts receivable payable in the normal course of business prior to the next payday, in a sufficient amount to make the payment of wages without discount or loss to any person employed on the mining property for such period.

**Source: L. 2003:** Entire article amended with relocations, p. 1854, § 1, effective August 6.

**Editor’s note:** This section is similar to former § 8-4-103 as it existed prior to 2003, and the former § 8-4-104 was relocated to § 8-4-109.

#### ANNOTATION

**Applied** in Lampley v. Celebrity Homes, Inc., 42 Colo. App. 359, 594 P.2d 605 (1979) (decided under former law).

**8-4-105. Payroll deductions permitted.** (1) No employer shall make a deduction from the wages or compensation of an employee except as follows:

(a) Deductions mandated by or in accordance with local, state, or federal law including, but not limited to, deductions for taxes, “Federal Insurance Contributions Act” (“FICA”) requirements, garnishments, or any other court-ordered deduction;

(a.5) Deductions for contributions attributable to automatic enrollment in an employee retirement plan, as defined in section 8-4-105.5, regardless of whether the plan is subject to the federal “Employee Retirement Income Security Act of 1974”, as amended;

(b) Deductions for loans, advances, goods or services, and equipment or property provided by an employer to an employee pursuant to a written agreement between such employer and employee, so long as it is enforceable and not in violation of law;

(c) Any deduction necessary to cover the replacement cost of a shortage due to theft by an employee if a report has been filed with the proper law enforcement agency in connection with such theft pending a final adjudication by a court of competent jurisdiction; except that, if the accused employee is found not guilty in a court action or if criminal charges related to such theft are not filed against the accused employee within ninety days after the filing of the report with the proper law enforcement agency, or such charges are dismissed, the accused employee shall be entitled to recover any amount wrongfully withheld plus interest. In the event an employer acts without good faith, in addition to the amount wrongfully withheld and legally proven to be due, the accused employee may be awarded an amount not to exceed treble the amount wrongfully withheld. In any such action the prevailing party shall be entitled to reasonable costs related to the recovery of such amount including attorney fees and court costs.

(d) Any deduction, not listed in paragraph (a), (a.5), (b), or (c) of this subsection (1), that is authorized by an employee if the authorization is revocable, including deductions for hospitalization and medical insurance, other insurance, savings plans, stock purchases, supplemental retirement plans, charities, and deposits to financial institutions;

(e) A deduction for the amount of money or the value of property that the employee failed to properly pay or return to the employer in the case where a terminated employee was entrusted during his or her employment with the collection, disbursement, or handling of such money or property. The employer shall have ten calendar days after the termination of employment to audit and adjust the accounts and property value of any items entrusted to the employee before the employee's wages or compensation shall be paid as provided in section 8-4-109. This is an exception to the pay requirements in section 8-4-109. The penalty provided in section 8-4-109 shall apply only from the date of demand made after the expiration of the ten-day period allowed for payment of the employee's wages or compensation. If, upon such audit and adjustment of the accounts and property value of any items entrusted to the employee, it is found that any money or property entrusted to the employee by the employer has not been properly paid or returned the employer as provided by the terms of any agreement between the employer and the employee, the employee shall not be entitled to the benefit of payment pursuant to section 8-4-109, but the claim for unpaid wages or compensation of such employee shall be disposed of as provided for by this article.

(2) Nothing in this section authorizes a deduction below the minimum wage applicable under the "Fair Labor Standards Act of 1938", 29 U.S.C. sec. 201 et seq.

**Source: L. 2003:** Entire article amended with relocations, p. 1855, § 1, effective August 6. **L. 2010:** (1)(a.5) added and (1)(d) amended, (SB 10-035), ch. 3, p. 33, § 1, effective January 1, 2011.

**Editor's note:** This section is similar to former § 8-4-101 (7.5) as it existed prior to 2003, and the former § 8-4-105 was relocated to § 8-4-103.

**8-4-105.5. Automatic enrollment in retirement plans - relief from liability - conditions - definitions.** (1) (a) (I) An employer that provides automatic enrollment in an employee retirement plan is not liable for the investment decisions made by the employer on behalf of any participating employee with respect to the default investment of contributions made for that employee to the plan if:

(A) The plan provides the participating employee at least quarterly opportunities to select investments for the employee's contributions among investment alternatives available under the plan;

(B) The participating employee is given notice of the investment decisions that will be made in the absence of direction from the employee, a description of all the investment alternatives available for employee investment direction under the plan, and a brief description of procedures available for the employee to change investments; and

(C) The employee is given at least annual notice of the actual default investments made of contributions attributable to the employee.

(II) The relief from liability of the employer under this subsection (1) extends to any employee retirement plan official who makes the actual default investment decisions on behalf of participating employees.

(b) Nothing in this subsection (1) modifies any existing responsibility of employers or other plan officials for the selection of investment funds for participating employees.

(2) As used in this section:

(a) "Automatic enrollment" means an employee retirement plan provision under which an employee will have a specified contribution made to the plan, equal to a compensation reduction, that will be made for the employee unless the employee affirmatively elects, in accordance with the federal "Pension Protection Act of 2006", Pub.L. 109-280, either not to have any compensation reduction contributions or a compensation reduction contribution in an alternative amount.

(b) "Employee retirement plan" means a plan described in sections 401(k) or 403(b) of the federal "Internal Revenue Code of 1986", as amended; a governmental deferred compensation plan described in section 457 of the federal "Internal Revenue Code of 1986", as amended; or a payroll deduction individual retirement account plan described in sections 408 or 408A of the federal "Internal Revenue Code of 1986", as amended.



**Source: L. 2010:** Entire section added, (SB 10-035), ch. 3, p. 33, § 2, effective January 1, 2011.

**8-4-106. Early payment of wages permitted.** Nothing contained in this article shall in any way limit or prohibit the payment of wages or compensation at earlier dates, or at more frequent intervals, or in greater amounts, or in full when or before due.

**Source: L. 2003:** Entire article amended with relocations, p. 1856, § 1, effective August 6.

**8-4-107. Post notice of paydays.** Every employer shall post and keep posted conspicuously at the place of work if practicable, or otherwise where it can be seen as employees come or go to their places of work, or at the office or nearest agency for payment kept by the employer a notice specifying the regular paydays and the time and place of payment, in accordance with the provisions of section 8-4-103, and also any changes concerning them that may occur from time to time.

**Source: L. 2003:** Entire article amended with relocations, p. 1856, § 1, effective August 6.

**8-4-108. Payment in the event of strike.** (1) In the event of a strike, every employee who is discharged shall be paid at the place of discharge, and every employee who quits or resigns shall be paid at the office or agency of the employer in the county or city and county where such employee has been performing the labor or service for the employer. All payments of money or compensation shall be made in the manner provided by law.

(2) In the event of any strike, the unpaid wages or compensation earned by such striking employee shall become due and payable on the employer's next regular payday, and the payment or settlement shall include all amounts due such striking employee without abatement or reduction. The employer shall return to each striking employee, upon request, any deposit or money or other guaranty required by the employer from the employee for the faithful performance of the duties of his or her employment.

**Source: L. 2003:** Entire article amended with relocations, p. 1856, § 1, effective August 6.

**8-4-109. Termination of employment - payments required - civil penalties - payments to surviving spouse or heir.** (1) (a) When an interruption in the employer-employee relationship by volition of the employer occurs, the wages or compensation for labor or service earned, vested, determinable, and unpaid at the time of such discharge is due and payable immediately. If at such time the employer's accounting unit, responsible for the drawing of payroll checks, is not regularly scheduled to be operational, then the wages due the separated employee shall be made available to the employee no later than six hours after the start of such employer's accounting unit's next regular workday; except that, if the accounting unit is located off the work site, the employer shall deliver the check for wages due the separated employee no later than twenty-four hours after the start of such employer's accounting unit's next regular workday to one of the following locations selected by the employer:

- (I) The work site;
- (II) The employer's local office; or
- (III) The employee's last-known mailing address.

(b) When an employee quits or resigns such employee's employment, the wages or compensation shall become due and payable upon the next regular payday. When a separation of employment occurs, the employer shall make the separated employee's check for wages due available at one of the following locations selected by the employer:

- (I) The work site;
- (II) The employer's local office; or

(III) The employee's last-known mailing address.

(2) Nothing in subsection (1) of this section shall limit the right of an employer to set off any deductions pursuant to section 8-4-105 owing by the employee to the employer or require the payment at the time employment is severed of compensation not yet fully earned under the compensation agreement between the employee and employer, whether written or oral.

(3) (a) If an employer refuses to pay wages or compensation in accordance with subsection (1) of this section, the employee or his or her designated agent shall make a written demand for the payment within sixty days after the date of separation and shall state in the demand where such payment can be received.

(a.5) If the employer disputes the amount of wages or compensation claimed by an employee under this article and if, within fourteen days after the employee's demand, the employer makes a legal tender of the amount that the employer in good faith believes is due, the employer shall not be liable for any penalty unless, in a legal action, the employee recovers a greater sum than the amount so tendered.

(b) If an employee's earned, vested, and determinable wages or compensation are not mailed to the place of receipt specified in a demand for payment and postmarked within fourteen days after the receipt of such demand, the employer shall be liable to the employee for the wages or compensation, and a penalty of the sum of the following amounts of wages or compensation due or, if greater, the employee's average daily earnings for each day, not to exceed ten days, until such payment or other settlement satisfactory to the employee is made:

(I) One hundred twenty-five percent of that amount of such wages or compensation up to and including seven thousand five hundred dollars; and

(II) Fifty percent of that amount of such wages or compensation that exceed seven thousand five hundred dollars.

(c) If the employee can show that the employer's failure to pay is willful, the penalty required under paragraph (b) of this subsection (3) shall increase by fifty percent. Evidence that a judgment has, within the previous five years, been entered against the employer for failure to pay wages or compensation shall be admissible as evidence of willful conduct.

(d) The daily earnings penalty shall not begin to accrue until the employer receives the written demand set forth in paragraph (a) of this subsection (3). The employee or his or her designated agent may commence a civil action to recover the penalty set forth in this subsection (3). Any employee or his or her designated agent who has not made a written demand for the payment within sixty days after the date of separation or who has otherwise not been available to receive payment shall not be entitled to any such penalty under this subsection (3). A payment under this subsection (3) shall be made in the form of a check draft or voucher in the name of the employee.

(4) If, at the time of the death of any employee, an employer is indebted to the employee for wages or compensation, and no personal representative of the employee's estate has been appointed, such employer shall pay the amount earned, vested, and determinable to the deceased employee's surviving spouse. If there is no surviving spouse, the employer shall pay the amount due to the deceased employee's next legal heir upon the request of such heir. If a personal representative for the employee has been appointed and is known to the employer prior to payment of the amount due to the spouse or other legal heir, the employer shall pay the amount due to such personal representative upon the request of such representative. The employer shall require proof of a claimant's relationship to the deceased employee by affidavit and require such claimant to acknowledge the receipt of any payment in writing. Any payments made by the employer pursuant to the provisions of this section shall operate as a full and complete discharge of the employer's indebtedness to the extent of the payment, and no employer shall thereafter be liable to the deceased employee's estate or to the deceased employee's personal representative. Any amounts received by a surviving spouse or legal heir shall be considered in diminution of the allowance to the spouse or legal heir pursuant to the "Colorado Probate Code", articles 10 to 17 of title 15, C.R.S. Nothing in this section shall create a substantive right that does not exist in any agreement between the employer and the employee.



**Source:** L. 2003: Entire article amended with relocations, p. 1856, § 1, effective August 6. L. 2007: (3) amended, p. 1677, § 2, effective May 31.

**Editor's note:** This section is similar to former § 8-4-104 as it existed prior to 2003, and the former § 8-4-109 was relocated to § 8-4-113.

**Cross references:** For the legislative declaration contained in the 2007 act amending subsection (3), see section 1 of chapter 381, Session Laws of Colorado 2007.

## ANNOTATION

**Law reviews.** For article, "Employee's Right to Compensation Accruing After Termination", see 13 Colo. Law. 1643 (1984). For article, "Rights of Terminated Employees: Expanding Remedies", see 21 Colo. Law. 1639 (1992).

**Annotator's note.** Since § 8-4-109 is similar to § 8-4-104 as it existed prior to the 2003 amendment to article 4, which resulted in the relocation of provisions, relevant cases construing that provision have been included in the annotations to this section.

**The purpose of the Colorado Wage Claim Act is to ensure that wages are paid in a timely manner** and to provide adequate judicial relief in the event wages are not paid. An employer is liable under the act if the employer does not pay an employee wages he or she earned at the time of discharge. *Fang v. Showa Entetsu Co.*, 91 P.3d 419 (Colo. App. 2003).

**Vacation pay is within the definition of "wages or compensation"**. *Hartman v. Freedman*, 197 Colo. 275, 591 P.2d 1318 (1979).

**Employee entitled to additional wages based on a company "comp time" program.** *Remote Switch Sys. v. Delangis*, 126 P.3d 269 (Colo. App. 2005).

**Stock options may be within the definition of "wages or compensation"**. Therefore, district court improperly dismissed claim for stock option. *Montemayor v. Jacor Commc'ns, Inc.*, 64 P.3d 916 (Colo. App. 2002).

**Share of a legal fee was not "wages or compensation"**. *Coffee v. Inman*, 728 P.2d 376 (Colo. App. 1986).

**Uncollected commissions are wages earned and due at discharge.** Where salesmen were terminated prior to the closing and the collection of the commissions by the broker, wages were earned or due at the time of their discharge. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**Or at time fully earned.** At the time the employment relationship is severed, an employer need not pay, immediately, compensation not yet fully earned under a compensation agreement. But the implication is clear that such wages become immediately due at the time they are fully earned. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**This section fails to offer any relief to employees whose wages are withheld while they**

**are still employed.** Consequently, plaintiff had no choice but to wait until he left the company to pursue his claim, because the claim accrued when the employment relationship ended, not when the wages were withheld. *Farris v. ITT Cannon, a Div. of ITT Corp.*, 834 F. Supp. 1260 (D. Colo. 1993).

**This section and § 8-4-105 are mutually exclusive.** *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**And distinguishable.** This section creates a right in an employee under one set of circumstances together with a cause of action for a penalty, while § 8-4-105 creates a right in an employee under a different set of circumstances and does not provide for a penalty. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**Salesmen employed on a commission basis cannot be terminated with impunity prior to a closing** and thus be deprived of large commissions obtained for their employers as a result of their efforts. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**Determination of good faith under subsection (3) is matter for trial court.** *Cortez v. Brokaw*, 632 P.2d 635 (Colo. App. 1981); *Kennedy v. Leo Payne Broad.*, 648 P.2d 673 (Colo. App. 1982); *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989); *Porter v. Castle Rock Ford Lincoln*, 895 P.2d 1146 (Colo. App. 1995).

**Trial court properly awarded the statutory penalty pursuant to subsection (3).** "Without good faith legal justification" means willfully withheld without good cause; however, willful withholding does not require a showing of malice or similar motivation, rather, there need only be a demonstration that compensation is willfully withheld without good cause. *Porter v. Castle Rock Ford Lincoln*, 895 P.2d 1146 (Colo. App. 1995).

**A plaintiff granted a money judgment under this section is a winning party entitled to reasonable attorney fees,** and a defendant does not become the "winning party" simply because the plaintiff does not prevail on each of its asserted claims. *Porter v. Castle Rock Ford Lincoln*, 895 P.2d 1146 (Colo. App. 1995).

**Entitlement to attorney fees.** If plaintiff was required to bring a claim for both wages and penalties under this section and § 8-4-105 in

order to be entitled to attorney fees, the reference to § 8-4-105 in § 8-4-114 would be meaningless, contrary to the other language of the statute, and inconsistent with the rules of statutory construction which require that the "entire statute is intended to be effective" and that every word must be given effect, if possible. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

Employee commenced an action within the meaning of the Wage Claim Act seeking additional wages owed to him or her. Because employee prevailed in that action, as the "winning party" under that claim, he or she was entitled to an award of attorney fees relating to the prosecution of that claim. *Remote Switch Sys. v. Delangis*, 126 P.3d 269 (Colo. App. 2005) (decided under former § 8-4-114).

**Failure to specify in complaint the precise statute on which claim is based does not prevent plaintiff from seeking attorney fees.** *Fang v. Showa Entetsu Co.*, 91 P.3d 419 (Colo. App. 2003) (decided under former § 8-4-114).

**Section 8-4-114 applies to recovery under either.** Even though it is not clear from the judgment, based on the jury verdict, whether the employee's recovery was under this section or § 8-4-105, § 8-4-114 applies to either. *Keeton v. Rike*, 38 Colo. App. 505, 559 P.2d 262 (1977).

**Attorney fees to be taxed as a cost of suit cannot be construed as an additional penalty,** i.e., recoverable only if the judgment in favor of the employee contains a penalty. Such a construction would discourage employees from instituting suit, since the judgment intended to make them whole would be substantially reduced by outlays for attorney fees. The consequence of this latter construction would be to defeat the fundamental purpose of the statute. One cannot assume that an unjust or oppressive result was contemplated by the general assembly. *Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975).

**Penalty assessable under subsection (3) is for wages undisputed but unpaid.** *Hartman v. Freedman*, 197 Colo. 275, 591 P.2d 1318 (1979).

**An employer who fails to pay an employee the wages earned by the employee at the time of the employee's discharge is liable under section, even if the employer had the absolute right to discharge the employee.** *Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989).

**Conversely, even though an employee's discharge may constitute a violation of contract or other legal wrong by the employer, this section is not applicable to the circumstance if the employer pays all wages earned by the employee at the time of the employee's discharge.** *Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989).

**This section has been held to apply to payments becoming due after the date of the discharge,** provided those future payments have been "earned," i.e., they are "vested and determinable," at the time of employee's termination. In such circumstances, the future payment must be made immediately upon becoming due or the employer becomes liable for the statutory penalty under the provisions of subsection (3). *Lee v. Great Empire Broad., Inc.*, 794 P.2d 1032 (Colo. App. 1989).

**Liability of corporate officers for wages and attorney fees.** Proof of good faith legal justification for refusal to pay wages by an employer is not required for the recovery of wages and attorney fees by an employee. *Cusimano v. Metro Auto, Inc.*, 860 P.2d 532 (Colo. App. 1992).

**An employer's claim of breach of fiduciary duty is not a good faith legal justification** for not timely paying an employee's final wages pursuant to this article. *Hartman v. Cmty. Responsibility Ctr., Inc.*, 87 P.3d 202 (Colo. App. 2003).

**The officers and agents of a corporation are not jointly and severally liable for payment of employee wages and other compensation** the corporation owes to its employees under the employment contract and the Colorado Wage Claim Act. *Leonard v. McMorris*, 320 F.3d 1116 (10th Cir. 2003).

**A general manager whose duties included scheduling of overtime work but who had been given no authority or responsibility over wage payment policies was not subject to personal liability** under the Wage Claim Act. *Major v. Chons Bros., Inc.*, 53 P.3d 781 (Colo. App. 2002).

**Federal Bankruptcy Code does not preempt claims against corporate officers under the Wage Claim Act.** Claims under the Wage Claim Act would be preempted if brought against the corporation because the corporation filed a bankruptcy petition. The Bankruptcy Code does not, however, extend its protections to individuals or entities that have not filed a bankruptcy petition. In the absence of such a statutory provision, no direct conflict exists between the Bankruptcy Code and the Wage Claim Act. *Leonard v. McMorris*, 106 F. Supp.2d 1098 (D. Colo. 2000), rev'd on other grounds, 320 F.3d 1116 (10th Cir. 2003).

**Evidence held sufficient to support finding that defendant employer owed plaintiff wages and commissions.** *Brogan v. Bill Eger Motors, Inc.*, 39 Colo. App. 104, 561 P.2d 377 (1977).

**"Without a good-faith legal justification" construed.** In order to impose a penalty under this section, a trial court must find from the evidence that the employer willfully withheld compensation due and owing the employee. *Beasley v. Mincomp Corp.*, 683 P.2d 370 (Colo. App. 1984).



Statutory penalty will not be assessed where there was bona fide dispute as to bonus due and payable. *Rohr v. Ted Neiters Motor Co.*, 758 P.2d 186 (Colo. 1988).

**Applied** in *Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo. 1981); *Paulu v. Lower Ark. Valley Council of Gov'ts*, 655 P.2d 1391 (Colo. App. 1982).

**8-4-110. Disputes - fees.** (1) If, in any action, the employee fails to recover a greater sum than the amount tendered by the employer, the court may award the employer reasonable costs and attorney fees incurred in such action when, in any pleading or other court filing, the employee claims wages or compensation that exceed the greater of seven thousand five hundred dollars in wages or compensation or the jurisdictional limit for the small claims court, whether or not the case was filed in small claims court or whether or not the total amount sought in the action was within small claims court jurisdictional limits. If, in any such action in which the employee seeks to recover any amount of wages or compensation, the employee recovers a sum greater than the amount tendered by the employer, the court may award the employee reasonable costs and attorney fees incurred in such action. If an employer fails or refuses to make a tender within fourteen days after the demand, then such failure or refusal shall be treated as a tender of no money for any purpose under this article.

(1.5) This section shall not apply to a claimant who is found to be an independent contractor and not an employee.

(2) Any person claiming to be aggrieved by violation of any provisions of this article or regulations prescribed pursuant to this article may file suit in any court having jurisdiction over the parties without regard to exhaustion of any administrative remedies.

**Source:** **L. 2003:** Entire article amended with relocations, p. 1858, § 1, effective August 6. **L. 2007:** (1) amended and (1.5) added, p. 1678, § 3, effective May 31.

**Editor's note:** Subsection (2) is similar to former § 8-4-123 as it existed prior to 2003.

**Cross references:** For the legislative declaration contained in the 2007 act amending subsection (1) and enacting subsection (1.5), see section 1 of chapter 381, Session Laws of Colorado 2007.

## ANNOTATION

**Annotator's note.** Since § 8-4-110 is similar to § 8-4-123 as it existed prior to the 2003 amendment to article 4, which resulted in the relocation of provisions, relevant cases construing that provision have been included in the annotations to this section.

**Arbitration provision in an employment contract that denied the employee the right to a timely civil action pursuant to this section in a Colorado court is void.** *Lambdin v. Dist. Ct. of Arapahoe Cty.*, 903 P.2d 1126 (Colo. 1995).

**This section explicitly creates a civil remedy to enable employees to pursue their claims for past due wages.** *Lambdin v. Dist. Ct. of Arapahoe Cty.*, 903 P.2d 1126 (Colo. 1995).

**Award of attorney fees is not conditioned on finding that claim was "frivolous".** *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010).

**Guidelines for exercise of court's discretion to award attorney fees under subsection (1) require consideration of all relevant circumstances, including 10 factors specifically listed.** *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010).

**"Discretion" does not imply a complete lack of standards.** When awarding attorney fees, the court is required to make sufficient findings to permit meaningful appellate review. *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010).

**Denial of a \$2,000 "per diem courtesy" for a witness, as an item of costs, was within the court's discretion.** *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010).

**Denial of attorney fees incurred on appeal was permissible where defendant did not fully prevail on its challenge to the trial court's award of attorney fees and costs.** *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199 (Colo. App. 2010).

**Where plaintiff is determined not to have been an "employee" but an independent contractor, award of attorney fees to defendant is proper.** *Voller v. Gertz*, 107 P.3d 1129 (Colo. App. 2004) (decided under former § 8-4-114).

**Where defendant prevails solely because the trier of fact determines that plaintiff was not an "employee", but was instead an independent contractor, an award of attorney fees to defendant is improper.** *Mahan v. Capitol Hill Internal Med. P.C.*, 151 P.3d 685 (Colo.

App. 2006) (following *Hyland v. Pikes Peak Capital Corp.*, 714 P.2d 914 (Colo. App. 1985) and declining to follow *Voller v. Gertz*, 107 P.3d 1129 (Colo. App. 2004)) (all decided under former § 8-4-114 prior to its repeal in 2003).

**The supremacy clause governs when the Federal Arbitration Act (FAA) applies to an employment contract and requires arbitra-**

**tion even in a CWCA claim despite the firm state policy that Colorado Wage Claim Act (CWCA) claims should not be subject to arbitration.** Where a contract containing an arbitration clause evidences a transaction involving commerce, the FAA applies and the agreement to arbitrate must be enforced. *Grohn v. Sisters of Charity Health*, 960 P.2d 722 (Colo. App. 1998).

**8-4-111. Enforcement - duty of director - duties of district or city attorneys.** (1) It is the duty of the director to inquire diligently for any violation of this article, and to institute the actions for penalties provided for in this article in such cases as he or she may deem proper, and to enforce generally the provisions of this article.

(2) Nothing in this article shall be construed to limit the authority of the district attorney of any county or city and county or the city attorney of any city to prosecute actions for such violations of this article as may come to his or her knowledge, or to enforce the provisions of this article independently and without specific direction of the director, or to limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him or her under the provisions of this article.

**Source: L. 2003:** Entire article amended with relocations, p. 1858, § 1, effective August 6.

**Editor's note:** Subsection (2) is similar to former § 8-4-112 as it existed prior to 2003.

**8-4-112. Enforcement of director subpoenas.** All courts shall take judicial notice of the seal of the director. Obedience to subpoenas issued by the director or his or her duly authorized representative shall be enforced by the courts in any county or city and county, as provided in section 24-4-105 (5), C.R.S., if said subpoenas do not call for any appearance at a distance greater than one hundred miles.

**Source: L. 2003:** Entire article amended with relocations, p. 1859, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-113 as it existed prior to 2003, and the former § 8-4-112 was relocated to § 8-4-111 (2).

**8-4-113. Penalties pursuant to enforcement.** (1) If a case against an employer is enforced pursuant to section 8-4-111, any employer who without good faith legal justification fails to pay the wages of each of his or her employees shall forfeit to the people of the state of Colorado an amount determined by the director but no more than the sum of fifty dollars per day for each such failure to pay each employee, commencing from the date that such wages first became due and payable, to be recovered by order of the director in a hearing held pursuant to section 24-4-105, C.R.S. For the convenience and necessity of the parties or their representatives, the division is authorized to conduct such hearing by telephone if the employer would otherwise be required to travel to locations of the division of labor from outside the general vicinity of such locations.

(2) A certified copy of any final order of the director, imposing a fine or penalty pursuant to this article, may be filed with the clerk of the district court having jurisdiction over the parties at any time after the entry of the order. The certified copy shall be recorded by the clerk of the district court in the judgment book of said court and entry thereof made in the judgment docket, and it shall thenceforth have all the effect of a judgment of the district court, and execution may issue thereon out of said court as in other cases. All fines and penalties collected shall be paid to the division and transmitted to the state treasurer for credit to the general fund.

**Source: L. 2003:** Entire article amended with relocations, p. 1859, § 1, effective August 6.



**Editor's note:** This section is similar to former § 8-4-109 as it existed prior to 2003, and the former § 8-4-113 was relocated to § 8-4-112.

**8-4-114. Criminal penalties.** (1) Any employer who violates the provisions of section 8-4-103 (6) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment.

(2) In addition to any other penalty imposed by this article, any employer or agent of an employer who, being able to pay wages or compensation and being under a duty to pay, willfully refuses to pay as provided in this article, or falsely denies the amount of a wage claim, or the validity thereof, or that the same is due, with intent to secure for himself, herself, or another person any discount upon such indebtedness or any underpayment of such indebtedness or with intent to annoy, harass, oppress, hinder, delay, or defraud the person to whom such indebtedness is due, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment. For purposes of this section, "being able to pay wages or compensation" does not include an employer who is unable to pay wages or compensation by reason of a chapter 7 bankruptcy action or other court action that results in the employer having limited control over his or her assets.

**Source: L. 2003:** Entire article amended with relocations, p. 1859, § 1, effective August 6.

**Editor's note:** This section is similar to former §§ 8-4-116 and 8-4-117 as they existed prior to 2003, and the former § 8-4-114 was repealed.

**8-4-115. Certificate of registration required.** No person shall engage in activities as a field labor contractor unless the person first obtains a certificate of registration from the division and unless such certificate is in full force and effect and in such person's immediate possession.

**Source: L. 2003:** Entire article amended with relocations, p. 1860, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-118 as it existed prior to 2003, and the former § 8-4-115 was relocated to § 8-4-103 (6).

**8-4-116. Issuance of certificate of registration.** (1) The director, after appropriate investigation, shall issue a certificate of registration to any person who:

(a) Has executed and filed with the director a written application subscribed and sworn to by the applicant containing such information concerning his or her conduct and method of operation as a field labor contractor as the director may require in order to effectively carry out the provisions of this article;

(b) Has consented to designation of the director as the agent available to accept service of process for any action against such field labor contractor at any and all times when such field labor contractor has departed from the jurisdiction of this state or has become unavailable to accept service;

(c) Has demonstrated evidence to the director that he or she has satisfied the insurance requirements of articles 40 to 47 of this title.

(2) Upon notice and hearing in accordance with rules prescribed by the director, the director may refuse to issue and may suspend, revoke, or refuse to renew a certificate of registration of any field labor contractor if the director finds that such field labor contractor:

(a) Knowingly has made any misrepresentation or false statement in his or her application for a certificate of registration or any renewal thereof;

- (b) Knowingly has given false or misleading information to any migratory laborer concerning the terms, conditions, or existence of agricultural employment;
- (c) Has failed, without justification, to perform agreements entered into or to comply with arrangements made with farm operators;
- (d) Has failed, without justification, to comply with the terms of any working arrangements he or she has made with migratory laborers;
- (e) Has permitted his or her insurance maintained pursuant to the requirements of paragraph (c) of subsection (1) of this section to terminate, lapse, or otherwise become inoperative;
- (f) Is not in fact the real party in interest in any such application or certificate of registration and that the real party in interest is a person, firm, partnership, association, or corporation which previously has been denied a certificate of registration; has had a certificate of registration suspended or revoked; or which does not presently qualify for a certificate of registration.

**Source: L. 2003:** Entire article amended with relocations, p. 1860, § 1, effective August 6.

**Editor's note:** (1) This section is similar to former § 8-4-119 as it existed prior to 2003, and the former § 8-4-116 was relocated to § 8-4-114 (1).

(2) Articles 40 to 47 of this title, referenced in subsection (1)(c), are the provisions of the "Workers' Compensation Act of Colorado".

**8-4-117. Additional obligations.** (1) Every field labor contractor shall:

- (a) Carry a certificate of registration at all times while engaging in activities as a field labor contractor and exhibit the same to all persons with whom he or she intends to deal in the capacity of a field labor contractor;
- (b) Ascertain and disclose in writing to each migratory laborer, in a language in which the migratory laborer is fluent at the time the migratory laborer is recruited, the following information:
  - (I) The area of employment;
  - (II) The crops and operations on which the migratory laborer may be employed;
  - (III) Transportation, housing, and insurance to be provided to the migratory laborer;
  - (IV) The wage rate to be paid;
  - (V) The charges by the field labor contractor for his or her services; and
  - (VI) The existence of any strikes at the place of contracted employment;
- (c) Promptly pay or deliver, when due to the migratory laborer entitled thereto, all moneys or other things of value entrusted to the field labor contractor by or on behalf of such migratory laborer.

**Source: L. 2003:** Entire article amended with relocations, p. 1861, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-120 as it existed prior to 2003, and the former § 8-4-117 was relocated to § 8-4-114 (2).

**8-4-118. Authority to obtain information.** The director or the director's designated representative may investigate and gather data pertinent to matters that may aid in carrying out the provisions of this article. In any case where a complaint has been filed with the director or the director's designated representative regarding a violation of this article, or where the director has reasonable grounds to believe that a field labor contractor has violated provisions of this article, the director or the director's designated representative may investigate and issue subpoenas as provided by section 8-4-112 requiring the attendance and testimony of any witness or the production of any evidence in connection with such investigation.



**Source: L. 2003:** Entire article amended with relocations, p. 1861, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-121 as it existed prior to 2003, and the former § 8-4-118 was relocated to § 8-4-115.

**8-4-119. Penalty provisions.** (1) Any field labor contractor who commits a violation of any provision of this article or implementing regulation shall be subject to a civil penalty of not more than two hundred fifty dollars for each violation. The penalty shall be assessed by the director pursuant to a published schedule of penalties and after written notice and after an opportunity for hearing under procedures established by the director. This provision as to civil penalties shall not exclude the possibility of criminal penalties as set forth in this article.

(2) The director, in the director's discretion, may grant a reasonable period of time, but in no event longer than ten days after the day of notification, for correction of the violation. In the event the violation is corrected within that period, no penalty shall be imposed.

**Source: L. 2003:** Entire article amended with relocations, p. 1861, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-122 as it existed prior to 2003, and the former § 8-4-119 was relocated to § 8-4-116.

**8-4-120. Discrimination prohibited - employee protections.** No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any employee who has filed any complaint or instituted or caused to be instituted any proceeding under this article or related law or who has testified or may testify in any proceeding on behalf of himself, herself, or another regarding afforded protections under this article. Any employer who violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment.

**Source: L. 2003:** Entire article amended with relocations, p. 1862, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-124 as it existed prior to 2003, and the former § 8-4-120 was relocated to § 8-4-117.

**8-4-121. Nonwaiver of employee rights.** Any agreement, written or oral, by any employee purporting to waive or to modify such employee's rights in violation of this article shall be void.

**Source: L. 2003:** Entire article amended with relocations, p. 1862, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-125 as it existed prior to 2003, and the former § 8-4-121 was relocated to § 8-4-118.

#### ANNOTATION

**Annotator's note.** Since § 8-4-121 is similar to § 8-4-125 as it existed prior to the 2003 amendment to article 4, which resulted in the relocation of provisions, relevant cases construing that provision have been included in the annotations to this section.

**This section, by its plain language, voids any agreement, written or oral, that constitutes a waiver or modification of any employee's rights under the Wage Claim Act.** *Morris v. Towers Financial Corp.*, 916 P.2d 678 (Colo. App. 1996).

The plain meaning of this section is that an agreement to arbitrate that conflicts with the rights established by the Wage Claim Act cannot be enforced against the employee. *Lambdin v. Dist. Ct. of Arapahoe Cty.*, 903 P.2d 1126 (Colo. 1995).

The supremacy clause governs when the Federal Arbitration Act (FAA) applies to an employment contract and requires arbitration even in a Colorado Wage Claim Act (CWCA) claim despite the firm state policy that CWCA claims should not be subject to arbitration. Where a contract containing an arbitration clause evidences a transaction involving commerce, the FAA applies and the agreement to arbitrate must be enforced. *Grohn v. Sisters of Charity Health*, 960 P.2d 722 (Colo. App. 1998); *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771 (Colo. App. 2000).

The FAA preempts this section to the extent that an agreement to arbitrate a dispute relating to employee compensation is not void and that public policy is not thereby offended. *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771 (Colo. App. 2000).

Since Wage Claim Act does not create a substantive right to compensation for labor and services performed, employee's right to compensation is governed by the employment agreement and not by the statute; therefore, employment contract is not void under this section. *Barnes v. Van Schaack Mortg.*, 787 P.2d 207 (Colo. App. 1990).

Arbitration provision in an employment contract that denies the employee the right to a timely civil action in a Colorado court pursuant to § 8-2-123 is void. *Lambdin v. Dist. Ct. of Arapahoe Ct.*, 903 P.2d 1126 (Colo. 1995).

**8-4-122. Limitation of actions.** All actions brought pursuant to this article shall be commenced within two years after the cause of action accrues and not after that time; except that all actions brought for a willful violation of this article shall be commenced within three years after the cause of action accrues and not after that time.

**Source:** L. 2003: Entire article amended with relocations, p. 1862, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-126 as it existed prior to 2003, and the former § 8-4-122 was relocated to § 8-4-119.

**8-4-123. Termination of occupancy pursuant to contract of employment - legislative declaration.** (1) The general assembly hereby finds, determines, and declares that many businesses, such as nursing homes or building management companies, either desire or are required by law to have staff on premises at all times. As part of the compensation for such employees, many employers offer housing to employees. However, once that employment relationship ceases, it may become undesirable for such employees to occupy the premises for many reasons, including the safety of the employer's patients, clients, customers, or tenants. Under traditional landlord and tenant law, such employees may have established the technical or legal right to occupy the premises for a fixed term that continues far beyond the cessation of the employment relationship. However, in employment situations, such occupancy is not a tenancy, but a license to occupy the premises pursuant to an employment relationship. The occupancy of the premises by the employee is not entered into by the employer for the purpose of providing housing, but merely as a means to provide services to the employer's patients, clients, customers, or tenants. In certain cases, it may be necessary to curtail the occupancy of former employees in order to protect the rights or safety of an employer's tenants or patients.

(2) (a) Pursuant to a written agreement meeting the requirements of paragraph (b) of this subsection (2), a license to occupy the premises entered into as part of an employee's compensation may be terminated at any time after the employment relationship ceases between an employer and employee. A termination of a license to occupy the premises shall be effective three days after the service of written notice of termination of a license to occupy the premises.

(b) An agreement made pursuant to this section shall be in writing and shall include the following:

(I) The names of the employer and employee;

(II) A statement that the license to occupy the premises is provided to the employee as part of the employee's compensation and is subject to termination at any time after the employment relationship ceases;



(III) The address of the premises; and

(IV) The signature of both the employer and the employee.

(c) The notice of termination of a license to occupy the premises shall describe the premises and shall set forth the time when the license to occupy the premises will terminate. The notice shall be signed by the employer or the employer's agent or attorney.

(3) If an employee fails to vacate the premises within three days after the receipt of the notice of termination of the license to occupy the premises, the employer may contact the county sheriff to have the employee removed from the premises. The county sheriff shall remove the employee and any personal property of the employee from the premises upon the showing to the county sheriff of the notice of termination of the license to occupy the premises and agreement pursuant to which the license to occupy the premises was granted.

**Source:** L. 2003: Entire article amended with relocations, p. 1862, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-4-127 as it existed prior to 2003, and the former § 8-4-123 was relocated to § 8-4-110 (2).

## ARTICLE 5

### Wage Equality Regardless of Sex

**Law reviews:** For article, "An Overview of Federal and State Wage-Hour Laws — Part II", see 14 Colo. Law. 781 (1985); for article, "Sex-based Wage Discrimination: A Management View", see 62 Den. U. L. Rev. 393 (1985); for note, "Comparable Worth: The Next Step Toward Pay Equity Under Title VII", see 62 Den. U. L. Rev. 417 (1985); for article, "Legal Overview of Equal Pay and Comparable Worth", see 15 Colo. Law. 1201 (1986).

8-5-101.	Definitions.		suits.
8-5-102.	Wage discrimination prohibited.	8-5-105.	Records open to inspection.
8-5-103.	Enforcement - rules and regulations - complaints.	8-5-106.	Colorado pay equity commission - creation - duties - cash fund - report - repeal.
8-5-104.	Employer liability - awards -		

**8-5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) Repealed.

(2) "Director" means the director of the division of labor.

(3) "Division" means the division of labor in the department of labor and employment.

(4) "Employee" means any individual in the employment of any employer.

(5) "Employer" means the state and every county, city, town, and body corporate and politic therein and every person, corporation, partnership, and association, including those operating in a representative capacity.

(6) "Employment" means any trade, occupation, job, or position in which any person may be engaged in the service of another for wages or salary, except household and domestic servants and farm and ranch laborers.

**Source:** L. 55: p. 503, § 1. CRS 53: § 80-23-1. C.R.S. 1963: § 80-3-1. L. 69: p. 593, § 68. L. 86: (1) repealed, p. 502, § 125, effective July 1.

**8-5-102. Wage discrimination prohibited.** No employer shall make any discrimination in the amount or rate of wages or salary paid or to be paid his employees in any employment in this state solely on account of the sex thereof.

**Source:** L. 55: p. 503, § 2. CRS 53: § 80-23-2. C.R.S. 1963: § 80-3-2.

**Cross references:** For minimum wages for workers, see article 6 of this title.

**8-5-103. Enforcement - rules and regulations - complaints.** (1) The director has the power to administer, carry out, and enforce all of the provisions of this article and may promulgate rules and regulations for that purpose. Copies of the rules and regulations shall be furnished by the division to all employees and employers upon written request.

(2) Upon written complaint, duly executed and verified, by any employee that any employer has, within one year from the date of such complaint, violated the provisions of section 8-5-102, the director or any referee of the division may proceed to hear and determine such complaint, and the director may make an award upon said complaint. Judicial review may be had of any award of the director under this article pursuant to section 24-4-106, C.R.S.

**Source:** L. 55: p. 504, § 3. CRS 53: § 80-23-3. C.R.S. 1963: § 80-3-3. L. 69: p. 593, § 69. L. 86: Entire section amended, p. 472, § 31, effective July 1.

**8-5-104. Employer liability - awards - suits.** An employer who violates the provisions of section 8-5-102 is liable in an amount equal to the difference between the amount which he paid to the complaining employee and the amount which the employee would have received had there been no discrimination; and, if the director finds that such discrimination was willful, the director may impose a penalty upon the employer in addition thereto of not more than the amount of such difference. The amount of such liability so determined by the director shall constitute the award of the director. Such award shall be the property of the employee but may be recovered for the employee in a suit brought by the director in his name in any court in the county of the residence of the employer within this state having jurisdiction of the amount of the demand in the suit. The director may join in one suit all of his awards against any one employer under this article.

**Source:** L. 55: p. 504, § 4. CRS 53: § 80-23-4. C.R.S. 1963: § 80-3-4. L. 69: p. 594, § 70.

**8-5-105. Records open to inspection.** When complaint is made to the division by any employee against any employer for a violation of this article, all books, records, and payrolls of such employer, material and pertinent to such complaint, shall be open for inspection by the division or any of its agents duly appointed for that purpose.

**Source:** L. 55: p. 504, § 5. CRS 53: § 80-23-5. C.R.S. 1963: § 80-3-5. L. 69: p. 594, § 71.

**8-5-106. Colorado pay equity commission - creation - duties - cash fund - report - repeal.** (1) (a) There is hereby created in the office of the executive director in the department of labor and employment the Colorado pay equity commission, referred to in this section as the "commission". The commission consists of eleven members as follows:

(I) The executive director of the department of labor and employment or his or her designee;

(II) The director of the civil rights division in the department of regulatory agencies or his or her designee;

(III) One member representing higher education who has expertise in pay equity issues, appointed by the governor;

(IV) Two members appointed by the president of the senate as follows:

(A) One member representing a statewide labor union federation that includes private and public sector unions; and

(B) One member representing a national organization that serves minority communities and communities of color;

(V) Two members appointed by the speaker of the house of representatives as follows:

(A) One member of a women's national association or organization; and

(B) One member who is an attorney with experience in labor and employment issues, is an active member of a statewide association of attorneys, and represents employees;



(VI) One member representing a business association, appointed by the minority leader of the senate;

(VII) One member representing a chamber of commerce or a consortium of chambers of commerce, appointed by the minority leader of the house of representatives;

(VIII) One member who is a private, for-profit employer with fewer than fifteen employees, appointed jointly by the minority leaders of the senate and house of representatives; and

(IX) One member who is a private, for-profit employer with fifteen or more employees, appointed jointly and with the unanimous consent of the president and minority leader of the senate and the speaker and minority leader of the house of representatives.

(b) (I) The initial appointments to the commission shall be made within ninety days after May 25, 2010. If the appointing authority for a particular position on the commission fails to appoint a person to fill the position by the ninetieth day after May 25, 2010, the commission, by a majority vote of the members appointed by such date, shall select a qualified person to fill the position. Members of the commission shall serve two-year terms of office, not to exceed two consecutive terms of office.

(II) Upon the vacancy of a position on the commission, the appointing authority for that position on the commission shall appoint a qualified person to complete the remainder of the unexpired term. If the appointing authority fails to appoint a person to fill the vacancy within sixty days after the date the vacancy occurs, the commission, by majority vote, shall select a qualified person to fill the vacancy.

(c) At its first meeting, the commission shall elect a chair from its membership.

(d) The commission shall convene its first meeting no later than September 1, 2010, and shall meet quarterly thereafter or more frequently, as necessary, based on the workload of the commission.

(e) Members of the commission shall serve without compensation and shall not be reimbursed for any expenses that they incur by serving on the commission.

(2) The department of labor and employment may accept gifts, grants, and donations on behalf of the commission to fund the commission's costs. Any gifts, grants, or donations received by the department for the benefit of the commission shall be deposited in the pay equity commission cash fund, which fund is hereby created in the state treasury. Interest earned on the deposit and investment of moneys in the fund shall be deposited in the fund. Moneys in the fund are continuously appropriated to the department to fund the commission's costs in complying with this section.

(3) The commission's work, in conjunction with the department, includes:

(a) Educating employers in the state about issues or practices that may contribute to pay inequities;

(b) Working with business groups and educational institutions to develop and maintain an inventory of best practices for encouraging equal pay;

(c) Encouraging employers to implement equal pay best practices;

(d) Studying other state models of equal pay practices that achieve pay equity;

(e) Developing a program recognizing employers who pursue pay equity practices;

(f) Conducting outreach and education to employees and employers regarding pay equity; and

(g) Working to establish the state of Colorado as a model employer with regard to pay equity.

(4) (a) By June 30, 2012, and by each June 30 through June 30, 2015, the commission shall submit a report to the executive director of the department, detailing the work of the commission, including the education and outreach the commission has engaged in, the steps taken to encourage employers to implement equal pay best practices, the status of the inventory of best practices and the recognition program and whether any employers have been recognized under the program, any findings the commission has made based on its study of other states and practices in this state, and any other relevant information. The executive director of the department shall present the written report to the business, labor, and technology committee of the senate and the business affairs and labor committee of the house of representatives, or their successor committees. Following presentation of the report to the legislative committees, the department shall post the report on its web site.

(b) The commission shall include, in the annual reports required under paragraph (a) of this subsection (4), any recommendations submitted since the date of the prior annual report to the executive director pursuant to subsection (5) of this section; except that the annual report required to be submitted by June 30, 2012, shall include all such recommendations made prior to that date.

(5) The commission may submit to the executive director, at any time, recommendations for policy or administrative changes that the commission has approved by at least a two-thirds vote of its membership.

(6) This section is repealed, effective July 1, 2015. Prior to such repeal, the commission shall be reviewed in accordance with section 2-3-1203, C.R.S.

**Source: L. 2010:** Entire section added, (HB 10-1417), ch. 266, p. 1217, § 1, effective May 25.

## ARTICLE 6

### Minimum Wages of Workers

**Law reviews:** For article, "An Overview of Federal and State Wage-Hour Laws — Part I", which discusses the federal wage-hour laws, see 14 Colo. Law. 384 (1985).

8-6-101.	Legislative declaration - minimum wage of workers - matter of statewide concern - prohibition on local minimum wage enactments.	8-6-109.	Methods of establishing minimum wages - wage board.
8-6-102.	Construction.	8-6-110.	Wage board - duties - report - quorum.
8-6-103.	Definitions.	8-6-111.	Director to review report.
8-6-104.	Wages shall be adequate - conditions healthful and moral.	8-6-112.	New determination of wages and conditions.
8-6-105.	Director to investigate.	8-6-113.	Employment at less than minimum wage - license. (Repealed)
8-6-106.	Determination of minimum wage and conditions.	8-6-114.	Wages and working conditions for minors. (Repealed)
8-6-107.	Powers of director - duty of employer.	8-6-115.	Discrimination by employer - penalty - prosecutions.
8-6-108.	Public hearings - witness fees - contempt - director to make rules.	8-6-116.	Violation - penalty.
8-6-108.5.	Minimum wage - rules.	8-6-117.	Minimum wage presumed reasonable - conclusiveness.
		8-6-118.	Recovery of balance of minimum wage.
		8-6-119.	Investigation of complaints.

**8-6-101. Legislative declaration - minimum wage of workers - matter of statewide concern - prohibition on local minimum wage enactments.** (1) The welfare of the state of Colorado demands that workers be protected from conditions of labor that have a pernicious effect on their health and morals, and it is therefore declared, in the exercise of the police and sovereign power of the state of Colorado, that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

(2) The general assembly hereby finds and determines that issues related to the wages of workers in Colorado have important statewide ramifications for the labor force in this state. The general assembly, therefore, declares that the minimum wages of workers in this state are a matter of statewide concern.

(3) (a) No unit of local government, whether by acting through its governing body or an initiative, a referendum, or any other process, shall enact any jurisdiction-wide laws with respect to minimum wages; except that a unit of local government may set minimum wages paid to its own employees.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (3), any local government regulation or law pertaining to minimum wages in effect as of January 1, 1999, shall remain in full force and effect until such law is repealed by the local government entity that enacted the law.



(c) If it is determined by the officer or agency responsible for distributing federal moneys to a local government that compliance with this subsection (3) may cause denial of federal moneys that would otherwise be available or would otherwise be inconsistent with requirements of federal law, this section shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with federal requirements.

**Source:** L. 17: p. 380, § 1. C.L. § 4262. CSA: C. 97, § 236. CRS 53: § 80-9-1. C.R.S. 1963: § 80-7-1. L. 77: Entire section amended, p. 428, § 2, effective July 1. L. 99: Entire section amended, p. 289, § 2, effective April 14.

#### ANNOTATION

**Law reviews.** For note, "Colorado Wage and Hour Law: Analysis and Some Suggestions", see 36 U. Colo. L. Rev. 223 (1964). For article, "The Migrant Farm Worker in Colorado — The Life and the Law", see 40 U. Colo. L. Rev. 45 (1967).

**This article, as a prerequisite to its operation, contemplates the relationship of employer and employee, and where that relationship does not exist, a minimum wage order is null and void.** Indus. Comm'n v. Am. Beauty Coll., Inc., 167 Colo. 269, 447 P.2d 531 (1968).

**8-6-102. Construction.** Whenever this article or any part thereof is interpreted by any court, it shall be liberally construed by such court.

**Source:** L. 17: p. 389, § 22. C.L. § 4282. CSA: C. 97, § 256. CRS 53: § 80-9-20. C.R.S. 1963: § 80-7-20.

**8-6-103. Definitions.** As used in this article, unless the context otherwise requires:

- (1) and (2) Repealed.
- (3) "Director" means the director of the division of labor.
- (4) "Division" means the division of labor in the department of labor and employment.
- (5) "Minor" means any person of either sex under the age of eighteen years.
- (6) "Occupation" means every vocation, trade, pursuit, and industry.
- (7) Repealed.

**Source:** L. 17: pp. 380, 382, §§ 2, 5, 7. C.L. §§ 4263, 4266, 4268. CSA: C. 97, §§ 237, 240, 242. CRS 53: §§ 80-9-2, 80-9-4, 80-9-6. C.R.S. 1963: §§ 80-7-2, 80-7-4, 80-7-6. L. 69: pp. 604, 605, §§ 86, 87, 89. L. 77: (7) repealed, p. 432, § 13, effective July 1. L. 86: (1) and (2) repealed, p. 502, § 125, effective July 1.

**Cross references:** For the division of labor and the director of the division of labor and their powers and duties, see article 1 of this title.

**8-6-104. Wages shall be adequate - conditions healthful and moral.** It is unlawful to employ workers in any occupation within the state of Colorado for wages which are inadequate to supply the necessary cost of living and to maintain the health of the workers so employed. It is unlawful to employ workers in any occupation within this state under conditions of labor detrimental to their health or morals.

**Source:** L. 17: p. 381, § 4. C.L. § 4265. CSA: C. 97, § 239. CRS 53: § 80-9-3. C.R.S. 1963: § 80-7-3. L. 77: Entire section amended, p. 428, § 3, effective July 1.

**Cross references:** For the payment of wages generally, see article 4 of this title; for wage equality regardless of sex, see article 5 of this title; for the "Colorado Youth Employment Opportunity Act of 1971", see article 12 of this title; for the eight-hour work day requirement, see article 13 of this title; for the general protection of building employees, article 14 of this title.

## ANNOTATION

**Not exception to rule of employment at will.** Statutory pronouncement that makes it unlawful to "employ workers in any occupation within this state under conditions of labor detrimental to their health or morals" is a broad, general statement of policy that is inadequate to

justify adoption of an exception to the rule that an indefinite general hiring is terminable at will by either party to the employment. *Corbin v. Sinclair Marketing, Inc.*, 684 P.2d 265 (Colo. App. 1984).

**8-6-105. Director to investigate.** It is the duty of the director to inquire into the wages paid to employees and into the conditions of labor surrounding said employees in any occupation in this state if the director has reason to believe that said conditions of labor are detrimental to the health or morals of said employees or that the wages paid to a substantial number of employees are inadequate to supply the necessary cost of living and to maintain such employees in health. At the request of not less than twenty-five persons engaged in any occupation, the director shall forthwith make such investigation as is provided in this article. Such investigation may be made at any time, upon the initiative of the director.

**Source:** L. 17: p. 381, § 5. C.L. § 4266. CSA: C. 97, § 240. CRS 53: § 80-9-4. C.R.S. 1963: § 80-7-4. L. 69: p. 604, § 87. L. 77: Entire section amended, p. 429, § 4, effective July 1.

**8-6-106. Determination of minimum wage and conditions.** The director shall determine the minimum wages sufficient for living wages for persons of ordinary ability, including minimum wages sufficient for living wages, whether paid according to time rate or piece rate; the minimum wages sufficient for living wages for learners and apprentices; standards of conditions of labor and hours of employment not detrimental to health or morals for workers; and what are unreasonably long hours. In all such determinations, the director shall be bound by the provisions of this article and of section 15 of article XVIII of the state constitution; except that, if a higher minimum wage rate is established by applicable federal law or rules, the director shall be bound by such federal law or rules.

**Source:** L. 17: p. 382, § 6. C.L. § 4267. CSA: C. 97, § 241. CRS 53: § 80-9-5. C.R.S. 1963: § 80-7-5. L. 69: p. 604, § 88. L. 77: Entire section amended, p. 429, § 5, effective July 1. L. 2007: Entire section amended, p. 46, § 1, effective March 14.

**8-6-107. Powers of director - duty of employer.** (1) The director, for the purposes of this article, has power to investigate and ascertain the conditions of labor and the wages in the different occupations, whether paid by time rate or piece rate, in the state of Colorado. The director has power, in person or through any authorized representative, to inspect and examine and make excerpts from any books, reports, contracts, payrolls, documents, papers, and other records of any employer that in any way pertain to the question of wages and to require from any such employer full and true statements of the wages paid.

(2) Every employer shall keep a register of the names, ages, dates of employment, and residence addresses of all employees. It is the duty of every such employer, whether a person, firm, or corporation, to furnish to the director, upon request, any reports or information which the director may require to carry out the purposes of this article, such reports and information to be verified by the oath of the person, or a member of the firm or the president, secretary, or manager of the corporation, furnishing the same if and when so requested by the director; and the director or any authorized representative shall be allowed free access to the place of business of such employer for the purpose of making any investigation authorized by this article.

**Source:** L. 17: p. 382, § 7. C.L. § 4268. CSA: C. 97, § 242. CRS 53: § 80-9-6. C.R.S. 1963: § 80-7-6. L. 69: p. 605, § 89. L. 77: Entire section amended, p. 429, § 6, effective July 1.



**8-6-108. Public hearings - witness fees - contempt - director to make rules.**

(1) The director may hold public hearings at such times and places as he deems proper for the purpose of investigating any of the matters he is authorized to investigate by this article at which hearings employers, employees, or other interested persons may appear and give testimony as to the matter under consideration. The director has the power to subpoena and compel the attendance of any witness and to administer oaths, also, by subpoena, to compel the production of any books, papers, or other evidence at any public hearing of the director or at any session of any wage board. All witnesses subpoenaed by said director shall be paid the same mileage and per diem as are allowed by law to witnesses in civil cases before the district court of the state of Colorado. If any person fails to attend as a witness or to bring with him any books, papers, or other evidence when subpoenaed by the director or refuses to testify when ordered so to do, the director may apply to any district court in this state to compel obedience on the part of such person. The district court shall thereupon compel obedience by proceedings for contempt as in cases of disobedience of any order of said court in a proceeding pending before said court. The director shall not be bound by the technical rules of evidence. Said director may hold meetings for the transaction of any of his business at such times and places as he prescribes.

(2) The director has power to make reasonable and proper rules and procedure and to enforce said rules and procedure.

**Source:** L. 17: p. 383, § 8. C.L. § 4269. CSA: C. 97, § 243. CRS 53: § 80-9-7. C.R.S. 1963: § 80-7-7. L. 64: p. 288, § 218. L. 69: p. 605, § 90. L. 73: p. 1409, § 60. L. 86: (2) amended, p. 472, § 32, effective July 1.

**Cross references.** For witness and mileage fees, see §§ 13-33-102 and 13-33-103; for proceedings for contempt, see C.R.C.P. 107.

**8-6-108.5. Minimum wage - rules.** (1) Effective July 1, 1977, the minimum wage for minors may be fifteen percent below the minimum wage for other workers; except that the full minimum wage shall be paid to any emancipated minor. An emancipated minor shall mean any individual less than eighteen years of age who:

- (a) Has the sole or primary responsibility for his own support;
- (b) Is married and living away from parents or guardian;
- (c) Is able to show that his well-being is substantially dependent upon being gainfully employed.

(2) An employer may pay a rate of fifteen percent lower than the minimum wage to persons certified by the director to be less efficient due to a physical disability.

(3) The director may issue only such rules as are necessary to carry out the provisions of this article and as are consistent with the purposes and intent of section 8-6-101 and section 15 of article XVIII of the state constitution; except that, if a higher minimum wage rate is established by applicable federal law or rules, the director's rules shall be consistent with such federal law or rules.

**Source:** L. 77: Entire section added, p. 430, § 7, effective July 1. L. 93: (2) amended, p. 1630, § 3, effective July 1. L. 2007: (3) amended, p. 46, § 2, effective March 14.

**8-6-109. Methods of establishing minimum wages - wage board.** (1) If after investigation the director is of the opinion that the conditions of employment surrounding said employees are detrimental to the health or morals or that a substantial number of workers in any occupation are receiving wages, whether by time rate or piece rate, inadequate to supply the necessary costs of living and to maintain the workers in health, the director shall proceed to establish minimum wage rates either directly or by the indirect method described in subsection (2) of this section. If he selects the direct method, the director shall establish the minimum wage rates.

(2) If he adopts the indirect method, the director shall establish a wage board consisting of not more than three representatives of employers in the occupation in question, and of

an equal number of persons to represent the employees in said occupation, and of an equal number of disinterested persons to represent the public, and someone representing the director if it is desired. The director shall name and appoint all members of the wage board and designate the chairman thereof. The selection of members representing employers and employees shall be, so far as practicable, through election by employers and employees respectively, subject to approval and selection by the director. The members of the wage board shall be compensated at the same rate and fees for service as jurors in courts of record, and they shall be allowed their necessary traveling and clerical expenses incurred in the actual performance of their duties, to be paid from the appropriations for the expenses of the division.

(3) The proceedings and deliberations of such wage board shall be made a matter of record for the use of the director and shall be admissible as evidence in any proceedings before the director. Each wage board has the same power as the director to subpoena witnesses, administer oaths, and compel the production of books, papers, and other evidence. Witnesses subpoenaed by a wage board shall be allowed the same compensation as when subpoenaed by the director.

**Source:** L. 17: p. 384, § 9. C.L. § 4270. CSA: C. 97, § 244. CRS 53: § 80-9-8. C.R.S. 1963: § 80-7-8. L. 69: p. 606, § 91. L. 77: (1) an (2) amended, p. 430, § 8, effective July 1.

**Cross references:** For juror's fees, see § 13-33-101; for mileage fees of jurors, see § 13-33-103.

#### ANNOTATION

**Pursuant to Colorado's Minimum Wage Act, the director of the Colorado division of labor has been delegated the authority to investigate and determine the wages and employment conditions** in certain occupations. If, following such investigation, the director finds that employment conditions in any industry en-

danger employees' health or morals, the director may directly or through a "wage board" adopt a wage order to establish minimum wage rates and standard conditions of employment in the affected industry. *Weissman v. Crawford Rehab. Servs.*, 914 P.2d 380 (Colo. App. 1995).

**8-6-110. Wage board - duties - report - quorum.** The director may transmit to each wage board all pertinent information in his possession relative to the wages paid or material to the subject of inquiry of the occupation in question. Each wage board shall endeavor to determine, if requested so to do by the director, the standard conditions of employment; the minimum wage, whether by time rate or piece rate, adequate to maintain in health and to supply with the necessary cost of living an employee of ordinary ability in the occupation in question, or in any branches thereof; and suitable minimum wages, graded, so far as practicable, on a rising scale toward the minimum allowed experienced workers, for learners and apprentices. When a majority of the members of a wage board agree upon standard conditions of employment or minimum wage board determinations, they shall report such determinations to the director, together with the reasons therefor and the facts relating thereto. A majority of the members of any such wage board shall constitute a quorum.

**Source:** L. 17: p. 385, § 10. C.L. § 4271. CSA: C. 97, § 245. CRS 53: § 80-9-9. C.R.S. 1963: § 80-7-9. L. 69: p. 606, § 92. L. 77: Entire section amended, p. 430, § 9, effective July 1.

#### ANNOTATION

**Pursuant to Colorado's Minimum Wage Act, the director of the Colorado division of labor has been delegated the authority to investigate and determine the wages and em-**

**ployment conditions** in certain occupations. If, following such investigation, the director finds that employment conditions in any industry endanger employees' health or morals, the director



may directly or through a "wage board" adopt a wage order to establish minimum wage rates and standard conditions of employment in the

affected industry. *Weissman v. Crawford Rehab. Servs.*, 914 P.2d 380 (Colo. App. 1995).

**8-6-111. Director to review report.** (1) Upon the receipt of a report from a wage board, the director shall review the same and may approve or disapprove any determination or recommit the subject to the same or a new wage board. If the director approves any of the determinations of the wage board, said director shall publish notice not less than once a week for two successive weeks in a newspaper of general circulation published in the county in which any business directly affected thereby is located, that he will, on a date and at a place named in said notice, hold a public meeting, at which all persons in favor of or opposed to said recommendations will be given a hearing.

(2) After publication of notice and the meeting, the director, if so desired, may make and render such an order as may be proper or necessary to adopt the recommendations and carry the same into effect and require all employees in the occupation directly affected thereby to preserve and comply with such recommendations and order. Such order is effective thirty days after it is made and rendered and shall be in full force and effect on and after that day. After the order is effective, it is unlawful for any employer to violate or disregard any of the terms of the order or to employ any worker in any occupation covered by the order at lower wages or under other conditions than authorized or permitted by the order. The director shall, as far as is practicable, mail a copy of any such order to every employer affected thereby; and every employer affected by the order shall keep a copy thereof posted in a conspicuous place in such employer's establishment. Such order shall include a notice of the contents of sections 8-12-105 (3), 8-12-115 (4) (b) (II), and 8-12-116 (2).

(3) In case of an emergency the director may authorize or permit the employment of any person for more hours per day or per week than the maximum now fixed by law.

(4) Overtime, at a rate of one and one-half times the regular rate of pay, may be permitted by the director under conditions and rules and for increased minimum wages which the director, after investigation, determines and prescribes by order and which shall apply equally to all employers in such industry or occupation.

**Source:** L. 17: p. 386, § 11. C.L. § 4272. CSA: C. 97, § 246. CRS 53: § 80-9-10. C.R.S. 1963: § 80-7-10. L. 69: p. 607, § 93. L. 77: (2), (3), and (4) amended, p. 431, § 10, effective July 1. L. 86: (4) amended, p. 472, § 33, effective July 1. L. 2000: (2) amended, p. 1487, § 2, effective July 1.

**Cross references:** For the maximum number of hours minors may be employed, see § 8-12-105; for the general eight-hour day requirement, see article 13 of this title.

#### ANNOTATION

Pursuant to Colorado's Minimum Wage Act, the director of the Colorado division of labor has been delegated the authority to investigate and determine the wages and employment conditions in certain occupations. If, following such investigation, the director finds that employment conditions in any industry en-

danger employees' health or morals, the director may directly or through a "wage board" adopt a wage order to establish minimum wage rates and standard conditions of employment in the affected industry. *Weissman v. Crawford Rehab. Servs.*, 914 P.2d 380 (Colo. App. 1995).

**8-6-112. New determination of wages and conditions.** Whenever a minimum wage rate or a new standard of conditions of employment has been established in any occupation, the director, if he deems proper or necessary so to do, upon petition of either employers or employees, may reconvene the wage board or establish a new wage board, and any recommendation made by such board shall be dealt with in the same manner as the original recommendation of a wage board. Pending any new determination, any minimum wage rate and any new standard of conditions of employment theretofore established shall be and

continue in force and effect. It is the duty of the director to survey and review for adequacy established wage orders made pursuant to the provisions of section 8-6-111 at least every four years, whether or not the director is petitioned to do so by either employers or employees.

**Source:** L. 17: p. 387, § 12. C.L. § 4273. CSA: C. 97, § 247. CRS 53: § 80-9-11. C.R.S. 1963: § 80-7-11. L. 69: pp. 607, 665, §§ 94, 1.

#### ANNOTATION

**Pursuant to Colorado's Minimum Wage Act, the director of the Colorado division of labor has been delegated the authority to investigate and determine the wages and employment conditions** in certain occupations. If, following such investigation, the director finds that employment conditions in any industry en-

danger employees' health or morals, the director may directly or through a "wage board" adopt a wage order to establish minimum wage rates and standard conditions of employment in the affected industry. *Weissman v. Crawford Rehab. Servs.*, 914 P.2d 380 (Colo. App. 1995).

#### **8-6-113. Employment at less than minimum wage - license. (Repealed)**

**Source:** L. 17: p. 387, § 13. C.L. § 4274. CSA: C. 97, § 248. CRS 53: § 80-9-12. C.R.S. 1963: § 80-7-12. L. 69: p. 608, § 95. L. 77: Entire section repealed, p. 432, § 13, effective July 1.

#### **8-6-114. Wages and working conditions for minors. (Repealed)**

**Source:** L. 17: p. 387, § 14. C.L. § 4275. CSA: C. 97, § 247. CRS 53: § 80-9-13. C.R.S. 1963: § 80-7-13. L. 69: p. 608, § 96. L. 77: Entire section repealed, p. 432, § 13, effective July 1.

**8-6-115. Discrimination by employer - penalty - prosecutions.** Any employer who discharges or threatens to discharge, or in any other way discriminates against an employee because such employee serves upon a wage board, or is active in its formation, or has testified or is about to testify, or because the employer believes that the employee may testify in any investigation or proceeding relative to enforcement of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars for each violation. The director shall investigate and report to the proper prosecuting officials whether employers in each occupation investigated are obeying his decrees, and the director or employees of the division may cause informations to be filed with and prosecutions to be instituted by the proper prosecuting officials for any violation of the provisions of this article.

**Source:** L. 17: p. 388, § 15. C.L. § 4276. CSA: C. 97, § 250. CRS 53: § 80-9-14. C.R.S. 1963: § 80-7-14. L. 69: p. 608, § 97.

#### ANNOTATION

**Law reviews.** For article, "Punitive Damages in Wrongful Discharge Cases", see 15 Colo. Law. 658 (1986).

**8-6-116. Violation - penalty.** The minimum wages fixed by the director, as provided in this article, shall be the minimum wages paid to the employees, and the payment to such employees of a wage less than the minimum so fixed is unlawful, and every employer or other person who, individually or as an officer, agent, or employee of a corporation or other person, pays or causes to be paid to any such employee a wage less than the minimum is



guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both such fine and imprisonment.

**Source:** L. 17: p. 388, § 16. C.L. § 4277. CSA: C. 97, § 251. CRS 53: § 80-9-15. L. 63: p. 290, § 9. C.R.S. 1963: § 80-7-15. L. 69: p. 608, § 98. L. 73: p. 1409, § 61. L. 77: Entire section amended, p. 431, § 11, effective July 1.

**8-6-117. Minimum wage presumed reasonable - conclusiveness.** In every prosecution for the violation of any provision of this article, the minimum wage established by the director shall be prima facie presumed to be reasonable and lawful and the wage required to be paid. The findings of fact made by the director acting within prescribed powers, in the absence of fraud, shall be conclusive.

**Source:** L. 17: p. 388, § 17. C.L. § 4278. CSA: C. 97, § 252. CRS 53: § 80-9-16. C.R.S. 1963: § 80-7-16. L. 69: p. 609, § 99. L. 77: Entire section amended, p. 432, § 12, effective July 1.

**8-6-118. Recovery of balance of minimum wage.** An employee receiving less than the legal minimum wage applicable to such employee is entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage, together with costs of suit, notwithstanding any agreement to work for a lesser wage.

**Source:** L. 17: p. 389, § 18. C.L. § 4279. CSA: C. 97, § 253. CRS 53: § 80-9-17. C.R.S. 1963: § 80-7-17.

**8-6-119. Investigation of complaints.** Any person may register with the division a complaint that the wages paid to an employee for whom a rate has been established are less than that rate, and the director shall investigate the matter and take all proceedings necessary to enforce the payment of the minimum wage rate.

**Source:** L. 17: p. 389, § 19. C.L. § 4280. CSA: C. 97, § 254. CRS 53: § 80-9-18. C.R.S. 1963: § 80-7-18. L. 69: p. 609, § 100.

## ARTICLE 7

### Salaries of Employees in Mining

#### 8-7-101 to 8-7-109. (Repealed)

**Source:** L. 77: Entire article repealed, p. 292, § 2, effective May 26.

**Editor's note:** This article was numbered as article 12 of chapter 80, C.R.S. 1963. For amendments to this article prior to its repeal in 1977, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## ARTICLE 8

### Truck System Abolished

#### 8-8-101 to 8-8-109. (Repealed)

**Source:** L. 95: Entire article repealed, p. 194, § 6, effective April 13.

**Editor's note:** This article was numbered as article 20 of chapter 80, C.R.S. 1963. For amendments to this article prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## ARTICLE 9

### Assignment of Wages

**Cross references:** For wage assignments in relation to child support or maintenance, see § 14-14-111.5.

8-9-101.	Assignment of wages - requirements.	8-9-104.	Joinder of wife or husband in assignment - acknowledgment.
8-9-102.	Copies to be given employer and assignor.	8-9-105.	Burden of proof of validity on assignee.
8-9-103.	When assignment must be recorded.	8-9-106.	Deductions for union dues.
		8-9-107.	Other authorized deductions.

**8-9-101. Assignment of wages - requirements.** This article is subject to the provisions of articles 2 and 3 of the "Uniform Consumer Credit Code". No assignment of wages by any employee to any person for the benefit of such employee shall be valid or enforceable. No employer or debtor shall recognize or honor any assignment of wages for any purpose unless it is in writing and for a fixed and definite part of the wages earned or to be earned within thirty days from the date of such assignment. Any assignment which is postdated or dated on any other date than that of its actual execution, shall be void and of no effect for any purpose.

**Source:** L. 49: p. 231, § 3. CSA: C. 97, § 223(1). CRS 53: § 80-11-1. C.R.S. 1963: § 80-15-1. L. 71: p. 853, § 3.

**Cross references:** For the "Uniform Consumer Credit Code", see articles 1 to 9 of title 5.

### ANNOTATION

**Law reviews.** For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968).

**Assignment of insurance renewal commissions held not to be wages within the meaning**

**of this article.** Crepeau v. Renewal Guar. Corp., 29 Colo. App. 23, 478 P.2d 698 (1970).

**8-9-102. Copies to be given employer and assignor.** No assignment of wages shall be valid or enforceable unless a copy of the assignment is given or mailed by registered mail to the employer within five days after its execution and a copy of the assignment given to the wage earner making the assignment.

**Source:** L. 49: p. 232, § 4. CSA: C. 97, § 227(1). CRS 53: § 80-11-2. C.R.S. 1963: § 80-15-2.

**8-9-103. When assignment must be recorded.** No assignment of wages not already earned at the time of the assignment and no assignment of any other sum to become due to the assignor shall be valid as against any creditor of the assignor who has not had actual notice of the assignment at the time the same is made unless the same is recorded with the recorder of the county wherein such wages are to be earned or such sums are to become due within five days from date thereof.

**Source:** L. 49: p. 231, § 1. CSA: C. 97, § 232(1). CRS 53: § 80-11-3. C.R.S. 1963: § 80-15-3.



**8-9-104. Joinder of wife or husband in assignment - acknowledgment.** No assignment of wages, except for child support, not already earned at the time of the assignment or any sum to become due the assignor after the date of such assignment shall be valid unless, if the assignor is married and residing with his spouse, such spouse joins in and signs such assignment and such assignment is duly acknowledged before a notary public or some other officer authorized by the laws of Colorado to take acknowledgments.

**Source:** L. 49: p. 231, § 2. CSA: C. 97, § 233(1). CRS 53: § 80-11-4. C.R.S. 1963: § 80-15-4. L. 81: Entire section amended, p. 909, § 2, effective June 8.

#### ANNOTATION

**Annotator's note.** A case decided prior to the earliest source of § 8-9-104 has been included in the annotations to this section.

**This section is designed to secure to the wife her rightful share** in the fruits of her husband's labor. State v. Elkins, 84 Colo. 409, 270 P. 875 (1928).

**Since this provision is for the protection of the home,** it would be incongruous to permit a

creditor to assume the role of the wife for the purpose of seizing her husband's paycheck. State v. Elkins, 84 Colo. 409, 270 P. 875 (1928).

**Where wages are in the wife's hands,** thus having reached the haven intended by this section, they are not subject to garnishment. State v. Elkins, 84 Colo. 409, 270 P. 875 (1928).

**8-9-105. Burden of proof of validity on assignee.** If any assignment of wages or other sums to be earned or to become due after the date of such assignment is contested by any creditor of the assignor, the burden of proof that the assignment was recorded as provided in section 8-9-103 or that the creditor had actual notice of the assignment at the time garnishee summons was issued and that the assignment was made in accordance with the provisions of this article rests upon the assignee under the assignment.

**Source:** L. 49: p. 232, § 5. CSA: C. 97, § 234(1). CRS 53: § 80-11-5. C.R.S. 1963: § 80-15-5.

**8-9-106. Deductions for union dues.** Nothing in this article shall prevent or prohibit the use of the check-off between employers or employees in the custom or practice of the deduction of union dues by an employer for his employees where such an arrangement has been entered into between the parties.

**Source:** L. 49: p. 232, § 6. CSA: C. 97, § 235(1). CRS 53: § 80-11-6. C.R.S. 1963: § 80-15-6.

**8-9-107. Other authorized deductions.** (1) Nothing contained in this article shall be construed to affect deductions authorized by an employee to be made by an employer for hospital, medical, stock purchases, savings, insurance, charities, credit unions, banks, savings and loans, or any other financial institution or other similar purposes, or for rent, board, and subsistence provided in connection with employment, if the authorization is revocable.

(2) Rent, board, and subsistence deductions as provided in subsection (1) of this section shall not be made a condition of employment.

**Source:** L. 49: p. 232, § 7. CSA: C. 97, § 235(2). CRS 53: § 80-11-7. C.R.S. 1963: § 80-15-7. L. 71: p. 853, § 3. L. 83: Entire section amended, p. 405, § 1, effective May 23.

#### ARTICLE 10

##### Preferred Claims

**Cross references:** For the power of Pinnacol Assurance to recover benefits for civil defense employees, see § 24-32-2213.

8-10-101. Wages a preferred claim.  
8-10-102. Statement of claim presented.

8-10-103. Payment - prorating - prior mortgage not impaired.

**8-10-101. Wages a preferred claim.** When the business of any person, corporation, company, or firm is suspended by the action of creditors or put into the hands of a receiver or trustee, the debts owing to laborers, servants, or employees, which have occurred by reason of their labor or employment shall be considered and treated as preferred claims. Such laborers or employees shall be preferred creditors and shall first be paid in full. If there are not sufficient funds to pay them in full, they shall be paid from the proceeds of the sale of the property seized. Any person interested may contest any such claim, or part thereof, by filing exceptions thereto, supported by affidavit, with the officer having the custody of such property, and thereupon the claimant shall be required to reduce his claim to judgment before a court having jurisdiction thereof before any part thereof is paid.

**Source:** L. 03: p. 143, § 1. R.S. 08: § 6998. C.L. § 4243. CSA: C. 97, § 217. CRS 53: § 80-12-1. C.R.S. 1963: § 80-16-1.

#### ANNOTATION

**Section should be liberally construed.** This section intended to secure wage earners against loss of their earnings from insolvency of employers, is based upon a sound public policy and should be liberally construed in order to accomplish the purpose of its enactment. Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915).

**But this section cannot be invoked for the purpose of supporting a decision not based upon the letter or spirit of its enactment,** for the general assembly has not created a lien, but has made debts due for labor preferred claims

against the property of the debtor, made claimants for wages preferred creditors, and provided that they shall be first paid, which is quite a different thing from the creation of a statutory lien. Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915).

**This section contains no provisions as to the time in which exceptions to claims must be filed.** Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915).

**For an early enactment on the subject of this section,** see Ray v. Hiller, 11 Colo. 445, 18 P. 622 (1888).

**8-10-102. Statement of claim presented.** Any laborer, servant, or employee desiring to enforce his claim for wages under this article shall present a statement under oath showing the amount due, the kind of work for which the wages are due, and when performed to the officer, person, or court charged with the property within twenty days after the seizure thereof on any execution or writ of attachment or within sixty days after same has been placed in the hands of any receiver or trustee, and thereupon it is the duty of the person or court having or receiving such statement to pay the amount of the claim to the person entitled thereto.

**Source:** L. 03: p. 143, § 2. R.S. 08: § 6999. C.L. § 4244. CSA: C. 97, § 218. CRS 53: § 80-12-2. C.R.S. 1963: § 80-16-2.

**8-10-103. Payment - prorating - prior mortgage not impaired.** No claim under this article shall be paid until after the expiration of the time in which to present such claim. If the funds realized from the sale of the property seized are insufficient to pay the total claims presented, such funds shall be prorated on such claims. The provisions of this article shall not be construed to extend to creditors who held a duly recorded mortgage upon the property attached which was given for a debt actually existing from such mortgage before the labor was performed.

**Source:** L. 03: p. 144, § 3. R.S. 08: § 7000. C.L. § 4245. CSA: C. 97, § 219. CRS 53: § 80-12-3. C.R.S. 1963: § 80-16-3.



## ANNOTATION

**This section places the claims of employees for labor in a preferred class to be paid in preference to other simple contract creditors.** Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915).

**But it does not create an express statutory lien superior to all other liens** without reference to priority. Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915).

**And it is not intended to give such claims a preference upon the corpus of mortgaged property.** Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915); Helm v. Smith, 62 Colo. 203, 162 P. 143 (1916).

**A recorded mortgage for an existing debt takes precedence** over claims for labor subsequently performed. Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915).

**Claims against a going railroad might be preferred over prior mortgage liens.** First Nat'l Bank v. Wyman, 16 Colo. App. 468, 66 P. 456 (1901).

**But ordinary liabilities of a railway company are preferred to a mortgage debt only when accrued within six months prior to the appointment of a receiver, and this rule is de-**

parted from only in extreme cases and for special reasons. Helm v. Smith, 62 Colo. 203, 162 P. 143 (1916).

**Moreover, the very existence of such a rule presupposes an affirmative showing** of facts sufficient to invoke and warrant its application; and where the record fails to disclose that the railroad involved is a public or quasi-public corporation, or that it had ever been operated as such, and there is no attempt to show that the claims were valid and existing obligations against the company at the time of presentment, much less that they have any of the other attributes or characteristics which would in equity entitle them to preference over a mortgage lien, preference will be denied. Central Sav. Bank v. Newton, 59 Colo. 150, 147 P. 690 (1915).

**Thus the salary of an attorney which accrued more than 13 months prior to the appointment of a receiver** for a railroad, no effort having been made to enforce payment and the attorney having all the time full knowledge of the bonded indebtedness, was not entitled to a preference. Helm v. Smith, 62 Colo. 203, 162 P. 143 (1916).

## Labor Conditions

## ARTICLE 11

## Occupational Safety and Health

8-11-100.1 to 8-11-125. (Repealed)

**Source:** L. 80: Entire article repealed, p. 451, § 6, effective April 13.

**Editor's note:** This article was numbered as articles 2 and 22 of chapter 80, C.R.S. 1963. For amendments to this article prior to its repeal in 1980, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## ARTICLE 12

## Colorado Youth Employment Opportunity Act

**Editor's note:** This article was numbered as article 6 of chapter 80, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1971, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1971, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Law reviews:** For article, "An Overview of Federal and State Wage-Hour Laws — Part II", see 14 Colo. Law. 781 (1985).

8-12-101.	Short title.		maximum hours of work.
8-12-102.	Legislative declaration.	8-12-106.	Permissible occupations at age
8-12-103.	Definitions.		nine or older.
8-12-104.	Exemptions.	8-12-107.	Permissible occupations at age
8-12-105.	Minimum age requirements -		twelve or older.

8-12-108.	Permissible occupations at age fourteen.	8-12-113.	Education program.
8-12-109.	Permissible occupations at age sixteen.	8-12-114.	School release permit.
8-12-110.	Hazardous occupations prohibited for minors.		Appeal from denial or cancellation of school release permit - procedure.
8-12-111.	Age certificates.	8-12-115.	Director of division of labor - powers and duties - rules and regulations.
8-12-112.	Proof of high school diploma, passing score on general educational development examination, or completion of vocational ed-	8-12-116.	Penalty for violations.
		8-12-117.	Minors covered by workers' compensation.

**8-12-101. Short title.** This article shall be known and may be cited as the "Colorado Youth Employment Opportunity Act of 1971".

**Source:** L. 71: R&RE, p. 889, § 1. C.R.S. 1963: § 80-6-13.

#### ANNOTATION

**Law reviews.** For article, "One Year Review of Torts", see 36 Dicta 64 (1959).

**8-12-102. Legislative declaration.** (1) It is the policy of this state to foster the economic, social, and educational development of young people through employment. Work is an integral factor in providing a sense of purpose, direction, and self-esteem necessary to the overall physical and mental health of an individual. In the first part of this century, state and federal laws and regulations were needed to prevent the exploitation of child labor. Unfortunately, such legislation also has tended, on occasion, to limit and curtail opportunities for minors to participate in reasonable work experiences. Young people, especially those who have completed high school or occupational training and no longer are in school, should not be denied employment opportunities because of arbitrary minimum age limits. Work, however, should be coordinated with schooling wherever appropriate. Work and study combined must be developed in the interest of the youth to be trained.

(2) (a) The general assembly hereby finds and determines that certain issues related to youth employment in Colorado have important statewide ramifications for the labor force in this state. In particular, the general assembly declares that the issue of minimum wages, as it relates to youth employment in this state, is a matter of statewide concern.

(b) No unit of local government, whether by acting through its governing body or an initiative, a referendum, or any other process, shall enact any jurisdiction-wide law or ordinance with respect to the minimum wages earned by young people unless otherwise specifically authorized to do so by this article; except that a unit of local government may enact such provisions with respect to its own employees.

**Source:** L. 71: R&RE, p. 889, § 1. C.R.S. 1963: § 80-6-2. L. 99: Entire section amended, p. 289, § 3, effective April 14.

#### ANNOTATION

**This section does not contemplate nor create a private cause of action for parents against their children's employers.** Wrongful death action brought by a minor employee's parents against the minor's employer for the death of the minor which occurred during the

course of the scope of the minor's employment was properly dismissed as being barred by the exclusivity provisions of the Workers' Compensation Act. *Henderson v. Bear*, 968 P.2d 144 (Colo. App. 1998).

**8-12-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) Repealed.



- (2) "Director" means the director of the division of labor.
- (3) "Division" means the division of labor in the department of labor and employment.
- (4) "Employment" means any occupation engaged in for compensation in money or other valuable consideration, whether paid to the minor or to some other person, including, but not limited to, occupation as a servant, agent, subagent, or independent contractor.
- (5) "Minor" means any person under the age of eighteen, except a person who has received a high school diploma or a passing score on the general educational development examination. The state board of education may administer the general educational development examination to any minor seventeen years of age or older who wishes to be considered an adult for the purpose of this article if such person is qualified to take the examination under the standards established by the state board of education.
- (6) "School day" means any day when normal classes are in session during the regular school year in the school district.
- (7) "School hours" means that period during which the student is expected to be in school in the school district.

**Source:** L. 71: R&RE, p. 889, § 1. C.R.S. 1963: § 80-6-3. L. 86: (1) repealed, p. 502, § 125, effective July 1.

**8-12-104. Exemptions.** (1) The provisions of this article, except section 8-12-110, shall not apply to the following:

- (a) School work and supervised educational activities;
  - (b) Home chores;
  - (c) Work done for a parent or guardian, except where the parent or guardian receives any payment therefor;
  - (d) Newsboys and newspaper carriers.
- (2) Any minor employed as an actor, model, or performer shall be exempt from the provisions of subsection (1) of section 8-12-105.
- (3) The director may grant exemptions from any provision of this article, except for sections 8-12-113 and 8-12-114, for an individual minor if he finds that such an exemption would be in the best interests of the minor involved. In granting exemptions, the director shall consider, among other things, the previous training which the minor has received in his proposed occupation and his knowledge of the proper safety measures to be taken in connection with such occupation. The director may require any applicant for an exemption from section 8-12-110 to submit to a test of his ability to perform the skills required for the proposed occupation. Such tests may be administered by a community and technical college, a private occupational school, or any other institution which offers courses in the skills required, which courses are approved by either the state board for community colleges and occupational education or the private occupational school division.
- (4) Any employer, minor, minor's parent or guardian, school official, or youth employment specialist may request an exemption, as provided in subsection (3) of this section, from a provision of this article.

**Source:** L. 71: R&RE, p. 890, § 1. C.R.S. 1963: § 80-6-4. L. 79: (3) amended, p. 1631, § 1, effective July 19. L. 81: (3) amended, p. 850, § 21, effective July 1. L. 90: (3) amended, p. 1160, § 6, effective July 1.

**8-12-105. Minimum age requirements - maximum hours of work.** (1) No minor under the age of fourteen shall be permitted employment in this state except as authorized by sections 8-12-104, 8-12-106, and 8-12-107.

- (2) On school days, during school hours, no minor under the age of sixteen shall be permitted employment except as provided in section 8-12-113; and, after school hours, no minor under the age of sixteen shall be permitted to work in excess of six hours unless the next day is not a school day.

(3) Except for baby-sitters, no minor under the age of sixteen shall be permitted to work between the hours of nine-thirty p.m. and five a.m., except as authorized by section 8-12-104 (2), unless the next day is not a school day.

(4) Except for the provisions of subsection (5) of this section, no employer shall be permitted to work a minor more than forty hours in a week or more than eight hours in any twenty-four-hour period. In case of emergencies which may arise in the conduct of an industry or occupation (not subject to a wage order promulgated under article 6 of this title) the director may authorize an employer to allow a minor to work more than eight hours in a twenty-four-hour period. In such emergencies an employee shall be paid at a rate of one and one-half times his time rate as determined in accordance with the provisions of section 8-6-106 for each hour worked in excess of forty hours in a week.

(5) In seasonal employment for the culture, harvest, or care of perishable products where wages are paid on a piece basis, as determined in accordance with the provisions of section 8-6-106, a minor fourteen years of age or older may be permitted to work hours in excess of the limitations of subsection (4) of this section; but in no case is he permitted to work more than twelve hours in any twenty-four-hour period nor more than thirty hours in any seventy-two-hour period; except that a minor fourteen or fifteen years of age may work more than eight hours per day on only ten days in any thirty-day period. Overtime wage provisions of subsection (4) shall not apply to this subsection (5).

**Source:** L. 71: R&RE, pp. 890, 898, §§ 1, 2. C.R.S. 1963: § 80-6-5. L. 73: p. 938, § 1.

**Cross references:** For the eight-hour day requirement in general, see article 13 of this title.

**8-12-106. Permissible occupations at age nine or older.** (1) Subject to the limitations of sections 8-12-105 and 8-12-110, any minor at age nine or older shall be permitted employment in any of the following nonhazardous occupations:

- (a) Delivery of handbills, advertising, and advertising samples;
- (b) Shoeshining;
- (c) Gardening and care of lawns involving no power-driven lawn equipment;
- (d) Cleaning of walks involving no power-driven snow-removal equipment;
- (e) Casual work usual to the home of the employer and not specifically prohibited in this article;
- (f) Caddying on golf courses;
- (g) Any other occupation which is similar to those enumerated in this subsection (1) and is not specifically prohibited by this article.

**Source:** L. 71: R&RE, p. 891, § 1. C.R.S. 1963: § 80-6-6.

**8-12-107. Permissible occupations at age twelve or older.** (1) Subject to the limitations of sections 8-12-105 and 8-12-110, any minor at age twelve or older shall be permitted employment in any of the following nonhazardous occupations:

- (a) Sale and delivery of periodicals and door-to-door selling of merchandise and the delivery thereof;
- (b) Baby-sitting;
- (c) Gardening and care of lawns, including the operation of power-driven lawn equipment if such type of equipment is approved by the division or if the minor has received training conducted or approved by the division in the operation of the equipment;
- (d) Cleaning of walks, including the operation of power-driven snow-removal equipment;
- (e) Agricultural work, except for that declared to be hazardous under the "Fair Labor Standards Act of 1938", as amended. However, it is the intent of the general assembly that migrant children eligible for attendance at migrant schools be encouraged to attend such schools.



(f) Any other occupation which is similar to those enumerated in this subsection (1) and is not specifically prohibited by this article.

**Source:** L. 71: R&RE, p. 892, § 1. C.R.S. 1963: § 80-6-7.

**Cross references:** For the "Fair Labor Standards Act of 1938", see 29 U.S.C. § 201 et seq.

**8-12-108. Permissible occupations at age fourteen.** (1) In addition to the occupations permitted by sections 8-12-106 and 8-12-107, and subject to the limitations of sections 8-12-105 and 8-12-110, any minor fourteen years of age or older shall be permitted employment in any of the following occupations:

- (a) Nonhazardous occupations in manufacturing;
- (b) Public messenger service and errands by foot, bicycle, and public transportation;
- (c) Operation of automatic enclosed freight and passenger elevators;
- (d) Janitorial and custodial service, including the operation of vacuum cleaners and floor waxes;
- (e) Office work and clerical work, including the operation of office equipment;
- (f) Warehousing and storage, including unloading and loading of vehicles;
- (g) Nonhazardous construction and nonhazardous repair work. The operation of motor vehicles shall be subject to article 2 of title 42, C.R.S.
- (h) Occupations in retail food service;
- (i) Occupations in gasoline service establishments, including but not limited to dispensing gasoline, oil, and other consumer items, courtesy service, car cleaning, washing, and polishing, the use of hoists where supervised, and changing tires; except that no minor may inflate or change any tire mounted on a rim equipped with a removable retaining ring. The operation of motor vehicles shall be subject to article 2 of title 42, C.R.S.
- (j) Occupations in retail stores, including cashiering, selling, modeling, art work, work in advertising departments, window trimming, price marking by hand or machine, assembling orders, packing and shelving, or bagging and carrying out customers' orders;
- (k) Occupations in restaurants, hotels, motels, or other public accommodations, except the operation of power food slicers and grinders;
- (l) Occupations related to parks or recreation, including but not limited to recreation aides and conservation projects;
- (m) Any other occupation which is similar to those enumerated in this subsection (1) and not specifically prohibited by this article.

**Source:** L. 71: R&RE, p. 892, § 1. C.R.S. 1963: § 80-6-8.

**8-12-109. Permissible occupations at age sixteen.** In addition to the occupations permitted by sections 8-12-106 to 8-12-108 and subject to the limitations of sections 8-12-105 and 8-12-110, any minor sixteen years of age or older shall be permitted employment in any occupation which involves the use of a motor vehicle if the minor is licensed to operate the motor vehicle for such purpose pursuant to article 2 of title 42, C.R.S.

**Source:** L. 71: R&RE, p. 893, § 1. C.R.S. 1963: § 80-6-9.

**8-12-110. Hazardous occupations prohibited for minors.** (1) No minor shall be permitted employment in any occupation declared to be hazardous in subsection (2) of this section unless such minor is fourteen years of age or older and he is employed:

- (a) Incidental to or upon completion of a program of apprentice training;
- (b) Incidental to or upon completion of a student-learner program of occupational education under the auspices of a public school, junior college, community and technical college, federally funded work-training program, or private occupational school approved by the private occupational school division;

(c) Upon completion of any other program of training approved by the state board for community colleges and occupational education; or

(d) Upon completion of a program of occupational education conducted outside this state which the director determines offers instructional quality and content comparable to that offered in programs certified by the state board for community colleges and occupational education.

(2) The following occupations are declared to be hazardous:

(a) Operation of any high pressure steam boiler or high temperature water boiler;

(b) Work which primarily involves the risk of falling from any elevated place located ten feet or more above the ground except that work defined as agricultural involving elevations of twenty feet or less above ground;

(c) Manufacturing, transporting, or storing of explosives;

(d) Mining, logging, oil drilling, or quarrying;

(e) Any occupation involving exposure to radioactive substances or ionizing radiation;

(f) Operation of the following power-driven machinery: Woodworking machines, metal-forming machines, punching or shearing machines, bakery machines, paper products machines, shears, and automatic pin-setting machines and any other power-driven machinery which the director determines to be hazardous;

(g) Slaughter of livestock and rendering and packaging of meat;

(h) Occupations directly involved in the manufacture of brick or other clay construction products or of silica refractory products;

(i) Wrecking or demolition, but not including manual auto wrecking;

(j) Roofing;

(k) Occupations in excavation operations.

(3) The director shall promulgate regulations, in accordance with section 24-4-103, C.R.S., to define the occupations prohibited under this section and to prescribe what types of equipment shall be required to make an occupation nonhazardous for minors.

**Source:** L. 71: R&RE, p. 893, § 1. C.R.S. 1963: § 80-6-10. L. 79: (1)(b) amended, p. 1631, § 2, effective July 19. L. 81: (1)(b) amended, p. 851, § 22, effective July 1. L. 86: (2)(f) and (3) amended, p. 473, § 34, effective July 1. L. 88: (1)(a) amended, p. 1429, § 3, effective June 11. L. 90: (1)(b) amended, p. 1160, § 7, effective July 1.

**8-12-111. Age certificates.** (1) Any employer desiring proof of the age of any minor employee or prospective employee may require the minor to submit an age certificate. Upon request of a minor, an age certificate shall be issued by or under the authority of the school superintendent of the district or county in which the applicant resides. The superintendents, principals, or headmasters of independent or parochial schools shall issue age certificates to minors who attend such schools.

(2) The age certificate shall show the age of the minor, the date of his birth, the date of issuance of the certificate, the name and position of the issuing officer, the name, address, and description of the minor, and what evidence was accepted as proof of age. The age certificate shall also show the school hours applicable and shall state that a separate school release permit is required for minors under sixteen to work on regular school days during such school hours. It shall be signed by the issuing officer and by the minor in his presence.

(3) An age certificate shall not be issued unless the minor's birth certificate or a photocopy or extract thereof is exhibited to the issuing officer, or unless such evidence was previously examined by the school authorities and the information is shown on the school records. If a birth certificate is not available, other documentary evidence such as a baptismal certificate or a passport may be accepted. If such evidence is not available, the parent or guardian shall appear with the minor and shall make an oath before the judge or other officer of the juvenile or county court as to the age of the minor.

(4) The employer shall keep an age certificate received by him for the duration of the minor's employment and shall keep on file all age certificates where they may be readily examined by an agent of the division. Upon termination of employment and upon request, the certificate shall be returned to the minor.

**Source:** L. 71: R&RE, p. 894, § 1. C.R.S. 1963: § 80-6-11.



**8-12-112. Proof of high school diploma, passing score on general educational development examination, or completion of vocational education program.** Any employer may require proof of a high school diploma, a passing score on the general educational development examination, or completion of a vocational education program. The employer shall be required to maintain a record of such high school diploma, proof of a passing score on the general educational development examination, or completion of a vocational education program.

**Source: L. 71: R&RE, p. 894, § 1. C.R.S. 1963: § 80-6-12.**

**8-12-113. School release permit.** (1) Any minor fourteen or fifteen years of age who wishes to work on school days during school hours shall first secure a school release permit. The permit shall be issued only by the school district superintendent, his agent, or some other person designated by the board of education. The school release permit shall be issued only for a specific position with a designated employer. The permit shall be for a specific length of time not to exceed thirty days. The permit shall be cancelled upon the termination of such employment and shall be issued only in the following circumstances:

- (a) If the minor is to be employed in an occupation not prohibited by section 8-12-110 and as evidence thereof presents a signed statement from his prospective employer; and
- (b) If the parent or guardian of the minor consents to the employment; and
- (c) If the issuing officer believes the best interests of the minor will be served by permitting him to work.

(2) The school release permit shall show the name, address, and description of the minor, the name and address of the employer, the kind of work to be performed, and the hours of exemption and shall also require the signature of the parent and the minor in the presence of the issuing officer.

(3) Inasmuch as it is desirable and practical to encourage school attendance by minors at least part time, no school release permit shall be issued under this section unless limited to require class attendance by the minor for at least three class hours each regular school day; except that, in cases of extreme hardship, class attendance may be waived if the issuing officer determines that such action would be in the best interest of the minor.

(4) If the issuing officer is in doubt about whether the proposed employment is in accordance with this article, he shall consult with the division before issuing the permit.

(5) Upon termination for any reason of the employment authorized, the employer shall return the school release permit directly to the issuing officer with a notation showing the date of termination.

(6) The issuing officer is authorized to cancel a school release permit if the issuing officer determines that the action would be in the best interest of the minor. If a school release permit is cancelled, for reasons other than the termination of employment for which the permit was granted, the minor shall be entitled to a review of the cancellation by the court having jurisdiction of juvenile matters in the county in which the minor resides, in accordance with the procedures established by section 8-12-114.

**Source: L. 71: R&RE, p. 895, § 1. C.R.S. 1963: § 80-6-13.**

**8-12-114. Appeal from denial or cancellation of school release permit - procedure.** (1) If a minor is refused a school release permit or has had a school release permit cancelled for reasons other than the termination of employment for which the permit was granted, he shall be entitled to review by the court having jurisdiction of juvenile matters in the county in which the minor resides, in accordance with the procedures described in this section.

(2) The official who refused to issue or cancelled the school release permit shall, upon demand made within five days after the refusal or cancellation, promptly furnish the minor and his parent or guardian with a written statement of the reasons for such refusal or cancellation.

(3) Within five days after the receipt of such statement, the minor and his parent or guardian may petition the court for an order directing the issuance or reissuance of a school release permit. The petition shall state the reasons why the court should issue such an order, and the petitioner shall attach to such petition the statement of the issuing officer obtained as provided in subsection (2) of this section.

(4) The court shall hold a hearing and receive such further testimony and evidence as it deems necessary. If the court finds that the issuance or reissuance of a permit is in the best interest of the minor, it shall grant the petition.

(5) No fee shall be charged by the court in such proceedings.

**Source: L. 71: R&RE, p. 896, § 1. C.R.S. 1963: § 80-6-14.**

**8-12-115. Director of division of labor - powers and duties - rules and regulations.**

(1) The director shall enforce the provisions of this article.

(2) The director shall take the necessary steps to inform employers, school authorities, and the general public regarding the provisions of this article, and he shall work with other public and private agencies to minimize the obstacles to legitimate employment of minors.

(3) The director shall receive and investigate complaints and may from time to time visit employers at reasonable times and inspect pertinent records to determine compliance with this article.

(4) (a) If investigation of any place of employment or complaint discloses a violation of this article, except section 8-12-105 (3), the director shall give the employer written notice describing the violation and specifying the provisions of this article that such employer is allegedly violating. Within ten days of receipt of such notice of violation, the employer may file a written request for a hearing on the issue of whether the violation exists, which hearing shall be conducted in accordance with section 24-4-105, C.R.S. After a hearing concerning a violation of this article, or after the expiration of twenty days after the issuance of a notice of violation during which the employer has neither requested a hearing nor ceased the conduct that constitutes the alleged violation, the director may issue a final order requiring the employer to cease and desist the conduct found to be in violation. At any time thereafter, the director may order the violating employer to pay a penalty of twenty dollars for each offense. Each day that the conduct constituting the violation is continued after the order is made final, and each minor employed in violation of this article, constitutes a separate offense. The order imposing the penalty shall become final upon issuance, and the penalty shall be due and payable thirty days after the order assessing the penalty is entered, unless prior to that time the order has been modified or a hearing on the penalty has been requested as provided by section 24-4-105, C.R.S. All penalties imposed by this section shall be collected as provided in section 8-1-142.

(b) (I) If investigation of any place of employment or complaint discloses a violation of section 8-12-105 (3), the director shall give the employer written notice describing the violation and specifying the provisions of this article that such employer is allegedly violating. Within ten days after receipt of such notice of violation, the employer may file a written request for a hearing on the issue of whether the violation exists, which hearing shall be conducted in accordance with section 24-4-105, C.R.S. After a hearing concerning a violation of section 8-12-105 (3), or after the expiration of twenty days after the issuance of a notice of violation during which the employer has neither requested a hearing nor ceased the conduct which constitutes the alleged violation, the director may issue a final order requiring the employer to cease and desist the conduct found to be in violation. At any time thereafter, the director may order the violating employer to pay a penalty pursuant to subparagraph (II) of this paragraph (b). The order imposing the penalty shall become final upon issuance, and the penalty shall be due and payable thirty days after the order assessing the penalty is entered, unless prior to that time the order has been modified or a hearing on the penalty has been requested as provided by section 24-4-105, C.R.S. All penalties imposed by this section shall be collected as provided in section 8-1-142.

(II) Failure to comply with the provisions of this paragraph (b) shall make the offender liable for administrative fines pursuant to the following penalty schedule:



(A) For a first offense, by a fine of not less than two hundred dollars nor more than five hundred dollars;

(B) For a second offense within six months after the first offense, by a fine of not less than five hundred dollars nor more than one thousand dollars;

(C) For a third or subsequent offense within six months after the first offense, by a fine of not less than one thousand dollars nor more than ten thousand dollars.

(5) The findings, orders, and penalties made by the director shall be subject to judicial review pursuant to section 24-4-106, C.R.S.

(6) The director may apply for an injunction in any court of competent jurisdiction to enjoin any person from committing any act prohibited by this article.

(7) The director, in accordance with section 24-4-103, C.R.S., shall promulgate rules and regulations more specifically defining the occupations and types of equipment permitted or prohibited by this article.

**Source:** L. 71: R&RE, p. 896, § 1. C.R.S. 1963: § 80-6-15. L. 86: (5) and (7) amended, p. 473, § 35, effective July 1. L. 2000: (4) amended, p. 1486, § 1, effective July 1.

**8-12-116. Penalty for violations.** (1) Any person, having legal responsibility for a minor under the age of eighteen years, who knowingly permits such minor to be employed in violation of this article, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars for each offense.

(2) Any person, firm, or corporation, or any agent, manager, superintendent, or foreman of any firm or corporation, who, by himself or through an agent, subagent, foreman, superintendent, or manager, knowingly violates or knowingly fails to comply with any of the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars for each offense. Upon conviction of a second or subsequent offense, such person shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not longer than ninety days, or by both such fine and imprisonment.

**Source:** L. 71: R&RE, p. 897, § 1. C.R.S. 1963: § 80-6-16.

#### ANNOTATION

A parent whose child was injured indirectly by an employer's violation of the Colorado Youth Employment Opportunity Act as to another child does not have a private

cause of action under the act. *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551 (Colo. App. 2003).

**8-12-117. Minors covered by workers' compensation.** All minors, whether lawfully or unlawfully employed, shall be subject to the rights and remedies of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, if the employer is included within the meaning of section 8-40-203.

**Source:** L. 71: R&RE, p. 897, § 1. C.R.S. 1963: § 80-6-17. L. 90: Entire section amended, p. 556, § 3, effective July 1.

#### ARTICLE 13

#### Eight-hour Day

**Cross references:** For hours of work for minors, see § 8-12-105; for office hours of county officers, see § 30-10-109.

**Law reviews:** For article, "An Overview of Federal and State Wage-Hour Laws — Part II", see 14 Colo. Law. 781 (1985).

8-13-101.	Employment declared dangerous.	8-13-106.	Penalty for violation. (Repealed)
8-13-102.	Eight-hour day - exceptions.	8-13-107.	Firemen - hours of duty.
8-13-102.1.	Period of employment - relation to conservation of fuel.	8-13-108.	Penalty for violation.
8-13-103.	Penalty for violation.	8-13-109.	Employment in cement and plaster factories injurious. (Repealed)
8-13-104.	Eight-hour day for public employees. (Repealed)	8-13-110.	Overtime not mandatory.
8-13-105.	Emergency cases. (Repealed)	8-13-111.	Penalty for violation. (Repealed)

**8-13-101. Employment declared dangerous.** Employment in all underground mines, underground workings, and smelters is declared to be injurious to health and dangerous to life and limb.

**Source:** L. 13: p. 306, § 1. C.L. § 4172. CSA: C. 97, § 100. CRS 53: § 80-7-1. C.R.S. 1963: § 80-14-1. L. 87: Entire section amended, p. 376, § 1, effective June 20.

#### ANNOTATION

**Law reviews.** For article, "Sex Discrimination and State Protective Laws", see 44 Den. L. J. 344 (1967).

**8-13-102. Eight-hour day - exceptions.** (1) The period of employment of persons working in all underground mines, underground workings, and smelters may exceed eight hours within a twenty-four-hour period upon the following conditions:

(a) The operator of the underground mine, underground workings, or smelter establishes a work plan setting forth the terms and conditions under which the period of employment may exceed eight hours in a twenty-four-hour period; and

(b) The operator provides reasonable notice to its employees, except in cases of emergency or upset conditions, of proposed increases in the regular work schedule which would result in a period of employment in excess of eight hours in a twenty-four-hour period. Reasonable notice shall be construed to be not less than one week, during which time affected employees may comment.

(2) Nothing in this section shall be construed so as to alter the provisions of any collective bargaining agreement.

**Source:** L. 13: p. 306, § 2. C.L. § 4173. CSA: C. 97, § 101. CRS 53: § 80-7-2. C.R.S. 1963: § 80-14-2. L. 87: Entire section amended, p. 376, § 2, effective June 20. L. 89: Entire section R&RE, p. 375, § 1, effective April 5.

#### ANNOTATION

**Law reviews.** For article, "Sex Discrimination and State Protective Laws", see 44 Den. L. J. 344 (1967).

**Annotator's note.** Cases decided prior to the earliest source of § 8-13-102 have been included in the annotations to this section.

**Earlier law on subject of this section held unconstitutional.** In re Morgan, 26 Colo. 415, 58 P. 1071 (1899).

**This section, passed with an emergency clause, cannot be suspended by referendum.** Van Kleeck v. Ramer, 62 Colo. 4, 156 P. 1108 (1916).

**For prior legislation relating to the hours of men employed in mines,** see In re Senate Resolution, 54 Colo. 262, 130 P. 333 (1913).

**8-13-102.1. Period of employment - relation to conservation of fuel.** (1) The general assembly hereby finds and declares that in order to give full effect to state programs for the conservation of fuel and not to impede or prevent the execution of any fuel



conservation powers the governor may impose pursuant to part 3 of article 20 of title 24, C.R.S., it is necessary to enact this section. The general assembly further finds and declares that it is necessary to enact this section in order for certain industries to support and cooperate with such state programs and powers and to assist their employees in the conservation of fuel by providing opportunity for certain employers to establish four-day workweeks thereby omitting one day of travel to and from work for employees.

(2) For purposes of section 8-13-102, "period of employment" means time spent which is directly related to an employee's performance of his primary job duties. "Period of employment" does not include time spent, whether or not compensation is paid, which is not directly related to the employee's performance of his primary job duties, including, but not limited to, meal periods, travel time, rest periods, and waiting time.

**Source: L. 79:** Entire section added, p. 871, § 2, effective June 22.

**Editor's note:** Part 3 of article 20 of title 24 concerning the fuel conservation powers of the governor which is referred to in subsection (1) was repealed, effective February 1, 1982.

**8-13-103. Penalty for violation.** Any person, body corporate, general manager, or employer who violates or causes to be violated any of the provisions of sections 8-13-101 and 8-13-102 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than two hundred fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than ninety days nor more than six months, or by both such fine and imprisonment. Each day in violation of the provisions of sections 8-13-101 and 8-13-102 shall constitute a separate offense.

**Source: L. 13:** p. 306, § 3. **C.L.** § 4174. **CSA:** C. 97, § 102. **CRS 53:** § 80-7-3. **C.R.S. 1963:** § 80-14-3.

#### ANNOTATION

**Former law held unconstitutional.** In re Morgan, 26 Colo. 415, 58 P. 1071 (1899).

#### **8-13-104. Eight-hour day for public employees. (Repealed)**

**Source: L. 1893:** p. 305, § 1. **L. 1894:** p. 85, § 1. **R.S. 08:** § 3921. **C.L.** § 4175. **CSA:** C. 97, § 103. **CRS 53:** § 80-7-4. **C.R.S. 1963:** § 80-14-4. **L. 86:** Entire section repealed, p. 508, § 1, effective March 26.

#### **8-13-105. Emergency cases. (Repealed)**

**Source: L. 1893:** p. 305, § 2. **L. 1894:** p. 85, § 2. **R.S. 08:** § 3922. **C.L.** § 4176. **CSA:** C. 97, § 104. **CRS 53:** § 80-7-5. **L. 63:** p. 621, § 1. **C.R.S. 1963:** § 80-14-5. **L. 73:** p. 942, § 1. **L. 75:** Entire section R&RE, p. 290, § 1, effective January 1, 1976. **L. 86:** Entire section repealed, p. 508, § 1, effective March 26.

#### **8-13-106. Penalty for violation. (Repealed)**

**Source: L. 1893:** p. 305, § 2. **L. 1894:** p. 86, § 3. **R.S. 08:** § 3923. **C.L.** § 4177. **CSA:** C. 97, § 104. **CRS 53:** § 80-7-6. **L. 63:** p. 621, § 2. **C.R.S. 1963:** § 80-14-6. **L. 86:** Entire section repealed, p. 508, § 1, effective March 26.

**8-13-107. Firemen - hours of duty.** It is unlawful for any municipality, or any officer or employee thereof, to require any person holding any position or employment in the fire department of such municipality, except one who may be at any time in command of the

department, to be or remain on duty in such employment during any calendar month for periods of time which in the aggregate during such month amount to more than twelve hours, for each day in said month. The requiring of more hours of work in cases of conflagrations or similar emergencies shall not be unlawful. This section shall apply to all municipalities having fire departments, whether such municipalities are created under general laws, or by special charter, or by or under the provisions of article XX of the constitution of the state of Colorado.

**Source:** L. 21: p. 333, § 1. C.L. § 4178. CSA: C. 97, § 106. CRS 53: § 80-7-7. C.R.S. 1963: § 80-14-7. L. 86: Entire section amended, p. 508, § 2, effective March 26.

**8-13-108. Penalty for violation.** Any officer, agent, or employee of any municipality who orders, directs, compels, or requires any employee or other person in any such fire department, except one who may be at any time in command of the fire department, to be or remain on duty in such work or employment in any calendar month for a longer time than that provided for in section 8-13-107 except in cases of emergency, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than one hundred days, or by both such fine and imprisonment.

**Source:** L. 21: p. 334, § 2. C.L. § 4179. CSA: C. 97, § 107. CRS 53: § 80-7-8. C.R.S. 1963: § 80-14-8.

#### **8-13-109. Employment in cement and plaster factories injurious. (Repealed)**

**Source:** L. 27: p. 288, § 1. CSA: C. 97, § 114. CRS 53: § 80-7-15. C.R.S. 1963: § 80-14-12. L. 2000: Entire section repealed, p. 161, § 1, effective March 17.

**8-13-110. Overtime not mandatory.** Nothing in this article shall be construed to mandate overtime for employees in and about cement manufacturing plants and plaster manufacturing plants unless otherwise negotiated by contract.

**Source:** L. 27: p. 288, § 2. CSA: C. 97, § 115. CRS 53: § 80-7-16. C.R.S. 1963: § 80-14-13. L. 2000: Entire section amended, p. 161, § 2, effective March 17.

#### **8-13-111. Penalty for violation. (Repealed)**

**Source:** L. 27: p. 289, § 3. CSA: C. 97, § 116. CRS 53: § 80-7-17. C.R.S. 1963: § 80-14-14. L. 2000: Entire section repealed, p. 161, § 3, effective March 17.

### **ARTICLE 13.3**

#### **Parental Involvement in K-12 Education Act**

**Cross references:** For the legislative declaration contained in the 2009 act adding this article, see section 1 of chapter 340, Session Laws of Colorado 2009.

- |   |                        |
|---|------------------------|
| 8-13.3-101. Short title.                  | democratic activities. |
| 8-13.3-102. Definitions.                  | 8-13.3-104. Repeal.    |
| 8-13.3-103. Leave for involvement in aca- |                        |

**8-13.3-101. Short title.** This article shall be known and may be cited as the "Parental Involvement in K-12 Education Act".

**Source:** L. 2009: Entire article added, (HB 09-1057), ch. 340, p. 1789, § 2, effective August 5.



**8-13.3-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Academic activity" means the following meetings or conferences regarding the employee's child or any child for whom the employee has primary legal responsibility:

(a) A parent-teacher conference; or

(b) A meeting related to: Special education services, as defined in section 22-20-103, C.R.S.; response to intervention, as defined in section 22-2-133 (4) (b), C.R.S.; dropout prevention; attendance; truancy; or disciplinary issues.

(2) "Academic year" means the period, not to exceed twelve consecutive months, allotted by a school for the completion of one grade level of study.

(3) (a) "Employee" means any person working for another for hire in the state of Colorado in a nonexecutive or nonsupervisory capacity who is the parent or legal guardian of a child enrolled in a public or private school or in a nonpublic home-based educational program pursuant to section 22-33-104.5, C.R.S., in Colorado in any grade from kindergarten through twelfth grade.

(b) "Employee" does not include independent contractors, domestic servants employed in and about private homes, seasonal workers, or farm and ranch laborers.

(4) "Employer" means an employer, as defined in the federal "Family and Medical Leave Act of 1993", Pub.L. 103-3, as amended.

**Source: L. 2009:** Entire article added, (HB 09-1057), ch. 340, p. 1789, § 2, effective August 5.

**8-13.3-103. Leave for involvement in academic activities.** (1) (a) An employee employed by an employer is entitled to take leave, not to exceed six hours in any one-month period and not to exceed eighteen hours in any academic year, for the purpose of attending an academic activity for or with the employee's child. In the alternative, an employer and employee may agree to an arrangement allowing the employee to take paid leave to attend an academic activity and to work the amount of hours of paid leave taken within the same work week.

(b) An employee who works less than a full-time schedule shall be eligible for a portion of the leave specified in paragraph (a) of this subsection (1) based on the percent of a full-time schedule the employee works.

(c) Notwithstanding paragraph (a) of this subsection (1), an employer may limit the ability of an employee to take leave pursuant to this section in cases of emergency or other situations that may endanger a person's health or safety or in a situation where the absence of the employee would result in a halt of service or production.

(2) An employer may require that the leave be taken in no longer than three-hour increments and that the employee provide written verification from the school or school district of the academic activity.

(3) An employee shall make a reasonable attempt to schedule academic activities for which leave may be taken under this section outside of regular work hours. In scheduling academic activities for which leave may be taken, schools and school districts shall make their best efforts to accommodate the schedules of employees with children in the school or school district.

(4) In order to take leave under this section, an employee shall provide the employer with notice of the need for leave at least one calendar week in advance of the academic activity, and the notice shall include the written verification specified in subsection (2) of this section if required by the employer. In the case of an emergency where the employee is not aware of the need for the leave one calendar week in advance, the employee shall provide the employer with notice of the leave as soon as possible once he or she becomes aware of the need for the leave and shall provide the employer with written verification, as described in subsection (2) of this section, upon return to work.

(5) Nothing in this section requires that parental leave be paid leave, nor shall this section be construed to prohibit an employer from providing its employees with leave provisions or leave benefits that are greater than the requirements for leave as described in this section.

(6) An employee or employer may elect to substitute accrued paid vacation leave, sick leave, personal leave, or other paid leave for unpaid leave provided pursuant to this section, and the employer shall allow the employee to use such accrued paid leave for the same purposes as, and with notice requirements no more stringent than, those applicable to leave under this article.

(7) An employer may satisfy the requirements of this section, and shall not be required to provide additional leave to its employees, if the employer:

(a) Makes available to its employees an amount of paid or unpaid leave, including vacation leave, sick leave, or personal leave, sufficient to meet the requirements of this section; and

(b) Allows its employees to use the leave for the same purposes as, and with notice requirements no more stringent than, those applicable to leave under this article.

**Source: L. 2009:** Entire article added, (HB 09-1057), ch. 340, p. 1789, § 2, effective August 5.

**8-13.3-104. Repeal.** This article is repealed, effective September 1, 2015.

**Source: L. 2009:** Entire article added, (HB 09-1057), ch. 340, p. 1791, § 2, effective August 5.

## ARTICLE 13.5

### Workplace Accommodations for Nursing Mothers

8-13.5-101. Short title.

8-13.5-102. Legislative declaration.

8-13.5-103. Definitions.

8-13.5-104. Right of nursing mothers to express breast milk in workplace - private location - discrimination prohibited.

**8-13.5-101. Short title.** This article shall be known and may be cited as the “Workplace Accommodations for Nursing Mothers Act”.

**Source: L. 2008:** Entire article added, p. 328, § 1, effective August 5.

**8-13.5-102. Legislative declaration.** (1) The general assembly hereby finds, determines, and declares that:

(a) The American academy of pediatrics recommends breastfeeding exclusively for the first six months of an infant’s life and has continuously endorsed breastfeeding for at least one year or longer as the optimal form of nutrition for infants and as a foundation for good feeding practices;

(b) Extensive research indicates that there are diverse and compelling advantages to nursing for infants, mothers, families, businesses, and society, including less illness among children who are nursed and lower health care costs;

(c) Epidemiologic research shows that breastfeeding infants provides benefits to their general health, growth, and development and results in significant decreases in risk for numerous acute illnesses;

(d) Breastfeeding has been shown to have numerous health benefits for mothers, including an earlier return to prepregnant weight, delayed resumption of ovulation with increased child spacing, improved bone remineralization postpartum with reduction in hip fractures in the postmenopausal period, and reduced risk of ovarian cancer and premenopausal breast cancer;

(e) In addition to individual health benefits, providing opportunities for breastfeeding results in substantial benefits to employers, including reduced health care costs, reduced employee absenteeism for care attributable to infant illness, improved employee productivity, higher morale and greater loyalty, improved ability to attract and retain valuable employees, and a family-friendly image in the community;



(f) Nursing is a basic, normal, and important act of nurturing that should be encouraged in the interests of maternal and infant health.

(2) The general assembly further declares that the purpose of this article is for the state of Colorado to become involved in the national movement to recognize the medical importance of breastfeeding, within the scope of complete pediatric care, and to encourage removal of boundaries placed on nursing mothers in the workplace.

**Source: L. 2008:** Entire article added, p. 328, § 1, effective August 5.

**8-13.5-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Employer" means a person engaged in business who has one or more employees. "Employer" includes the state and any political subdivision of the state.

(2) "Reasonable efforts" means any effort that would not impose an undue hardship on the operation of the employer's business.

(3) "Undue hardship" means any action that requires significant difficulty or expense when considered in relation to factors such as the size of the business, the financial resources of the business, or the nature and structure of its operation, including consideration of the special circumstances of public safety.

**Source: L. 2008:** Entire article added, p. 329, § 1, effective August 5.

**8-13.5-104. Right of nursing mothers to express breast milk in workplace - private location - discrimination prohibited.** (1) An employer shall provide reasonable unpaid break time or permit an employee to use paid break time, meal time, or both, each day to allow the employee to express breast milk for her nursing child for up to two years after the child's birth.

(2) The employer shall make reasonable efforts to provide a room or other location in close proximity to the work area, other than a toilet stall, where an employee can express breast milk in privacy.

(3) An employer that makes reasonable efforts to accommodate an employee who chooses to express breast milk in the workplace shall be deemed to be in compliance with the requirements of this section.

(4) The department of labor and employment shall provide, on its web site, information and links to other web sites where employers can access information regarding methods to accommodate nursing mothers in the workplace. The department shall consult with appropriate organizations or associations to determine the appropriate information and web site links to provide on the department's web site so as to provide employers with the most accurate and useful information available.

(5) Before an employee may seek litigation for a violation of this section, there shall be nonbinding mediation between the employer and the employee.

**Source: L. 2008:** Entire article added, p. 329, § 1, effective August 5.

## ARTICLE 14

### Protection of Building Employees

8-14-101. Protection of building employees.

8-14-102. Scaffolding - complaints - duty of building inspector.

8-14-103. Flooring - hoisting of materials -

regulations.

8-14-104. Building inspector to enforce - prosecutions.

8-14-105. Penalty for violation.

**8-14-101. Protection of building employees.** A person employing or directing another to perform labor of any kind in the erection, repairing, altering, or painting of a house, building, or structure shall not furnish or erect for the performance of such labor scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable, or

improper and which are not constructed, placed, and operated to give proper protection to life and limb of a person so employed or engaged. Scaffolding or staging swung or suspended from an overhead support more than twenty feet from the ground or floor shall have a safety rail of wood, properly bolted, secured, and braced, rising at least thirty-four inches above the floor or main portions of the scaffolding or staging and extending along the entire length of the outside and the ends thereof and properly attached thereto, and such scaffolding or staging shall be so fastened to prevent the same from swaying from the building or structure.

**Source:** L. 13: p. 448, § 1. C.L. § 4186. CSA: C. 97, § 117. CRS 53: § 80-16-1. C.R.S. 1963: § 80-13-1.

#### ANNOTATION

A general contractor owes a duty of ordinary care to provide the employees of a subcontractor a reasonably safe place in which to

work. J & K Constr. Co. v. Molton, 154 Colo. 214, 390 P.2d 68 (1964).

**8-14-102. Scaffolding - complaints - duty of building inspector.** (1) Whenever complaint is made to the building inspector of any town or city wherein work is being done that the scaffolding or the slings, hangers, blocks, pulleys, stays, braces, ladders, or ropes of any swinging or stationary scaffolding used in the construction, alteration, repairing, painting, cleaning, or pointing of buildings within the limits of such city are unsafe or liable to prove dangerous to the life or limb of any person, the building inspector shall immediately cause an inspection to be made of the scaffolding or the slings, hangers, blocks, pulleys, stays, braces, ladders, irons, or other parts connected therewith. If, after examination, the scaffolding or any of the parts are found to be dangerous to life or limb, the building inspector shall prohibit the use thereof and require the same to be altered and reconstructed to avoid such danger. The building inspector making the examination shall attach a certificate to the scaffolding or the slings, hangers, irons, ropes, or other parts thereof examined by him stating that he has made an examination and that he has found it safe or unsafe, as the case may be. If he declares it unsafe, he shall notify the person responsible for its erection of the fact at once, in writing, and warn him against the use thereof. Such notice may be served personally upon the person responsible for its erection or by affixing it conspicuously to the scaffolding or the part thereof declared to be unsafe. After the notice has been so served or affixed, the person responsible therefor shall immediately remove the scaffolding or part thereof or alter or strengthen it in such manner as to render it safe, in the discretion of the officer who has examined it.

(2) The building inspector, whose duty it is to examine or test any scaffolding or part thereof as required by this section, shall have free access at all reasonable hours to any building or premises containing scaffolding or where it is in use. All swinging or stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use, and not more than four men shall be allowed on any swinging scaffolding at one time.

**Source:** L. 13: p. 448, § 2. C.L. § 4187. CSA: C. 97, § 118. CRS 53: § 80-16-2. C.R.S. 1963: § 80-13-2.

**8-14-103. Flooring - hoisting of materials - regulations.** (1) All contractors and owners, when constructing buildings in cities where the plans and specifications require the floors to be arched between the beams thereof or where the floors or filling in between the floors are of fireproof material or brick work, shall complete the flooring or filling in as the building progresses to not less than within three tiers of beams below that on which the iron work is being erected. If the plans and the specifications of the buildings do not require



filling in between the beams of floors with brick or fireproof material, all contractors for carpenter work in the course of construction shall lay the underflooring thereof on each story as the building progresses to not less than within two stories below the one to which the building has been erected.

(2) Where double floors are not to be used, the contractor shall keep the floor planked over not less than two stories below the story where the work is being performed. If the floor beams are of iron or steel, the contractor for the iron or steel work of building in course of construction, or the owners of such building, shall thoroughly plank over the entire tier of iron or steel beams on which the structural iron or steel work is being erected except such spaces as may be reasonably required for the proper construction of such iron or steel work and for the raising or lowering of materials to be used in the construction of the building or such spaces as may be designated by the plans and specifications for stairways and elevator shafts. If elevators, elevating machines, or hod-hoisting apparatus are used within a building in the course of construction for the purpose of lifting materials to be used in the construction, the contractors or owners shall cause the shafts or openings in each floor to be enclosed or fenced in on all sides by a barrier at least eight feet in height; except on two sides, which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edge of the shaft or opening. If a building in course of construction is five stories or more in height, no lumber or timber needed for such construction shall be hoisted or lifted on the outside of the building.

**Source:** L. 13: p. 449, § 3. C.L. § 4188. CSA: C. 97, § 119. CRS 53: § 80-16-3. C.R.S. 1963: § 80-13-3.

**8-14-104. Building inspector to enforce - prosecutions.** The building inspector shall enforce all the provisions of this article. He shall investigate complaints made to him of violations of such provisions, and, if he finds that such complaints are well-founded, he shall issue an order directed to the person or corporation complained of requiring such person or corporation to comply with those provisions. If such order is disregarded, the building inspector shall present to the district attorney of the proper county all the facts ascertained by him in regard to the alleged violation and all other papers, documents, or evidence pertaining thereto which he has in his possession. The district attorney to whom such presentation is made shall proceed at once to prosecute the person or corporation for the violations complained of.

**Source:** L. 13: p. 450, § 4. C.L. § 4189. CSA: C. 97, § 120. CRS 53: § 80-16-4. C.R.S. 1963: § 80-13-4.

**8-14-105. Penalty for violation.** Any person, corporation, company, or association who violates any of the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined in a sum of not less than fifty dollars nor more than five hundred dollars for each offense.

**Source:** L. 13: p. 451, § 5. C.L. § 4190. CSA: C. 97, § 121. CRS 53: § 80-16-5. C.R.S. 1963: § 80-13-5.

### **Workers' Compensation Cost Containment**

**Cross references:** For the "Workers' Compensation Act of Colorado", see articles 40 to 47 of this title.

**ARTICLE 14.5****Cost Containment**

8-14.5-101. Short title.	8-14.5-107.5. Workplace safety programs - study by commissioner.
8-14.5-102. Legislative declaration.	8-14.5-108. Cost containment fund - creation.
8-14.5-103. Definitions.	8-14.5-109. Grants-in-aid - cooperative agreements.
8-14.5-104. Creation of board.	8-14.5-110. Repeal of article. (Repealed)
8-14.5-105. Powers and duties of board.	
8-14.5-106. Duties of director.	
8-14.5-107. Cost containment certification.	

**8-14.5-101. Short title.** This article shall be known and may be cited as the “Workers’ Compensation Cost Containment Act”.

**Source:** **L. 89:** Entire article added, p. 376, § 1, effective July 1. **L. 90:** Entire section amended, p. 556, § 4, effective July 1.

**8-14.5-102. Legislative declaration.** The general assembly hereby finds and declares that any adjustments to premiums for workers’ compensation insurance be granted on the basis of equity, rate adequacy, fairness, and insurer compliance with Colorado insurance rating laws. The general assembly further finds and declares that notwithstanding the granting of different rates to insureds for their experience modification, participation in return-to-work programs, and premium volume discounts not exceeding fifteen percent, any other premium adjustments should be principally weighted in a manner primarily encouraging the adoption and successful implementation by insureds of effective workplace safety programs mainly encompassing risk management and medical cost containment procedures.

**Source:** **L. 89:** Entire article added, p. 376, § 1, effective July 1. **L. 90:** Entire section amended, p. 556, § 5, effective July 1. **L. 93:** Entire section amended, p. 2083, § 1, effective July 1.

**8-14.5-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Approved program” means a cost containment or risk management program approved by the board.

(2) “Board” means the workers’ compensation cost containment board established pursuant to section 8-14.5-104.

(3) “Certified program” means a cost containment or risk management program which has been implemented for a period of at least one year and certified by the board.

(3.5) “Commissioner” means the insurance commissioner, appointed pursuant to section 10-1-104, C.R.S.

(4) “Department” means the department of labor and employment.

(5) “Director” means the director of the division.

(6) “Division” means the division of workers’ compensation in the department of labor and employment.

(7) “High risk employer” means any employer classified in the upper ten percent of the insurance rate schedule in the Colorado workers’ compensation insurance system.

(8) “Managed care” shall have the meaning set forth in section 8-42-101 (3.6) (p) (I) (B).

(9) “Workplace safety program” means those programs offered by insurance carriers authorized to do business in this state for purposes of workers’ compensation insurance policies and implemented by employers to promote cost containment and risk management of workplace safety hazards.



**Source:** **L. 89:** Entire article added, p. 376, § 1, effective July 1. **L. 90:** (2) amended, p. 1836, § 4, effective May 31; (2) amended, p. 556, § 6, effective July 1. **L. 93:** (3) amended, p. 1723, § 1, effective June 6; (3.5) and (7) to (9) added, p. 2083, § 2, effective July 1.

**Editor's note:** Amendments to subsection (2) by House Bill 90-1160 and House Bill 90-1316 were harmonized.

**8-14.5-104. Creation of board.** (1) There is hereby created in the division the workers' compensation cost containment board, to be composed of seven members: The commissioner of insurance, the chief executive officer of Pinnacol Assurance, and five members appointed by the governor and confirmed by the senate. Appointed members of the board shall be chosen among the following: Employers or their designated representatives engaged in businesses having workers' compensation insurance rates in the upper five percent of the rate schedule, actuaries or executives with risk management experience in the insurance industry, or employers who have demonstrated good risk management experience with respect to their workers' compensation insurance.

(2) The board shall exercise its powers and perform its functions under the department and the director of the division as if the same were transferred to the department by a **type 2** transfer, as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S.

(3) The appointed members of the board shall serve for terms of three years and may be reappointed; except that, of the members first appointed, two shall serve for terms of three years; two shall serve for terms of two years, and one shall serve for a term of one year. The chief executive officer of Pinnacol Assurance and the commissioner of insurance shall serve continuously.

(4) Members of the board shall receive no compensation but shall be reimbursed for actual and necessary traveling and subsistence expenses incurred in the performance of their official duties as members of the board.

**Source:** **L. 89:** Entire article added, p. 377, § 1, effective July 1. **L. 90:** (1) amended, p. 557, § 7, effective July 1. **L. 2002:** (1) and (3) amended, p. 1880, § 25, effective July 1.

**8-14.5-105. Powers and duties of board.** (1) The board shall have the following powers and duties:

(a) To establish model cost containment and risk management programs for selected classifications in the upper ten percent of the insurance rate schedule under the Colorado workers' compensation insurance program;

(b) To adopt standards for the approval of particular cost containment and risk management programs submitted by community, technical, or junior colleges or by employers in those selected high risk classifications;

(c) To receive, evaluate, and certify cost containment and risk management programs implemented by community, technical, or junior colleges or by employers in those selected high risk classifications for a period of at least one year;

(d) To promote cost containment and risk management training by community, technical, or junior colleges, employers, groups of employers, or trade associations;

(e) To review annually the classifications in the upper ten percent of the insurance rate schedule under the Colorado workers' compensation insurance program for inclusion in the cost containment program;

(f) To set the qualifications for technical personnel to assist community, technical, and junior colleges and employers in establishing risk management and cost containment programs;

(g) To disseminate information regarding the types of workers' compensation insurance policies available;

(h) To adopt such rules and regulations as may be necessary to carry out the purposes of this article.

**Source:** L. 89: Entire article added, p. 377, § 1, effective July 1. L. 90: (1)(a), (1)(e), and (1)(g) amended, p. 557, § 8, effective July 1. L. 91: Entire section amended, p. 1353, § 1, effective April 20.

**8-14.5-106. Duties of director.** (1) The director shall have the following powers and duties:

- (a) To provide technical advice to the board;
- (b) To provide technical advice and assistance to community, technical, or junior colleges, employers, groups of employers, or trade associations with respect to the development and implementation of cost containment and risk management programs;
- (c) To publish, as may be appropriate, documents relating to the development and implementation of cost containment and risk management programs;
- (d) To maintain records of all proceedings of the board, including the evaluation of proposals for cost containment and risk management programs submitted by employers and by community, technical, or junior colleges;
- (e) To maintain records of all employers and community, technical, or junior colleges with certified programs.

**Source:** L. 89: Entire article added, p. 378, § 1, effective July 1. L. 91: Entire section amended, p. 1354, § 2, effective April 20.

**8-14.5-107. Cost containment certification.** Any employer complying with an approved program for at least one year may present evidence of such compliance to the board and petition the board to certify its program. The names of such certified employers shall be made available on a periodic basis to bona fide insurance carriers on file with the division.

**Source:** L. 89: Entire article added, p. 378, § 1, effective July 1.

**8-14.5-107.5. Workplace safety programs - study by commissioner.** (1) The commissioner shall undertake a full study of current workplace safety, risk management, and cost containment programs offered by insurers, including Pinnacol Assurance, a review and analysis of the various incentives used by insurers to obtain policyholder participation, including any premium adjustment programs in use, and shall evaluate other possible programs and incentives that could be used by insurers to expand workplace safety programs and reward policyholder participation. The commissioner shall consult with the Colorado department of labor and employment in conducting the study. Such study, review and analysis, and evaluation shall include but not be limited to the following:

- (a) Whether or not by a date certain, all insurers including Pinnacol Assurance issuing workers' compensation insurance policies in this state shall offer all insureds in the ten most populous counties a managed care plan featuring a designated medical provider;
- (b) Whether or not by a date certain, if it is in the best interest of employers and employees, all insurers including Pinnacol Assurance issuing workers' compensation insurance policies in this state shall offer to all or some selected classes of insureds some type of basic workplace safety program;
- (c) Whether or not the board or the commissioner should continue providing certification of workplace safety programs or whether such certification should be provided by insurers for insureds;
- (d) Whether or not by July 1, 1995, the commissioner should promulgate regulations concerning the granting of premium adjustments for an insured's participation and implementation of a basic workplace safety program or managed care program;
- (e) The participation by insureds in existing workplace safety programs offered by insurers and the methods by which insurers offer such programs;



- (f) Insurer compliance with deductible provisions;
- (g) Insurer compliance with the provisions of part 4 of article 4 of title 10, C.R.S., regarding the current design and use of any premium adjustment, rate deviation, premium discount, retro-rate, scheduled adjustment, or other type of financial plan and their effect on the fairness and reasonableness of rates for those insureds not qualifying for experience or schedule rating;
- (h) The efficacy of reducing the premium dollar volume needed for an insured to become experience rated;
- (i) A cost benefit analysis of implementation of workplace safety programs.
- (2) (a) Repealed.
- (b) Insurers shall make all necessary information and records pertaining to workplace safety programs of such insurers available to the commissioner in carrying out the study required by subsection (1) of this section. The reasonable costs of such study shall be borne by insurers, including Pinnacol Assurance, as determined by the commissioner based on the total cost of such study.

**Source:** L. 93: Entire section added, p. 2084, § 3, effective July 1. L. 97: (2)(a) repealed, p. 1474, § 6, effective June 3. L. 2002: IP(1), (1)(a), (1)(b), and (2)(b) amended, p. 1881, § 26, effective July 1.

**8-14.5-108. Cost containment fund - creation.** All moneys collected for cost containment pursuant to section 8-14.5-109 or 8-44-112 (1) (b) (III) shall be transmitted to the state treasurer who shall credit the same to the cost containment fund, which fund is hereby created. All moneys credited to said fund and all interest earned thereon shall be subject to appropriation by the general assembly to pay the direct and indirect costs of the cost containment program, and said moneys shall remain in such fund for such purposes and shall not revert to the general fund or any other fund.

**Source:** L. 89: Entire article added, p. 378, § 1, effective July 1. L. 90: Entire section amended, p. 1841, § 24, effective July 1.

**8-14.5-109. Grants-in-aid - cooperative agreements.** The division may receive grants-in-aid from any agency of the United States and may cooperate and enter into agreements with any agency of the United States, any agency of any other state, and any other agency of this state or its political subdivisions, for the purpose of carrying out the provisions of this article.

**Source:** L. 89: Entire article added, p. 378, § 1, effective July 1.

**8-14.5-110. Repeal of article. (Repealed)**

**Source:** L. 89: Entire article added, p. 378, § 1, effective July 1. L. 92: Entire section repealed, p. 1810, § 1, effective March 16.

## **Apprenticeship and Training**

### **ARTICLE 15**

#### **Apprenticeship and Training**

**8-15-101 to 8-15-301. (Repealed)**

**Source:** L. 87: Entire article repealed, p. 378, § 4, effective May 20.

**Editor's note:** This article was numbered as article 1 of chapter 9, C.R.S. 1963. For amendments to this article prior to its repeal in 1987, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## ARTICLE 15.5

### Displaced Homemakers

**Editor's note:** This article was repealed in 1979 and was subsequently recreated and reenacted in 1980, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1979, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Law reviews:** For article, "Colorado's Displaced Homemakers Act", see 27 Colo. Law. 129 (June 1998).

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|--|---|
| 8-15.5-101. Short title.   | 8-15.5-105. Evaluation.                           |
| 8-15.5-102. Definitions.   | 8-15.5-106. Advisory body.                        |
| 8-15.5-103. Multipurpose service centers for displaced homemakers. | 8-15.5-107. Rules and regulations.                |
| 8-15.5-104. Selection and administration of centers.               | 8-15.5-108. Displaced homemakers fund - creation. |

**8-15.5-101. Short title.** This article shall be known and may be cited as the "Displaced Homemakers Act".

**Source: L. 80:** Entire article RC&RE, p. 452, § 1, effective July 1.

**8-15.5-102. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Department" means the department of labor and employment.
- (2) "Displaced homemaker" means an individual who:
  - (a) Has worked in the home, providing unpaid household services for family members for a substantial number of years;
  - (b) Is not gainfully employed;
  - (c) Has had, or would have, difficulty finding employment; and
  - (d) (I) Has depended on the income of a family member and has lost that income; or  
(II) Has depended on government assistance as the parent of dependent children, but who is no longer eligible for such assistance, or is supported, as the parent of minor children, by government assistance, but whose children are within two years of reaching the age of eighteen years.
- (3) "Executive director" means the executive director of the department of labor and employment.

**Source: L. 80:** Entire article RC&RE, p. 452, § 1, effective July 1.

**8-15.5-103. Multipurpose service centers for displaced homemakers.** (1) The executive director may establish multipurpose service centers for displaced homemakers and is authorized to enter into contracts with and make grants to agencies or organizations, public or private, to establish, organize, and administer the various programs enumerated in section 8-15.5-104.

- (2) Each service center shall include the following services:
  - (a) Job counseling services which shall:
    - (I) Be specifically designed for displaced homemakers; and
    - (II) Operate to counsel displaced homemakers with respect to appropriate job opportunities;
  - (b) Job training and job placement services which shall:



(I) Develop, by working with state and local government agencies and private employers, training and placement programs for jobs in the public and private sectors;

(II) Assist displaced homemakers in gaining admission to existing public and private job-training programs and opportunities; and

(III) Assist in identifying community needs and creating new jobs in the public and private sectors;

(c) Health education and counseling services in cooperation with existing health programs with respect to:

(I) General principles of preventive health care;

(II) Health care consumer education, particularly in the selection of physicians and health care services, including, but not limited to, health maintenance organizations and health insurance;

(III) Family health care and nutrition;

(IV) Alcohol and drug addiction; and

(V) Other related health care matters;

(d) Financial management services which provide information and assistance with respect to insurance, taxes, estate and probate problems, mortgages, loans, and other related financial matters;

(e) Educational services, including:

(I) Outreach and information about courses offering credit through secondary or postsecondary education programs, including bilingual programming where appropriate; and

(II) Information about such other programs which are determined by the executive director to be of interest and benefit to displaced homemakers;

(f) Legal counseling and referral services; and

(g) Outreach and information services with respect to employment, education, health, public assistance, and unemployment assistance programs which the executive director determines would be of interest and benefit to displaced homemakers.

(3) Supervisory, technical, and administrative positions relating to centers established under this article shall, to the maximum extent feasible, be filled by displaced homemakers.

**Source: L. 80:** Entire article RC&RE, p. 453, § 1, effective July 1. **L. 83:** (1) amended, p. 395, § 2, effective June 3.

#### ANNOTATION

**Law reviews.** For article, "Employment Issues Facing the Displaced Homemaker", see 16 Colo. Law. 468 (1987).

**8-15.5-104. Selection and administration of centers.** (1) In selecting sites for the centers established under section 8-15.5-103, the executive director shall consider:

(a) The location of any existing facilities for displaced homemakers and any existing services similar to those listed in section 8-15.5-103 which might be incorporated into a center;

(b) The needs of each region of the state for a center;

(c) The needs of both urban and rural communities.

(2) The executive director shall select a public or private organization to administer each center. The selection of such an organization shall be made after consultation with local government agencies and shall take into consideration the experience and capability of such organizations in administering the services to be provided by each center.

(3) The executive director shall consult and cooperate with the secretary or director of such agencies in the executive branch of the federal and state governments as the executive director considers appropriate to facilitate the establishment of centers under this article with existing state or federal programs of a similar nature.

**Source:** L. 80: Entire article RC&RE, p. 454, § 1, effective July 1. L. 83: (2) amended, p. 396, § 3, effective June 3.

**8-15.5-105. Evaluation.** (1) The executive director, in cooperation with the administrator of each center, and in consultation with appropriate heads of executive agencies, shall prepare and furnish to the general assembly evaluations of the centers established under this article, including:

- (a) A thorough assessment of each center;
- (b) Recommendations covering the administration and expansion of such centers; and
- (c) Data on the numbers of persons referred to and enrolled in the programs enumerated in section 8-15.5-103, and data on job placements and employment of persons enrolled in such programs.

(2) No later than January 1, 1981, the executive director shall submit to the general assembly an evaluation pursuant to this section. Subsequent evaluations shall be made every two years.

(3) The executive director, in consultation with the appropriate heads of executive agencies, shall prepare and furnish to the general assembly a study to determine the feasibility of and appropriate procedure for placing displaced homemakers in:

- (a) Programs established under the federal "Workforce Investment Act of 1998", 29 U.S.C. sec. 2801 et seq.;

- (b) Work incentive programs established under section 432 (b) (1) of the federal "Social Security Act";

- (c) Related federal and state employment, education, and health assistance programs; and

- (d) Programs established or benefits provided under federal and state unemployment compensation laws by consideration of full-time homemakers as provided eligible for such benefits or programs.

**Source:** L. 80: Entire article RC&RE, p. 454, § 1, effective July 1. L. 2009: (3)(a) amended, (SB 09-292), ch. 369, p. 1939, § 5, effective August 5.

**Editor's note:** (1) The "Comprehensive Employment and Training Act of 1973", referenced in subsection (3)(a), was repealed in 1982. For similar provisions, see the "Workforce Investment Act of 1998", 29 U.S.C. § 2801 et seq.

(2) Section 432 of the "Social Security Act", referenced in subsection (3)(b), was repealed in 1988. For a similar provision, see 42 U.S.C. § 632a.

**8-15.5-106. Advisory body.** The executive director shall establish an advisory body to the department which shall consist of members who are representative of displaced homemakers, local service deliverers, appropriate state agencies, and the general public. The advisory body shall provide recommendations to the executive director regarding the planning, operation, and evaluation of the activities mandated by this article.

**Source:** L. 80: Entire article RC&RE, p. 455, § 1, effective July 1.

**8-15.5-107. Rules and regulations.** The executive director shall promulgate rules and regulations to govern the eligibility of persons for the job training and other programs of the multipurpose service center, the level of stipends for the job training programs described in section 8-15.5-103 (2) (b), a sliding fee scale for the service programs described in section 8-15.5-103 (2) (c) to (2) (g), and such other matters as the executive director deems necessary.

**Source:** L. 80: Entire article RC&RE, p. 455, § 1, effective July 1.

**8-15.5-108. Displaced homemakers fund - creation.** (1) There is hereby created in the state treasury the displaced homemakers fund. All fees collected pursuant to section



14-10-120.5, C.R.S., shall be deposited in said fund. All moneys in the fund shall be subject to annual appropriation by the general assembly and, commencing July 1, 1980, shall be available for carrying out the purposes of this article; except that, if the amount in said fund from fees collected pursuant to section 14-10-120.5, C.R.S., exceeds one hundred forty-five thousand dollars in any fiscal year, the excess of one hundred forty-five thousand dollars shall revert to the general fund.

(2) The executive director may apply for and accept any funds, grants, gifts, or services made available by any agency or department of the federal government or any private agency or individual, which funds, grants, gifts, or services shall be used to carry out the total program of this article. Funds and grants received pursuant to this subsection (2) shall be placed in the displaced homemakers fund in a separate account and shall not be included in computing the amount that will revert to the general fund pursuant to subsection (1) of this section.

**Source:** **L. 80:** Entire article RC&RE, p. 455, § 1, effective July 1. **L. 82:** (1) amended, p. 233, § 1, effective April 23. **L. 93:** (1) amended, p. 1515, § 18, effective June 6.

## Public Works

### ARTICLE 16

#### Rate of Wages on Public Works

#### 8-16-101. (Repealed)

**Source:** **L. 85:** Entire article repealed, p. 340, § 1, effective June 13.

**Editor's note:** This article was numbered as article 17 of chapter 80, C.R.S. 1963. For amendments to this article prior to its repeal in 1985, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

### ARTICLE 17

#### Colorado Labor on Public Works

- |           |   |                                  |
|-----------|---|----------------------------------|
| 8-17-101. | Colorado labor shall be employed on public works. | ence of Colorado labor.          |
| 8-17-102. | Contracts to provide for prefer-                  | 8-17-103. Penalty for violation. |

**8-17-101. Colorado labor shall be employed on public works.** Whenever any public works financed in whole or in part by funds of the state, counties, school districts, or municipalities of the state of Colorado are undertaken in this state, Colorado labor shall be employed to perform the work to the extent of not less than eighty percent of each type or class of labor in the several classifications of skilled and common labor employed on such project or public works. "Colorado labor" as used in this article means any person who is a resident of the state of Colorado, at the time of employment, without discrimination as to race, color, creed, sex, sexual orientation, marital status, national origin, ancestry, age, or religion except when sex or age is a bona fide occupational qualification.

**Source:** **L. 33:** p. 660, § 1. **CSA: C. 138,** § 263. **L. 39:** p. 473, § 1. **CRS 53:** § 80-21-1. **C.R.S. 1963:** § 80-18-1. **L. 77:** Entire section amended, p. 446, § 1, effective May 26. **L. 2008:** Entire section amended, p. 1599, § 12, effective May 29.

**Cross references:** For the legislative declaration contained in the 2008 act amending this section, see section 1 of chapter 341, Session Laws of Colorado 2008.

**8-17-102. Contracts to provide for preference of Colorado labor.** All contracts let for public works financed in whole or in part by funds of the state, counties, school districts, or municipalities of the state of Colorado shall contain provisions for the preference in employment of Colorado labor.

**Source:** L. 33: p. 660, § 2. CSA: C. 138, § 264. CRS 53: § 80-21-2. C.R.S. 1963: § 80-18-2.

#### ANNOTATION

**Law reviews.** For article, "Fair Housing in Colorado", see 42 Den. L. Ctr. J. 1 (1965).

**8-17-103. Penalty for violation.** Any officer or agent of the state, counties, school districts, or municipalities of the state of Colorado or any contractor who violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

**Source:** L. 33: p. 660, § 2. CSA: C. 138, § 264. CRS 53: § 80-21-2. C.R.S. 1963: § 80-18-2.

#### ANNOTATION

**Law reviews.** For article, "Fair Housing in Colorado", see 42 Den. L. Ctr. J. 1 (1965).

### ARTICLE 17.5

#### Illegal Aliens - Public Contracts for Services

**Law reviews:** For article, "2006 Immigration Legislation in Colorado", see 35 Colo. Law. 79 (October 2006); for article, "Colorado Among Leading States to Enact Immigration Enforcement Laws on Employers", see 38 Colo. Law. 55 (April 2009).

8-17.5-101. Definitions.

8-17.5-102. Illegal aliens - prohibition - public contracts for services - rules.

**8-17.5-101. Definitions.** As used in this article, unless the context otherwise requires:

- (1) (Deleted by amendment, L. 2008, p. 736, § 1, effective May 13, 2008.)
- (2) "Contractor" means a person having a public contract for services with a state agency or political subdivision of the state.
- (3) "Department" means the department of labor and employment.
- (3.3) "Department program" means the employment verification program established pursuant to section 8-17.5-102 (5) (c).
- (3.7) "E-verify program" means the electronic employment verification program created in Public Law 104-208, as amended, and expanded in Public Law 108-156, as amended, and jointly administered by the United States department of homeland security and the social security administration, or its successor program.
- (4) "Executive director" means the executive director of the department of labor and employment.
- (4.5) "Newly hired for employment" means hired to work in the United States since the effective date of the public contract for services.
- (5) "Political subdivision" means any city, county, city and county, town, special district, school district, local improvement district, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law.



(6) (a) "Public contract for services" means any type of agreement, regardless of what the agreement may be called, between a state agency or political subdivision and a contractor for the procurement of services.

(b) "Public contract for services" does not include:

(I) Agreements relating to the offer, issuance, or sale of securities, including but not limited to agreements pertaining to:

(A) Underwriting, marketing, remarketing, paying, transferring, rating, or registering securities; or

(B) The provision of credit enhancement, liquidity support, interest rate exchanges, or trustee or financial consulting services in connection with securities;

(II) Agreements for investment advisory services or fund management services;

(III) Any grant, award, or contract funded by any federal or private entity for any research or sponsored project activity of an institution of higher education or an affiliate of an institution of higher education that is funded from moneys that are restricted by the entity under the grant, award, or contract. For purposes of this subparagraph (III), "sponsored project" means an agreement between an institution of higher education and another party that provides restricted funding and requires oversight responsibilities for research and development or other specified programmatic activities that are sponsored by federal or private agencies and organizations.

(IV) Intergovernmental agreements; or

(V) Agreements for information technology services or products and services.

(7) "Services" means the furnishing of labor, time, or effort by a contractor or a subcontractor not involving the delivery of a specific end product other than reports that are merely incidental to the required performance.

(8) "State agency" means any department, commission, council, board, bureau, committee, institution of higher education, agency, or other governmental unit of the executive, legislative, or judicial branch of state government.

**Source:** L. 2006: Entire article added, p. 1694, § 1, effective August 7. L. 2008: (1), (5) and (6) amended and (3.3), (3.7), and (4.5) added, p. 736, § 1, effective May 13.

**8-17.5-102. Illegal aliens - prohibition - public contracts for services - rules.** (1) A state agency or political subdivision shall not enter into or renew a public contract for services with a contractor who knowingly employs or contracts with an illegal alien to perform work under the contract or who knowingly contracts with a subcontractor who knowingly employs or contracts with an illegal alien to perform work under the contract. Prior to executing a public contract for services, each prospective contractor shall certify that, at the time of the certification, it does not knowingly employ or contract with an illegal alien who will perform work under the public contract for services and that the contractor will participate in the e-verify program or department program in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work under the public contract for services.

(2) (a) Each public contract for services shall include a provision that the contractor shall not:

(I) Knowingly employ or contract with an illegal alien to perform work under the public contract for services; or

(II) Enter into a contract with a subcontractor that fails to certify to the contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under the public contract for services.

(b) Each public contract for services shall also include the following provisions:

(I) A provision stating that the contractor has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under the public contract for services through participation in either the e-verify program or the department program;

(II) A provision that prohibits the contractor from using either the e-verify program or the department program procedures to undertake preemployment screening of job applicants while the public contract for services is being performed;

(III) A provision that, if the contractor obtains actual knowledge that a subcontractor performing work under the public contract for services knowingly employs or contracts with an illegal alien, the contractor shall be required to:

(A) Notify the subcontractor and the contracting state agency or political subdivision within three days that the contractor has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and

(B) Terminate the subcontract with the subcontractor if within three days of receiving the notice required pursuant to sub-subparagraph (A) of this subparagraph (III) the subcontractor does not stop employing or contracting with the illegal alien; except that the contractor shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien;

(IV) A provision that requires the contractor to comply with any reasonable request by the department made in the course of an investigation that the department is undertaking pursuant to the authority established in subsection (5) of this section.

(3) If a contractor violates a provision of the public contract for services required pursuant to subsection (2) of this section, the state agency or political subdivision may terminate the contract for a breach of the contract. If the contract is so terminated, the contractor shall be liable for actual and consequential damages to the state agency or political subdivision.

(4) A state agency or political subdivision shall notify the office of the secretary of state if a contractor violates a provision of a public contract for services required pursuant to subsection (2) of this section and the state agency or political subdivision terminates the contract for such breach. Based on this notification, the secretary of state shall maintain a list that includes the name of the contractor, the state agency or political subdivision that terminated the public contract for services, and the date of the termination. A contractor shall be removed from the list if two years have passed since the date the contract was terminated, or if a court of competent jurisdiction determines that there has not been a violation of the provision of the public contract for services required pursuant to subsection (2) of this section. A state agency or political subdivision shall notify the office of the secretary of state if a court has made such a determination. The list shall be available for public inspection at the office of the secretary of state and shall be published on the internet on the web site maintained by the office of the secretary of state.

(5) (a) The department may investigate whether a contractor is complying with the provisions of a public contract for services required pursuant to subsection (2) of this section. The department may conduct on-site inspections where a public contract for services is being performed within the state of Colorado, request and review documentation that proves the citizenship of any person performing work on a public contract for services, or take any other reasonable steps that are necessary to determine whether a contractor is complying with the provisions of a public contract for services required pursuant to subsection (2) of this section. The department shall receive complaints of suspected violations of a provision of a public contract for services required pursuant to subsection (2) of this section and shall have discretion to determine which complaints, if any, are to be investigated. The results of any investigation shall not constitute final agency action. The department is authorized to promulgate rules in accordance with article 4 of title 24, C.R.S., to implement the provisions of this subsection (5).

(b) The executive director shall notify a state agency or political subdivision if he or she suspects that there has been a breach of a provision in a public contract for services required pursuant to subsection (2) of this section.

(c) (I) There is hereby created the department program. Any contractor who participates in the department program shall notify the department and the contracting state agency or political subdivision of such participation. A participating contractor shall comply with the provisions of subparagraph (II) of this paragraph (c) and shall consent to department audits conducted in accordance with subparagraph (III) of this paragraph (c). Failure to meet either of these obligations shall constitute a violation of the department program. The executive director shall notify a contracting state agency or political subdivision of such violation.



(II) A participating contractor shall, within twenty days after hiring an employee who is newly hired for employment to perform work under the public contract for services, affirm that the contractor has examined the legal work status of such employee, retained file copies of the documents required by 8 U.S.C. sec. 1324a, and not altered or falsified the identification documents for such employees. The contractor shall provide a written, notarized copy of the affirmation to the contracting state agency or political subdivision.

(III) The department may conduct random audits of state agencies or political subdivisions to review the affidavits and of contractors to review copies of the documents required by subparagraph (II) of this paragraph (c). Audits shall not violate federal law.

(6) Nothing in this section shall be construed as requiring a contractor to violate any terms of participation in the e-verify program.

**Source:** L. 2006: Entire article added, p. 1695, § 1, effective August 7. L. 2007: (1) and (2)(b)(I) amended, p. 119, § 1, effective August 3. L. 2008: (1), (2)(b)(I), (2)(b)(II), and (5)(a) amended and (5)(c) and (6) added, pp. 737, 738, 739, §§ 2, 3, 4, effective May 13.

## ARTICLE 18

### Preference for State Commodities and Services

**Editor's note:** This article was repealed in 1985 and was subsequently recreated and reenacted in 1987, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1985, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

8-18-101. Bid preference - state contracts.  
8-18-102. Repeal of article. (Repealed)

8-18-103. Preference for state agricultural products.

**8-18-101. Bid preference - state contracts.** (1) (a) Except as provided in paragraph (b) of this subsection (1) and in section 8-18-103, when a contract for commodities or services is to be awarded to a bidder, a resident bidder as defined in section 8-19-102 (2) shall be allowed a preference against a nonresident bidder equal to the preference given or required by the state in which the nonresident bidder is a resident.

(b) Notwithstanding paragraph (a) of this subsection (1), when an invitation for bids for a contract for the purchase of commodities results in a low tie bid, as defined in section 24-103-101, C.R.S., the provisions of section 24-103-202.5, C.R.S., apply.

(c) For the purposes of this subsection (1), "commodities" includes supplies as defined in section 24-101-301 (22), C.R.S.

(2) If it is determined by the officer responsible for awarding the bid that compliance with this section may cause denial of federal moneys which would otherwise be available or would otherwise be inconsistent with requirements of federal law, this section shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with federal requirements.

(3) This section applies to contracts governed by the procurement code in articles 101 to 112 of title 24, C.R.S.

**Source:** L. 87: Entire article RC&RE, p. 379, § 1, effective May 13. L. 95: (1) amended and (3) added, p. 26, § 1, effective July 1. L. 2004: (1)(a) amended, p. 270, § 1, effective August 4.

**Cross references:** For general provisions concerning state purchasing, see the "Procurement Code", articles 101 to 112 of title 24.

### 8-18-102. Repeal of article. (Repealed)

**Source:** L. 87: Entire article RC&RE, p. 379, § 1, effective May 13. L. 89: Entire section repealed, p. 381, § 1, effective July 1.

**8-18-103. Preference for state agricultural products.** (1) When purchasing agricultural products, a governmental body, as defined in section 24-101-301 (10), C.R.S., shall award the contract to a resident bidder, as defined in section 8-19-102 (2), who produces products in the state, subject to the conditions in subsection (2) of this section.

(2) The preference in subsection (1) of this section shall apply only if the following conditions are met:

(a) The quality of available products produced in the state is equal to the quality of products produced outside the state;

(b) Available products produced in the state are suitable for the use required by the purchasing entity;

(c) The resident bidder is able to supply products produced in the state in sufficient quantity, as indicated in the invitation for bids; and

(d) (I) The resident bidder's bid or quoted price for products produced in the state does not exceed the lowest bid or price quoted for products produced outside the state or the resident bidder's bid or quoted price reasonably exceeds the lowest bid or price quoted for products produced outside the state.

(II) For purposes of this paragraph (d), "reasonably exceeds" shall occur when the head of the governmental body, or other public officer charged by law with the duty to purchase such products, at his or her sole discretion, determines such higher bid to be reasonable and capable of being paid out of that governmental body's existing budget, without any further supplemental or additional appropriation.

(3) (a) For purposes of this section, an agricultural product is produced in the state if it is grown, raised, or processed in the state.

(b) A resident bidder that seeks to qualify for the preference created by subsection (1) of this section shall certify to the governmental body inviting the bid and provide documentation confirming that the resident bidder's agricultural product was produced in the state. The governmental body may rely in good faith on such certification and documentation.

(4) A governmental body shall report to the joint budget committee of the general assembly, or any successor committee, any cost increases associated with the provisions of this section during the previous fiscal year.

(5) This section shall apply to contracts governed by the "Procurement Code" in articles 101 to 112 of title 24, C.R.S.

**Source:** L. 2004: Entire section added, p. 270, § 2, effective August 4. L. 2005: (1) and (2)(d) amended and (4) and (5) added, p. 1485, § 1, effective August 8.

## ARTICLE 19

### Bid Preference - Public Projects

8-19-101. Bid preference - public projects.

8-19-102. Definitions.

8-19-102.5 Resident bidder - reciprocity.

8-19-103. Repeal of article. (Repealed)

**8-19-101. Bid preference - public projects.** (1) When a construction contract for a public project is to be awarded to a bidder, a resident bidder shall be allowed a preference against a nonresident bidder from a state or foreign country equal to the preference given or required by the state or foreign country in which the nonresident bidder is a resident.

(2) If it is determined by the officer responsible for awarding the bid that compliance with this section may cause denial of federal moneys which would otherwise be available or would otherwise be inconsistent with requirements of federal law, this section shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with federal requirements.

**Source:** L. 85: Entire article added, p. 342, § 1, effective July 1.



**8-19-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Public project" means:

(a) Any public project as defined in section 24-92-102 (8), C.R.S., including any such project awarded by any county, including any home rule county, municipality, as defined in section 31-1-101 (6), C.R.S., school district, special district, or other political subdivision of the state;

(b) Any publicly funded contract for construction entered into by a governmental body of the executive branch of this state which is subject to the "Procurement Code", articles 101 to 112 of title 24, C.R.S.; and

(c) Any highway or bridge construction, whether undertaken by the department of transportation or by any political subdivision of this state, in which the expenditure of funds may be reasonably expected to exceed fifty thousand dollars.

(2) "Resident bidder" means:

(a) A person, partnership, corporation, or joint venture which is authorized to transact business in Colorado and which maintains its principal place of business in Colorado; or

(b) A person, partnership, corporation, or joint venture which:

(I) Is authorized to transact business in Colorado;

(II) Maintains a place of business in Colorado;

(III) Has paid Colorado unemployment compensation taxes in at least seventy-five percent of the eight quarters immediately prior to bidding on a construction contract for a public project.

**Source: L. 85:** Entire article added, p. 342, § 1, effective July 1. **L. 91:** (1)(c) amended, p. 1056, § 8, effective July 1. **L. 99:** (2)(b) amended, p. 72, § 1, effective March 17.

**8-19-102.5. Resident bidder - reciprocity.** In addition to any other criteria for awarding a preference under this article, the residence, registration, unemployment compensation, and other preference conditions applied to a Colorado resident bidder doing business in another state or foreign country shall be applied to a resident bidder from that state or foreign country doing business in Colorado in determining whether a preference shall be allowed.

**Source: L. 99:** Entire section added, p. 72, § 2, effective March 17. **L. 2001:** Entire section amended, p. 959, § 1, effective August 8.

### **8-19-103. Repeal of article. (Repealed)**

**Source: L. 85:** Entire article added, p. 342, § 1, effective July 1. **L. 88:** Entire section repealed, p. 367, § 1, effective February 26.

## **ARTICLE 19.5**

### **Bid Preference - Recycled Plastic Products**

8-19.5-101. Bid preference - recycled plastic products.

**8-19.5-101. Bid preference - recycled plastic products.** (1) When a contract is to be awarded in a public project, a bidder who has used recycled plastics in the manufacture of the commodity or supplies described in the bid shall be allowed a preference of up to five percent for finished products which contain no less than ten percent recycled plastics.

(2) If it is determined by the officer responsible for awarding a bid that compliance with this section may cause denial of federal moneys which would otherwise be available or would otherwise be inconsistent with requirements of federal law, this section shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with federal requirements.

(3) For purposes of this section, "public project" means any publicly funded contract entered into by a governmental body of the executive branch of this state which is subject to the "Procurement Code", articles 101 to 112 of title 24, C.R.S.

**Source: L. 89:** Entire article added, p. 1181, § 2, effective July 1.

**Cross references:** For provisions concerning the labeling and coding of plastic bottles and rigid plastic containers, see article 17 of title 25.

## ARTICLE 19.7

### Bid Preference - Recycled Paper Products

#### 8-19.7-101 to 8-19.7-103. (Repealed)

**Editor's note:** (1) Section 8-19.7-103 (2) provided for the repeal of this article, effective July 1, 1995. (See L. 90, p. 464.)

(2) This article was added in 1990. For amendments to this article prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## Fuel Products

**Cross references:** For provisions regarding oil wells and boreholes, see article 61 of title 34; for the "Oil and Gas Conservation Act", see article 60 of title 34; for regulations regarding royalties under the federal leasing act, see article 63 of title 34; for provisions regarding underground storage of natural gas, see article 64 of title 34.

## ARTICLE 20

### Fuel Products

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8-20-101.	Division of oil and public safety - creation - appointment of director - transfer of duties.	8-20-205.	Specifications of kerosene. (Repealed)
		8-20-206.	Shipper notify director.
8-20-102.	Duties of director of division of oil and public safety.	8-20-206.5.	Environmental response surcharge - liquefied petroleum gas inspection fund - definitions.
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CONTAINERS OF GAS OR GASEOUS  
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## PART 1

## DIVISION OF OIL AND PUBLIC SAFETY

**8-20-101. Division of oil and public safety - creation - appointment of director - transfer of duties.** (1) There is hereby created within the department of labor and employment the division of oil and public safety, the head of which shall be the director of the division of oil and public safety. The director of the division of oil and public safety shall be appointed by the executive director of the department of labor and employment and shall not have an interest in the manufacture, sale, or distribution of oils.

(2) The director of the division of oil and public safety, on and after July 1, 2001, shall execute, administer, perform, and enforce the rights, powers, duties, functions, and obligations vested prior to July 1, 2001, in the state inspector of oils, the state boiler inspector, and, with respect to articles 6 and 7 of title 9, C.R.S., the director of the division of labor. On July 1, 2001, all employees of the state inspector of oils, the state boiler inspector, and, with respect to duties performed pursuant to articles 6 and 7 of title 9, C.R.S., the director of the division of labor, whose principal duties are concerned with the duties and functions to be performed by the director of the division of oil and public safety and whose employment by the director of the division of oil and public safety is deemed necessary by the director of the division of oil and public safety to carry out the purposes of articles 20 and 20.5 of this title and articles 4, 6, and 7 of title 9, C.R.S., shall be transferred to the director of the division of oil and public safety and shall become employees thereof. Such employees shall retain all rights to the state personnel system and retirement benefits under the laws of this state, and their services shall be deemed to have been continuous. All transfers and any abolishment of positions in the state personnel system shall be made and processed in accordance with state personnel system laws and rules.

(3) and (4) Repealed.

(5) The director of the division of oil and public safety shall enforce and administer article 5.5 of title 9, C.R.S.

**Source:** L. 15: pp. 376, 377, §§ 40, 42, 44. L. 19: p. 562, §2. C.L. §§ 3653, 3655, 3657. CSA: C. 118, §§ 54, 56, 58. CRS 53: §§ 100-1-1, 100-1-2. C.R.S. 1963: §§ 100-1-1, 100-1-2. L. 69: p. 661, §§ 248, 249. L. 2001: Entire section R&RE, p. 1114, § 3, effective June 5. L. 2007: (5) added, p. 1423, § 3, effective January 1, 2008. L. 2008: (3) repealed, p. 1020, § 2, effective May 21. L. 2009: (4) repealed, (HB 09-1151), ch. 230, p. 1060, § 14, effective January 1, 2010.

**8-20-102. Duties of director of division of oil and public safety.** (1) The director of the division of oil and public safety shall make, promulgate, and enforce rules setting forth minimum and general standards covering the design, construction, location, installation, and operation of equipment for storing, handling, and utilizing liquid fuel products. Said rules shall be such as are reasonably necessary for the protection of the health, welfare, and safety of the public and persons using such materials, and shall be in substantial conformity with the generally accepted standards of safety concerning the same subject matter. Such rules shall be adopted by the director of the division of oil and public safety in compliance with section 24-4-103, C.R.S.

(2) The director of the division of oil and public safety shall enforce the provisions of section 8-20-213 concerning recycled and used motor oil.

**Source:** L. 15: p. 377, § 43. C.L. § 3656. CSA: C. 118, § 57. CRS 53: § 100-1-3. C.R.S. 1963: § 100-1-3. L. 69: p. 661, § 250. L. 73: p. 1066, § 1. L. 95: Entire section



amended, p. 351, § 2, effective April 27. **L. 2001:** Entire section amended, p. 1115, § 4, effective June 5. **L. 2003:** (1) amended, p. 1820, § 2, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (1), see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-103. Inspector's report - publications.**

- (1) Repealed.
- (2) Publications of the office circulated in quantity outside the executive branch shall be issued in accordance with the provisions of section 24-1-136, C.R.S.

**Source:** **L. 15:** p. 376, § 39; **C.L.** § 3652; **CSA:** C. 118, § 53; **CRS 53:** § 100-1-4; **C.R.S. 1963:** § 100-1-4. **L. 64:** p. 158, § 108. **L. 83:** Entire section amended, p. 825, § 3, effective July 1. **L. 97:** (1) repealed, p. 1474, § 7, effective June 3.

**8-20-104. Enforcement of law - penalties - definitions.** (1) The director shall enforce this article, articles 4, 5.5, and 7 of title 9, C.R.S., and rules promulgated pursuant to this article and articles 4, 5.5, and 7 of title 9, C.R.S., by appropriate actions in courts of competent jurisdiction.

(2) (a) The director may issue a notice of violation to a person who is believed to have violated this article, article 4, 5.5, or 7 of title 9, C.R.S., or rules promulgated pursuant to this article or article 4, 5.5, or 7 of title 9, C.R.S. The notice shall be delivered to the alleged violator personally, by certified mail, return receipt requested, or by any means that verifies receipt as reliably as certified mail, return receipt requested.

(b) The notice of violation shall allege the facts that constitute a violation and the rule or statute violated.

(c) The notice of violation may require the alleged violator to act to correct the alleged violation.

(d) Within ten working days after delivery of the notice of violation, the alleged violator may request in writing an informal conference with the director concerning the notice of violation. If the alleged violator fails to request such conference within ten days, the notice is then final, the notice is not subject to further review, and any statement of facts required to correct the alleged violation pursuant to paragraph (c) of this subsection (2) become a binding enforcement order.

(e) Upon receipt of a request for an informal conference, the director shall set a reasonable time and place for such conference and shall notify the alleged violator of such time and place. At the conference, the alleged violator may present evidence and arguments concerning the allegations in the notice of violation.

(f) Within twenty working days after the informal conference, the director shall uphold, modify, or strike the allegations within the notice of violation and may issue an enforcement order. The decision and, if applicable, enforcement order shall be delivered to the alleged violator personally, by certified mail, return receipt requested, or by any means that verifies receipt as reliably as certified mail, return receipt requested.

(3) (a) A person who is the subject of and is adversely affected by a notice of violation or an enforcement order issued pursuant to subsection (2) of this section may appeal such action to the executive director of the department of labor and employment. The executive director shall hold a hearing to review such notice or order and take final action in accordance with article 4 of title 24, C.R.S., and may either conduct the hearing personally or appoint an administrative law judge from the department of personnel.

(b) Final agency action shall be subject to judicial review pursuant to article 4 of title 24, C.R.S.

(c) An alleged violator who is required to correct an action pursuant to paragraph (c) of subsection (2) of this section shall be afforded the procedures set forth in section 24-4-104 (3), C.R.S., to the extent applicable.

(4) (a) An enforcement order issued pursuant to this section may impose a civil penalty, depending on the severity of the alleged violation, not to exceed five hundred

dollars per violation for each day of violation; except that the director may impose a civil penalty not to exceed one thousand dollars per violation for each day of violation that results in, or may reasonably be expected to result in, serious bodily injury.

(b) A civil penalty collected for a violation of:

(I) Article 4 of title 9, C.R.S., or a rule promulgated pursuant to such article, shall be deposited in the boiler inspection fund created in section 9-4-109, C.R.S.;

(II) Article 5.5 of title 9, C.R.S., or a rule promulgated pursuant to such article, shall be deposited in the conveyance safety fund created in section 9-5.5-111, C.R.S.;

(III) Article 7 of title 9, C.R.S., or a rule promulgated pursuant to such article, shall be deposited in the public safety inspection fund created in section 8-1-151.

(5) The director may file suit in the district court in the judicial district in which a violation is alleged to have occurred to judicially enforce an enforcement order issued pursuant to this section.

(6) For the purposes of this section:

(a) "Director" means the director of the division of oil and public safety.

(b) "Division" means the division of oil and public safety.

(7) In addition to the remedies provided in this section, the director is authorized to apply to the district court, in the judicial district where the violation has occurred, for a temporary or permanent injunction restraining any person from violating any provision of articles 4, 5.5, and 7 of title 9, C.R.S., and rules promulgated pursuant to articles 4, 5.5, and 7 of title 9, C.R.S., regardless of whether there is an adequate remedy at law.

**Source:** L. 15: p. 377, § 41. C.L. § 3654. CSA: C. 118, § 55. CRS 53: § 100-1-5. C.R.S. 1963: § 100-1-5. L. 2003: Entire section amended, p. 1820, § 3, effective May 21. L. 2006: (1) and (2)(a) amended, p. 1355, § 1, effective July 1. L. 2007: (2)(a) amended, p. 1422, § 2, effective January 1, 2008. L. 2008: (1), (2)(a), and (4) amended and (7) added, p. 984, § 2, effective May 21. L. 2009: (1), (2)(a), (4)(b)(III), and (7) amended, (HB 09-1151), ch. 230, p. 1060, § 15, effective January 1, 2010. L. 2010: (1) amended, (HB 10-1422), ch. 419, p. 2064, § 10, effective August 11.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

### **8-20-105. Expenses of administration. (Repealed)**

**Source:** L. 83: Entire section added, p. 407, § 1, effective May 3. L. 2003: Entire section repealed, p. 1822, § 4, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act repealing this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-106. Confidentiality.** (1) Information concerning liquefied petroleum gas storage tanks obtained under this article shall be available to the public; except that any specific information that is confidential by state or federal law shall remain confidential.

(2) Confidential records may be disclosed to officers, employees, or authorized representatives of this state or of the United States who have been charged with administering this article or subchapter I of the federal "Resource Conservation and Recovery Act of 1976", as amended. Such disclosure shall not constitute a waiver of confidentiality.

**Source:** L. 2003: Entire section added, p. 1822, § 5, effective May 21.

**Cross references:** (1) For the legislative declaration contained in the 2003 act enacting this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

(2) For the "Resource Conservation and Recovery Act of 1976", as amended, see Pub.L. 94-580, codified at 42 U.S.C. sec. 6901 et seq.



## PART 2

## FUEL PRODUCTS

**8-20-201. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Alternative fuel" means a motor fuel that combines petroleum-based fuel products with renewable fuels.

(1.1) "Antiknock index" or "AKI" means the arithmetic average of the research octane number (RON) and motor octane number (MON):  $AKI = (RON + MON) / 2$ . This value is called by a variety of names in addition to antiknock index including: Octane rating, posted octane, and (R+M)/2 octane.

(1.2) "ASTM" means ASTM international, formerly known as the American society for testing and materials.

(1.3) "British thermal unit" or "BTU" means a scientific unit of measurement equal to the quantity of heat required to raise the temperature of one pound of water one degree Fahrenheit at approximately sixty degrees Fahrenheit.

(1.5) "Department" means the department of labor and employment, division of oil and public safety.

(1.7) "DOT" means the United States department of transportation.

(2) "Fuel products" means all gasoline, aviation gasoline, aviation turbine fuel, diesel, jet fuel, fuel oil, biodiesel, biodiesel blends, kerosene, all alcohol blended fuels, liquified petroleum gas, gas or gaseous compounds, and all other volatile, flammable, or combustible liquids, produced, compounded, and offered for sale or used for the purpose of generating heat, light, or power in internal combustion engines or fuel cells, for cleaning, or for any other similar usage.

(2.3) (a) "Gallon equivalent" means either a gallon diesel equivalent or a gallon gasoline equivalent.

(b) (Deleted by amendment, L. 97, p. 137, § 1, effective March 28, 1997.)

(2.5) (a) "Gallon diesel equivalent" means an amount of a motor fuel that contains an average lower heating value of one hundred twenty-eight thousand BTUs (British thermal units), but in no case contains a lower heating value of less than one hundred twenty-four thousand BTUs.

(b) (Deleted by amendment, L. 97, p. 137, § 1, effective March 28, 1997.)

(2.7) (a) "Gallon gasoline equivalent" means an amount of a motor fuel that contains an average lower heating value of one hundred fourteen thousand BTUs (British thermal units), but in no case contains a lower heating value of less than one hundred ten thousand BTUs.

(b) (Deleted by amendment, L. 97, p. 137, § 1, effective March 28, 1997.)

(3) "Gross gallons" as applied to fuel and petroleum products means units of two hundred thirty-one cubic inches measured at storage or metered temperature.

(3.5) "Hg" means the element mercury.

(4) "Lubricants" means petroleum products used for the purpose of reducing friction between moving surfaces.

(4.5) (a) "Motor fuel" means any liquid or gas used as fuel to generate power in engines or motors.

(b) (Deleted by amendment, L. 97, p. 137, § 1, effective March 28, 1997.)

(5) "Net gallons" as applied to fuel and petroleum products means units of two hundred thirty-one cubic inches measured at standard temperature.

(5.3) "NFPA" means the national fire protection association.

(5.5) "NIST" means the national institute of standards and technology.

(6) "Person" means an individual, trust or estate, partnership, association, joint stock company or corporation, and any receiver appointed by law.

(7) "Proved" as applied to measuring devices means the act of having verified the accuracy of meters used to measure fuel and petroleum products.

(8) "Prover" as applied to determination of meter accuracy means a calibrated volumetric receiver or a mechanical positive displacement device.

(8.5) “Renewable fuel” means a motor vehicle fuel that is produced from plant or animal products or wastes, as opposed to fossil fuel sources.

(9) “Standard temperature” as applied to fuel and petroleum products means sixty degrees Fahrenheit.

(10) “Temperature compensation” as applied to liquid measure of fuel and petroleum products means adjustment of gallons measured at storage or metered temperature to the standard temperature.

**Source:** L. 31: p. 589, §§ 1, 2. CSA: C. 118, § 1. L. 41: p. 581, § 1. CRS 53: § 100-2-1. C.R.S. 1963: § 100-2-1. L. 73: p. 1066, § 2. L. 93: (1) amended and (1.5), (2.3), (2.5), (2.7), and (4.5) added, p. 269, § 2, effective July 1. L. 97: (1), (2.3), (2.5), (2.7), and (4.5) amended, p. 137, § 1, effective March 28. L. 2001: (1.5) amended, p. 1115, § 5, effective June 5. L. 2005: (1), (1.5), and (2) amended and (1.1), (1.2), (1.7), (3.5), (5.3), and (5.5) added, p. 1341, § 1, effective August 8. L. 2007: (1), (1.1), and (1.2) amended and (1.3) and (8.5) added, p. 1759, § 2, effective June 1.

**Editor’s note:** The amendment made to subsection (1) by House Bill 93-1114 resulted in adding new language to subsection (1) and numbering what was subsection (1) as subsection (1.5).

**Cross references:** For the legislative declaration contained in the 1993 act amending subsection (1) and enacting subsections (1.5), (2.3), (2.5), (2.7), and (4.5), see section 1 of chapter 79, Session Laws of Colorado 1993.

**8-20-202. Classification of liquid fuel products.** (1) “Liquid” means any material that has a fluidity greater than that of three hundred penetration asphalt when tested in accordance with ASTM specifications that are found in publication number D 5, “Test for Penetration of Bituminous Materials”. Unless otherwise identified, the term “liquid” shall include both flammable and combustible liquids.

(2) - “Flammable liquid” or “class I liquid” means a liquid that has a flash point below one hundred degrees Fahrenheit and a vapor pressure not exceeding forty PSIA at one degree Fahrenheit. Class I liquids are subdivided as follows:

(a) Class IA liquids have a flash point below seventy-three degrees Fahrenheit and a boiling point below one hundred degrees Fahrenheit.

(b) Class IB liquids have a flash point below seventy-three degrees Fahrenheit and a boiling point at or above one hundred degrees Fahrenheit.

(c) Class IC liquids have a flash point at or above seventy-three degrees Fahrenheit and below one hundred degrees Fahrenheit.

(3) “Combustible liquid” means a liquid that has a flash point at or above one hundred degrees Fahrenheit. Combustible liquids are subdivided as follows:

(a) Class II liquids have a flash point at or above one hundred degrees Fahrenheit and below one hundred forty degrees Fahrenheit.

(b) Class IIIA liquids have a flash point at or above one hundred forty degrees Fahrenheit and below two hundred degrees Fahrenheit.

(c) Class IIIB liquids have a flash point at or above two hundred degrees Fahrenheit.

**Source:** L. 31: p. 589, § 3. CSA: C. 118, § 2. L. 41: p. 581, § 2. CRS 53: § 100-2-2. C.R.S. 1963: § 100-2-2. L. 2005: Entire section R&RE, p. 1342, § 2, effective August 8.

**8-20-203. Inspection.** (1) All fuel products included within classes I and II shall be inspected and the containers of such products marked by brand or stencil as provided in this part 2, and all fuel products shall comply with the specifications provided for in this part 2.

(2) Fuel products included in class III shall be subject to inspection.

(3) All transports and other tank trucks used to carry fuel products shall prominently display thereon, in letters at least three inches in height, the name and address of the owner or operator thereof. All such transport, tank, and delivery trucks shall also display prominently upon the rear of the tank the appropriate DOT placard for the product contained therein.



(4) At all filling stations, garages, stores, and all other places where fuel products are sold or offered for sale, there shall be displayed in a prominent place where it may be readily seen on each pump, the name, trade name, symbol, sign, or other distinguishing mark or device of such fuel product in type at least two inches in height. If such fuel product has no such name, trade name, symbol, sign, or other distinguishing mark, or device, then there shall be displayed the name and address of the person from whom such fuel product was purchased.

**Source:** L. 31: p. 590, § 1. CSA: C. 118, § 3. L. 41: p. 582, § 3. L. 43: p. 446, § 1. CRS 53: § 100-2-3. C.R.S. 1963: § 100-2-3. L. 2005: (1), (2), and (3) amended, p. 1343, § 3, effective August 8.

**8-20-204. Specifications - classes I, II, and III.** (1) All products in classes I, II, and III shall comply with the most current applicable specifications of ASTM, which are found in section 5 of that organization's publication "Petroleum Products, Lubricants, and Fossil Fuels" and supplements thereto or revisions thereof as may be designated by ASTM, except as modified or rejected by this article or any rule promulgated pursuant to this article. If gasoline is blended with ethanol, the ASTM D 4814 specifications shall apply to the base gasoline prior to blending. Blends of gasoline and ethanol shall not exceed the ASTM D 4814 vapor pressure standard; except that, if the ethanol is blended at nine percent or higher but not exceeding ten percent, the blend may exceed the ASTM D 4814 vapor pressure standard by no more than 1.0 PSI. Class I products shall not be blended at a retail location with products commonly and commercially known as casinghead gasoline, absorption gasoline, condensation gasoline, drip gasoline, or natural gasoline.

(2) to (4) Repealed.

(5) To further avoid the perpetration of fraud upon the users and purchasers of motor fuel offered for sale for highway vehicle use, the artificial coloring of such motor fuel is absolutely prohibited, except in motor fuel having a research octane rating of eighty-eight or better after coloring, as determined by the ASTM's research method.

(6) The sale of any product under any grade name that indicates to the purchaser that it is of a certain automotive fuel rating or ASTM grade shall not be permitted unless the automotive fuel rating or grade indicated in the grade name is consistent with the value and meets the applicable requirements of ASTM. The AKI shall not be less than the AKI posted on the product dispenser or as certified on the invoice, bill of lading, shipping paper, or other documentation.

**Source:** L. 31: p. 590, § 5. CSA: C. 118, § 4. L. 41: p. 582, § 4. L. 43: p. 447, § 2. CRS 53: § 100-2-4. C.R.S. 1963: § 100-2-4. L. 67: p. 211, § 1. L. 86: (1) amended and (2) to (4) repealed, pp. 509, 510, §§ 1, 5, effective July 1. L. 93: (1) amended, p. 511, § 1, effective April 26. L. 2005: (1), (5), and (6) amended, p. 1343, § 4, effective August 8. L. 2007: (1) amended, p. 386, § 1, effective April 3.

**8-20-204.5. Motor fuel blends containing alcohol - purity.** No motor fuel blend containing alcohol derived from agricultural commodities and forest products shall be sold for retail use unless the alcohol in such blend has a purity of at least ninety-nine percent.

**Source:** L. 81: Entire section added, p. 459, § 1, effective May 18.

**8-20-205. Specifications of kerosene. (Repealed)**

**Source:** L. 31: p. 592, § 6. CSA: C. 118, § 5. L. 41: p. 583, § 5. CRS 53: § 100-2-5. C.R.S. 1963: § 100-2-5. L. 2005: Entire section repealed, p. 1344, § 5, effective August 8.

**8-20-206. Shipper notify director.** (1) Any person who ships fuel products included in classes I and II into the state, or who ships such fuel products from any refinery or

pipeline terminal within the state to another point within the state, shall notify the director of the division of oil and public safety of the shipment within twenty-four hours after the shipment has been billed for departure in the case of tank cars, or after the shipment has been loaded for departure in the case of barrels, trucks, or tank wagons. At the same time, such person shall forward to the director of the division of oil and public safety a true sample of the contents of the shipment weighing at least eight ounces, with the specifications thereof and the number and initial of the tank car, or if some other method of transportation is used, an adequate description of the means of conveyance or container, so as to enable identification of the shipment. Any person who diverts a shipment of such fuel products into the state of Colorado from outside the state shall give the same notice and forward the same type of sample to the director of the division of oil and public safety within twenty-four hours after the billing of the shipment is changed to a Colorado destination.

(2) If more than one car of fuel products included in classes I and II is shipped at the same time from the same source and refinery run, the director of the division of oil and public safety may accept one sample for all or any part of such shipment.

**Source:** L. 31: p. 593, § 7. CSA: C. 118, § 6. L. 41: p. 584, § 6. L. 49: p. 535, § 1. CRS 53: § 100-2-6. C.R.S. 1963: § 100-2-6. L. 2001: Entire section amended, p. 1115, § 6, effective June 5. L. 2005: Entire section amended, p. 1344, § 6, effective August 8.

**8-20-206.5. Environmental response surcharge - liquefied petroleum gas inspection fund - definitions.** (1) (a) Every first purchaser of odorized liquefied petroleum gas, every manufacturer of fuel products who manufactures such products for sale within Colorado or who ships such products from any point outside of Colorado to a distributor within Colorado, and every distributor who ships such products from any point outside of Colorado to a point within Colorado shall pay to the executive director of the department of revenue, each calendar month, either twenty-five dollars per tank truckload of fuel products delivered during the previous calendar month for sale or use in Colorado or the fee for odorized liquefied petroleum gas as specified in paragraph (d) of this subsection (1), whichever is applicable. Such payment shall be made on forms prescribed and furnished by the executive director. The provisions of this section shall not apply to fuel that is especially prepared and sold for use in aircraft or railroad equipment or locomotives.

(b) In the event the available fund balance in the petroleum storage tank fund is greater than twelve million dollars, no surcharge shall be imposed, but if the available fund balance in the fund is less than:

(I) Twelve million dollars, the fee imposed by paragraph (a) of this subsection (1) shall be fifty dollars per tank truckload;

(II) Six million dollars, the fee imposed shall be seventy-five dollars per tank truckload;

(III) Three million dollars, the fee imposed shall be one hundred dollars per tank truckload.

(c) Notwithstanding paragraph (b) of this subsection (1), on and after July 1, 2018, if the available fund balance in the petroleum storage tank fund is greater than eight million dollars, no surcharge shall be imposed, but if the available fund balance in the fund is less than eight million dollars, the fee imposed by paragraph (a) of this subsection (1) shall be twenty-five dollars per tank truckload.

(d) Notwithstanding paragraph (b) of this subsection (1), the executive director of the department of revenue shall have the authority to determine and adjust a fee for odorized liquefied petroleum gas, not to exceed ten dollars per tank truckload.

(e) (I) There is hereby created the liquefied petroleum gas inspection fund within the state treasury. Neither this section nor section 8-20.5-103 shall be construed to make the liquefied petroleum gas inspection fund an enterprise fund. Such fund shall consist of:

(A) Liquefied petroleum gas inspection moneys collected pursuant to this article;

(B) Civil penalties collected as a result of court actions pursuant to section 8-20-104;

(C) Any moneys appropriated to the fund by the general assembly; and

(D) Any moneys granted to the department from a federal agency or trade association for administration of the department's liquefied petroleum gas inspection program.



(II) The executive director of the department of revenue shall adjust the fees collected pursuant to this article so that the balance of unexpended and unencumbered moneys in the liquefied petroleum gas inspection fund does not exceed the amount necessary to accumulate and maintain in the liquefied petroleum gas inspection fund a reserve sufficient to defray administrative expenses of the division of oil and public safety for a period of two months.

(III) The moneys in the fund shall be subject to annual appropriation by the general assembly. Moneys in the fund shall only be used for costs related to:

- (A) Initial and subsequent inspections of liquefied petroleum gas installations;
- (B) Proving, including calibrating and adjusting, liquefied petroleum gas meters and dispensers;
- (C) Abatement of fire and safety hazards at liquefied petroleum gas installations;
- (D) Investigation of reported liquefied petroleum gas that requires state matching dollars;
- (E) Any federal program pertaining to liquefied petroleum gas that requires state matching dollars;
- (F) Liquefied petroleum gas product quality testing;
- (G) Administrative costs, including costs for contract services; and
- (H) Defraying the salaries and operating expenses incurred by the department of labor and employment in the administration of this article as it pertains to liquefied petroleum gas installations, meters, and dispensers. Such moneys shall be appropriated for such purposes by the general assembly.

(IV) The moneys in the liquefied petroleum gas inspection fund and all interest earned on the moneys in the fund shall remain in such fund and shall not be credited or transferred to the general fund or any other fund at the end of any fiscal year.

(1.5) Notwithstanding the amount specified for any fee or surcharge in subsection (1) of this section, the executive director by rule or as otherwise provided by law may reduce the amount of one or more of the fees or surcharges if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of one or more of the fees or surcharges is credited. After the uncommitted reserves of the fund are sufficiently reduced, the executive director by rule or as otherwise provided by law may increase the amount of one or more of the fees or surcharges as provided in section 24-75-402 (4), C.R.S.

(2) The fee or surcharge imposed by subsection (1) of this section shall be collected, administered, and enforced in the same manner as the fuel taxes imposed pursuant to the provisions of article 27 of title 39, C.R.S., and the same penalty and interest provisions shall apply.

(3) It is the duty of every manufacturer or distributor as described in subsection (1) of this section to compute the amount of the surcharge payable on all tank truckloads sold by him and separately state the surcharge due on statements issued with each purchase of fuel. In the event that the manufacturer or distributor sells such fuel to a retailer or consumer or consumes such fuel, he shall pay to the department of revenue the surcharge imposed in subsection (1) of this section.

(4) For the purposes of this section:

(a) "Available fund balance" means the sum of the current year revenues and the previous fund balance minus the sum of the obligations approved by the petroleum storage tank committee pursuant to section 8-20.5-104 and the costs incurred by the division of oil and public safety for purposes of administering articles 20 and 20.5 of this title.

(b) "Fuel product" means gasoline, blended gasoline, gasoline sold for gasohol production, gasohol, diesel, biodiesel blends, and special fuels, and special fuel mixes with alcohol.

(5) Repealed.

**Source:** L. 89: Entire section added, p. 405, § 4, effective July 1. L. 92: (1)(b) and (5) amended, p. 1820, § 2, effective June 3. L. 95: (1)(b) amended, p. 419, § 4, effective July 1. L. 96: (1)(b) amended and (1)(c) added, p. 709, § 1, effective May 15. L. 97: (5) repealed, p. 138, § 2, effective March 28. L. 98: (1.5) added, p. 1324, § 22, effective June

1. **L. 2000:** (1)(b)(III) and (1)(c) amended, p. 1384, § 3, effective May 30. **L. 2003:** (1)(a) amended and (1)(d) and (1)(e) added, p. 1822, § 6, effective May 21; (1)(a), IP(1)(b), (1)(c), and (4) amended, p. 2664, § 1, effective June 5. **L. 2005:** (1)(b), (1)(c), and IP(1)(e)(I) amended, p. 1328, § 5, effective July 1; (4)(b) amended, p. 1345, § 7, effective August 8. **L. 2010:** (1)(a), (1)(c), and (2) amended, (HB 10-1185), ch. 82, p. 275, § 1, effective August 11.

**Editor's note:** Amendments to subsection (1)(a) by House Bill 03-1099 and Senate Bill 03-324 were harmonized.

**Cross references:** (1) For the petroleum storage tank fund, see § 8-20.5-103.

(2) For the legislative declaration contained in the 2003 act amending subsection (1)(a) and enacting subsections (1)(d) and (1)(e), see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-207. Method of tests.** Tests made by the director of the division of oil and public safety shall be made in accordance with the most recent standard methods of tests of ASTM. The director of the division of oil and public safety is not required in every case to make a complete analysis to ascertain every form of impurities, such as sulphur and tar-like matter, but when, in the opinion of the director, a more complete analysis is necessary or advisable, the director may make a detailed chemical analysis to determine exactly the impurities or imperfections. The director in his or her discretion is authorized to make inspections of petroleum products loaded for shipment into this state, at points outside of this state.

**Source:** **L. 31:** p. 594, § 9. **CSA:** C. 118, § 7. **L. 41:** p. 584, § 7. **CRS 53:** § 100-2-7. **C.R.S. 1963:** § 100-2-7. **L. 2001:** Entire section amended, p. 1116, § 7, effective June 5. **L. 2005:** Entire section amended, p. 1345, § 8, effective August 8.

**8-20-208. Director to keep record.** (1) The director of the division of oil and public safety shall keep a record of all inspections made, showing:

- (a) Time and place of each;
- (b) Number of packages inspected;
- (c) Number of gallons contained therein;
- (d) Record of rejections;
- (e) Record of fuel products destroyed.

(2) If any fuel products included in classes I and II have been rejected, such report shall show the date and place thereof and quantity rejected, together with the name of the person possessing it, together with a record from whom received. All such records shall be open for public inspection.

**Source:** **L. 31:** p. 595, § 11. **CSA:** C. 118, § 8. **L. 41:** p. 584, § 8. **CRS 53:** § 100-2-8. **C.R.S. 1963:** § 100-2-8. **L. 2001:** IP(1) amended, p. 1116, § 8, effective June 5. **L. 2005:** (2) amended, p. 1345, § 9, effective August 8.

**8-20-209. Access to premises - records.** (1) Any duly authorized agent or employee of the division of oil and public safety shall have authority to enter in or upon the premises of any manufacturer, vendor, or dealer in fuel products during regular business hours and inspect any such product intended for sale or use.

(2) Every distributor shall keep a complete and accurate record of the number of gallons, as covered in classes I and II, sold by such distributor and of the number of gallons of fuel used by such distributor, the date of such sales and of such use, and, except in the case of retail sales through filling stations operated by such distributor, the names and addresses of the purchasers.

**Source:** **L. 31:** p. 595, § 12. **CSA:** C. 118, § 9. **L. 41:** p. 585, § 9. **CRS 53:** § 100-2-9. **C.R.S. 1963:** § 100-2-9. **L. 2001:** (1) amended, p. 1116, § 9, effective June 5. **L. 2005:** (2) amended, p. 1345, § 10, effective August 8.



**8-20-210. Records of carriers - access.** Every agent or employee of any railroad company or other transportation company, having the custody of books or records showing the shipment or receipt of fuel products, shall permit the director of the division of oil and public safety or the director's agents and employees free access to such books and records to determine the amount of fuel products shipped and received. All clerks, bookkeepers, express agents or officials, railroad agents, employees of common carriers, or other persons shall render to the director of the division of oil and public safety or the director's employees all the assistance in their power when so requested in tracing, finding, and inspecting such shipments.

**Source:** L. 31: p. 596, § 13. CSA: C. 118, § 10. L. 41: p. 585, § 10. CRS 53: § 100-2-10. C.R.S. 1963: § 100-2-10. L. 2001: Entire section amended, p. 1116, § 10, effective June 5.

**8-20-211. Labeling visible containers.** All visible containers and all devices used for drawing class I product from underground or aboveground containers at filling stations, garages, or other places where such products are sold or offered for sale shall be stamped or labeled in a visible place with the letters and figures:

“State Inspected \_\_\_\_\_ (Date) \_\_\_\_\_”.

**Source:** L. 31: p. 596, § 14. CSA: C. 118, § 11. L. 41: p. 585, § 11. CRS 53: § 100-2-11. C.R.S. 1963: § 100-2-11. L. 2005: Entire section amended, p. 1345, § 11, effective August 8.

**8-20-211.5. Labeling of containers.** Throughout the state of Colorado, all visible containers and all devices for drawing motor fuel blends containing class I fuel products and at least two percent by volume of alcohol from underground containers at filling stations, garages, or other places where such products are sold or offered for sale shall be stamped or labeled in a visible place with information indicating the presence of alcohol in the motor fuel blend. If the volume of ethanol exceeds ten percent, or if the volume of methanol exceeds two percent, the stamp or label shall state the exact percentage. Such information shall appear on the front of the pump in a position clear and conspicuous to the driver's position, in at least one-half inch block letters, with information that identifies the maximum percentage by volume to the nearest whole percent of ethanol or of methanol or methanol with cosolvents.

**Source:** L. 79: Entire section added, p. 1326, § 1, effective July 1. L. 86: Entire section amended, p. 509, § 2, effective July 1. L. 89: Entire section amended, p. 382, § 1, effective June 10. L. 2000: Entire section amended, p. 763, § 4, effective September 1. L. 2005: Entire section amended, p. 1346, § 12, effective August 8.

**8-20-212. Loading lines to be cleaned.** Any loading or unloading line once used for one class of fuel products shall not be used for loading or unloading other classes of fuel products until the lines have been thoroughly cleaned and approved by the director of the division of oil and public safety.

**Source:** L. 41: p. 585, § 12. CSA: C. 118, § 12. CRS 53: § 100-2-12. C.R.S. 1963: § 100-2-12. L. 2001: Entire section amended, p. 1116, § 11, effective June 5.

**8-20-213. Recycled or used motor oil - legislative declaration - definitions - sale.** (1) The general assembly hereby finds and declares that the used oil generated by this state each year is a valuable resource that can be reused as an environmentally acceptable re-refined product. The general assembly further finds that the disposal of automotive engine oil and other lubricants is very costly, creates environmental and health hazards, and depletes the state's and the nation's dwindling supply of petroleum. It is the intent of the

general assembly to reduce the amount of used oil that is improperly disposed of and to increase the amount that is reused as a re-refined product.

(2) As used in this section, unless the context otherwise requires:

(a) "API service classification" means one of the two letter classification performance ratings for engine oils, including re-refined oils, as determined by the American petroleum institute.

(b) "Lubricant" means a lubricating oil as defined in paragraph (c) of this subsection (2) or any other substance or mixture of substances used to reduce the friction caused by automotive parts moving against each other.

(c) "Lubricating oil" means oil classified for use in an internal combustion engine, hydraulic system, gear box, differential gear mechanism, or wheel bearing.

(d) "Recycled oil" means oil that is prepared for automotive use by reclaiming and otherwise reprocessing used oil.

(e) "Re-refined oil" means used oil that has been refined using processing technology to remove the physical and chemical contaminants acquired through use and which, by itself or when blended with new lubricating oil or additives, meets applicable API service classifications and SAE viscosity grades.

(f) "SAE viscosity grade" means the measure of an oil's, including a re-refined oil's, resistance to flow at a given temperature, as determined by the society of automotive engineers.

(g) "Used oil" means refined crude or synthetic oil that as a result of use has become unsuitable for its original purpose due to loss of original properties or the presence of impurities and that may be recycled in an economical manner and made suitable for further use as an automotive lubricant.

(3) (a) It is unlawful for a person to package and sell a container of:

(I) Lubricant unless the container prominently displays the applicable API service classification, API certification mark, and SAE viscosity grade of the contents; or

(II) Lubricant made wholly or partly from used or recycled oil unless the container is plainly labeled as containing used or recycled oil.

(b) The label or advertising on a container of used or recycled oil shall accurately reflect the type of oil stored in such container.

(c) A person may represent a product made wholly or partly from re-refined oil to be equal to or better than a similar product made from virgin oil if the product for sale conforms with applicable API service classifications, API certification mark, and SAE viscosity grades.

(d) Notwithstanding section 8-20-104, a person found guilty of violating this subsection (3) shall be subject to a fine of not less than one hundred dollars and not more than five hundred dollars for the first offense. A person found guilty of a second or subsequent offense shall be enjoined from selling or distributing used oil for not less than one year and not more than five years.

**Source:** L. 41: p. 586, § 13. CSA: C. 118, § 13. CRS 53: § 100-2-13. C.R.S. 1963: § 100-2-13. L. 95: Entire section amended, p. 349, § 1, effective April 27. L. 2003: (3)(d) amended, p. 1824, § 7, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (3)(d), see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-214. Inspectors - business forbidden.** No person employed by the director of the division of oil and public safety to make inspections under this part 2 shall engage directly or indirectly in the business of dealing in petroleum products.

**Source:** L. 31: p. 598, § 17. CSA: C. 118, § 14. L. 41: p. 586, § 14. CRS 53: § 100-2-14. C.R.S. 1963: § 100-2-14. L. 2001: Entire section amended, p. 1117, § 12, effective June 5.



**8-20-215. Mislabeling.** No person shall mark, stencil, brand, or certify falsely any pump, receptacle, or container of fuel products, or change, alter, or deface the mark, brand, or a certificate on any such pump, receptacle, or container, or falsely represent the quality or grade of any fuel product.

**Source:** L. 31: p. 598, § 17. CSA: C. 118, § 14. L. 41: p. 586, § 14. CRS 53: § 100-2-15. C.R.S. 1963: § 100-2-15. L. 2005: Entire section amended, p. 1346, § 13, effective August 8.

**8-20-216. Unlawful to deceive purchaser.** It is unlawful for any person, firm, or corporation to store, sell, expose for sale, or offer for sale any liquid fuels, lubricating oils, or other similar products, in any manner whatsoever, so as to deceive or tend to deceive the purchaser as to the nature, price, quality, and identity of the products so sold or offered for sale.

**Source:** L. 31: p. 598, § 18. CSA: C. 118, § 15. L. 41: p. 586, § 15. CRS 53: § 100-2-16. C.R.S. 1963: § 100-2-16. L. 86: Entire section amended, p. 510, § 3, effective July 1.

**8-20-217. Sale of products not indicated.** It is unlawful for any person to store, keep, expose for sale, offer for sale, or sell from any tank or container, or from any pump or other distributing device or equipment, any fuel or other similar products than those indicated by the name, trade name, symbol, sign, or other distinguishing mark or device of such fuel or other products, or by the name and address of the manufacturer of such fuel product appearing upon the tank, container, pump, or other distributing equipment, from which the same are sold, offered for sale, or distributed.

**Source:** L. 31: p. 599, § 19. CSA: C. 118, § 16. L. 41: p. 586, § 16. L. 43: p. 448, § 3. CRS 53: § 100-2-17. C.R.S. 1963: § 100-2-17.

**8-20-218. Calibration of transport, tank truck, or delivery trucks.** (1) The director of the division of oil and public safety shall calibrate transport, trailer, and delivery truck tanks to determine the legal capacity of each compartment, allowing for expansion outage to conform to DOT regulations, except in the case of delivery truck tanks where two percent outage will suffice. Each tank compartment shall have affixed and spot-welded by the owner or operator thereof a capacity marker, which shall be set by measuring with a steel rule from the bottom of a steel bar set across the fill opening to the bottom of the marker (floated). The compartment gallonage shall be marked or stenciled with paint in figures at least one inch in height on each compartment dome collar.

(2) All new or additional vehicular tanks purchased or leased after April 6, 1955, by any person for hauling class I, II, or III petroleum products within or into the state shall be calibrated by the director of the division of oil and public safety and a certificate of calibration shall be issued to the owner or operator thereof before such equipment is put in service. A copy of the certificate of calibration shall accompany the tank at all times.

(3) Whenever a certificate of calibration has been lost or mutilated, the director of the division of oil and public safety shall issue a duplicate of the original which shall serve the purpose of the original. The director of the division of oil and public safety may order, after proper inspection, a calibration or a recalibration of any transport, trailer, or delivery truck tank operating in the state, whether calibrated by the director previously or not, when inspection by the director or the director's deputy reveals that tank compartments or capacity markers have been altered intentionally or accidentally, and the owner or operator shall comply with such order within ten days. If the owner or operator of a delivery truck tank has available calibrating equipment acceptable to the director of the division of oil and public safety, the tanks shall be calibrated in the presence of the director or the director's deputy, at or near the place of business of the owner or operator, and the director shall issue a certificate of calibration for said tank.

**Source:** L. 31: p. 599, § 19. CSA: C. 118, § 16. L. 41: p. 586, § 16. L. 43: p. 448, § 3. CRS 53: § 100-2-18. L. 55: p. 644, § 1. C.R.S. 1963: § 100-2-18. L. 2001: Entire section amended, p. 1117, § 13, effective June 5. L. 2005: (1) and (2) amended, p. 1346, § 14, effective August 8.

**8-20-219. Equipment - disguise unlawful.** It is unlawful for any person, firm, or corporation, to disguise or camouflage his equipment, by imitating the design, symbol, or trade name of the equipment under which recognized brands of liquid fuels, lubricating oils, and similar products are generally marketed.

**Source:** L. 31: p. 599, § 20. CSA: C. 118, § 17. L. 41: p. 587, § 17. CRS 53: § 100-2-19. C.R.S. 1963: § 100-2-19.

**8-20-220. Trade names - unlawful use.** It is unlawful for any person, firm, or corporation, to expose for sale, offer for sale, or sell, under any trademark or trade name in general use, any liquid fuels, lubricating oils, or other like products, except those manufactured or distributed by the manufacturer or distributor marketing liquid fuels, lubricating oils, or other like products, under such trademark or trade names, or to substitute, mix, or adulterate the liquid fuels, lubricating oils, or other similar products sold, offered for sale, or distributed under such trademark or trade name.

**Source:** L. 31: p. 599, § 21. CSA: C. 118, § 18. L. 41: p. 587, § 18. CRS 53: § 100-2-20. C.R.S. 1963: § 100-2-20.

**Cross references:** For trademarks and trade names, see articles 70 and 71 of title 7.

#### ANNOTATION

**The intent of this section is to prevent deception of the public** by making certain that a retailer of gasoline fuels who offers for sale a trade-named product has not in any manner diluted or adulterated it and that the trade-named article is exactly what it is held out to be, nothing more, nothing less. *Houston v. Symington Wayne Corp.*, 149 Colo. 332, 369 P.2d 424 (1962).

**Therefore this section provides** that no foreign liquid shall be substituted for, or mixed

with, a trade-named product. *Houston v. Symington Wayne Corp.*, 149 Colo. 332, 369 P.2d 424 (1962).

**But this section does not preclude** the mixing of trade-named regular and premium gasolines by a special type of fuel pump in accordance with the wishes of the customer. *Houston v. Symington Wayne Corp.*, 149 Colo. 332, 369 P.2d 424 (1962).

**8-20-221. Assisting in violations.** It is unlawful for any person to aid or assist any other person in the violation of the provisions of this part 2, by depositing or delivering into any tank, receptacle, or other container, any liquid fuels, lubricating oils, or like products than those intended to be stored therein and distributed therefrom, as indicated by the name of the manufacturer or distributor or the trade name or trademark of the product displayed on the container itself, or on the pump, or on any other distributing device in connection therewith.

**Source:** L. 31: p. 599, § 22. CSA: C. 118, § 19. L. 41: p. 587, § 19. CRS 53: § 100-2-21. C.R.S. 1963: § 100-2-21.

**8-20-222. Improvers of products.** All materials, fluids, or substances offered for sale or exposed for sale, purporting to be substances for, or improvers of, fuel products to be used for power, heating, lubricating, or illuminating purposes, before being sold, exposed, or offered for sale, shall be submitted to the director of the division of oil and public safety for examination and inspection, and shall only be sold or offered for sale when properly labeled with a label, the form and contents of which label has been approved by the director in writing.



**Source:** L. 31: p. 600, § 23. CSA: C. 118, § 20. L. 41: p. 587, § 20. CRS 53: § 100-2-22. C.R.S. 1963: § 100-2-22. L. 73: p. 1067, § 3. L. 2001: Entire section amended, p. 1117, § 14, effective June 5. L. 2005: Entire section amended, p. 1346, § 15, effective August 8.

**8-20-223. Containers - inspection.** It is the duty of the director of the division of oil and public safety and the director's deputies to inspect all containers or storage tanks from which products of petroleum to be used for illuminating or power purposes are retailed. When such containers or storage tanks are found to be placed in an unsafe position or to contain water or foreign matter, the director shall make a written order to have the same properly cleaned or removed, and upon failure of the owner to comply with said order within ten days after the date thereof, the director shall confiscate and cause the same to be destroyed or removed. All vendors of classes I, II, and III fuel products shall have fire extinguishers in their establishments.

**Source:** L. 31: p. 600, § 24. CSA: C. 118, § 21. L. 41: p. 587, § 21. CRS 53: § 100-2-23. C.R.S. 1963: § 100-2-23. L. 78: Entire section amended, p. 255, § 12, effective May 23. L. 2001: Entire section amended, p. 1118, § 15, effective June 5. L. 2005: Entire section amended, p. 1347, § 16, effective August 8.

**8-20-223.5. Emission inspection.** (1) The director of the division of oil and public safety shall conduct the emission inspection of any underground storage tank which is required to have installed pollution control equipment. Such inspection shall only be conducted in the ozone nonattainment area as defined pursuant to the authority contained in section 25-7-107, C.R.S. Such inspection shall be for the purpose of verifying the installation of such pollution control equipment and for the purpose of assuring its proper use.

(2) The director of the division of oil and public safety shall contract with the department of public health and environment for the purpose of submitting inspection reports, determining the frequency of certain inspections, assisting in the enforcement of the "Colorado Air Quality Control Act" as it pertains to underground storage tank pollution control equipment violations, and transmitting the payment for the costs of administering the program aspects in the department of public health and environment.

(3) The fees paid pursuant to this subsection (3) shall be no more than necessary to offset the direct cost of the inspection conducted pursuant to subsections (1) and (2) of this section, but in no event more than twelve dollars.

**Source:** L. 89: Entire section added, p. 1167, § 3, effective May 26. L. 94: (2) amended, p. 2721, § 312, effective July 1. L. 2001: (1) and (2) amended, p. 1118, § 16, effective June 5.

**Editor's note:** The "Colorado Air Quality Control Act" was changed to the "Colorado Air Pollution Prevention and Control Act" and is located in article 7 of title 25. (See L. 92, p. 1165.)

**8-20-224. Empty containers - removal.** It is the duty of the director of the division of oil and public safety or the director's deputies to notify the owner or person having in his or her possession empty oil barrels and other containers which are stored or placed in a position dangerous to property to remove the same to a place of safety.

**Source:** L. 31: p. 600, § 25. CSA: C. 118, § 22. L. 41: p. 588, § 22. CRS 53: § 100-2-24. C.R.S. 1963: § 100-2-24. L. 2001: Entire section amended, p. 1118, § 17, effective June 5.

**8-20-225. Measuring device - sealing - approval of prover and procedure.** (1) No person, or agent or employee of any person, shall use any meter or mechanical device for the measurement of oil, gasoline, or liquid fuels unless the same has been proved in a manner acceptable to the director of the division of oil and public safety and sealed as

correct by the director or one of the director's deputies. The director and the director's deputies are further authorized, if any such meter or mechanical device fails to comply with any of the provisions of this part 2, to seal the meter or mechanical device in a manner that prohibits its use until such meter or mechanical device complies with all of the provisions of this part 2, at which time the seal shall be removed by the director or the director's deputies.

(2) The specifications, tolerances, and other technical requirements published in the NIST handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Commercial Weighing and Measuring Devices", NIST handbook 130, "Uniform Laws and Regulations in the area of legal metrology and engine fuel quality", and supplements thereto or revisions thereof, shall apply to the provisions of this article, except as modified or rejected by this article or any rule promulgated pursuant to this article.

**Source:** L. 31: p. 601, § 26. CSA: C. 118, § 23. L. 41: p. 588, § 23. CRS 53: § 100-2-25. C.R.S. 1963: § 100-2-25. L. 67: p. 150, § 1. L. 73: p. 1067, § 4. L. 86: Entire section amended, p. 510, § 4, effective July 1. L. 2001: (1) amended, p. 1118, § 18, effective June 5. L. 2003: (1) amended, p. 1824, § 8, effective May 21. L. 2005: (2) amended, p. 1347, § 17, effective August 8.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (1), see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-226. False labels unlawful.** No label upon, or invoice for, any lubricating oil or grease shall contain any untrue or misleading statement, and any person, agent, or employee of any person who substitutes any oil or grease for any other brand, without notice, shall be subject to the penalties prescribed in section 8-20-104.

**Source:** L. 31: p. 605, § 36. CSA: C. 118, § 24. L. 41: p. 588, § 24. CRS 53: § 100-2-26. C.R.S. 1963: § 100-2-26. L. 2003: Entire section amended, p. 1825, § 9, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-227. Tests used.** Where no tests are specified in this part 2, the most recent tests prescribed, accepted, and considered as standards by ASTM or NIST shall be used.

**Source:** L. 31: p. 605, § 37. CSA: C. 118, § 25. L. 41: p. 588, § 25. CRS 53: § 100-2-27. C.R.S. 1963: § 100-2-27. L. 2005: Entire section amended, p. 1347, § 18, effective August 8.

**8-20-228. Hazardous, dangerous conditions - duty of director.** (1) It is the duty of the director of the division of oil and public safety, whenever the director has reasonable and probable grounds to believe that a hazardous or dangerous condition exists due to deterioration of fuel products storage and piping facilities which are endangering human and environmental life to determine the reason for the condition. The director may order the person responsible for the hazardous or dangerous condition to take corrective measures within a reasonable period of time to alleviate or eliminate the condition, and if the measures are not taken within such time, the director may act to alleviate or eliminate the same.

(2) If any person fails or refuses to comply with any such order of the director of the division of oil and public safety, the director, in the name of the people of the state of Colorado and through the attorney general, may apply to any district court having jurisdiction for a mandatory injunction to compel compliance with such order to alleviate or eliminate such hazardous or dangerous condition.



(3) The provisions of this part 2 shall not extend to nor be applicable to cities which are organized under article XX of the state constitution. If any such city desires to become subject to this part 2, the same may be accomplished by a resolution of the legislative body of such city adopted in the usual manner.

**Source:** L. 67: p. 144, § 1. C.R.S. 1963: § 100-2-29. L. 73: p. 1067, § 5. L. 2001: (1) and (2) amended, p. 1119, § 19, effective June 5.

#### **8-20-229. Penalty. (Repealed)**

**Source:** L. 31: p. 605, § 38, CSA: C. 118, § 26. L. 41: p. 588, § 26. CRS 53: § 100-2-28. C.R.S. 1963: § 100-2-28. L. 2003: Entire section repealed, p. 1825, § 10, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act repealing this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-230. Submittal of plans.** (1) Plans for all installations utilizing liquid fuel products, except for those liquid fuel products which are defined as regulated substances and regulated pursuant to article 20.5 of this title, in storage containers of an aggregate of over fifteen hundred gallons water capacity, including gasoline stations, garages, stores, and all other places where said products are dispensed, shall be submitted to the director of the division of oil and public safety for approval before construction begins.

(2) Plans for the preceding installations shall include:

(a) Provisions for extended protection against underground leaks due to corrosion, erosion, electrolysis, galvanic action, soil shifting, soil compaction, and high groundwater tables;

(b) Provisions for a containment of liquid fuels in the event of damage to fuel dispensers and attendant piping;

(c) Provisions for safety of human and environmental life.

**Source:** L. 73: p. 1068, § 6. C.R.S. 1963: § 100-2-30. L. 89: (1) amended, p. 405, § 3, effective July 1. L. 95: (1) amended, p. 419, § 5, effective July 1. L. 2001: (1) amended, p. 1119, § 20, effective June 5.

**8-20-231. Minimum standards.** The design, construction, location, installation, and operation of liquid fuel systems and equipment and the handling of liquid fuels shall conform to the minimum standards as prescribed by the applicable sections of the current edition of the national fire code published by the national fire protection association, as revised by the association from time to time. The minimum standards as prescribed shall also apply to marine and pipeline terminals, natural gasoline plants, refineries, tank farms, underground storage facilities, aboveground storage facilities, and chemical plants utilizing liquid fuels; except that the gallon limitations in such minimum standards shall not apply to aboveground storage facilities associated with mining, oil and gas production facilities, asphalt or concrete production, construction projects, and activities related thereto. Copies of the codes shall be kept and maintained in the office of the director of the division of oil and public safety at all times for examination by any interested person.

**Source:** L. 73: p. 1068, § 6. C.R.S. 1963: § 100-2-31. L. 90: Entire section amended, p. 467, § 2, effective May 24. L. 2001: Entire section amended, p. 1119, § 21, effective June 5. L. 2005: Entire section amended, p. 1347, § 19, effective August 8.

**8-20-232. Method of sales.** Petroleum products in liquid form shall be sold only by metered liquid measure or by weight.

**Source:** L. 73: p. 1068, § 6. C.R.S. 1963: § 100-2-32.

**8-20-232.5. Method of sales of motor fuels - gallon equivalents - conversion factors.**

(1) In addition to any other allowed unit of measurement, motor fuels may be sold by gallon equivalents pursuant to the requirements of this section.

(2) (a) Any dispenser used for the sale of motor fuel in gallon equivalents shall display gallon equivalents as the primary display information provided. Such dispenser shall indicate the number of gallon equivalents and fractions of gallon equivalents sold, the total sales price of the motor fuel dispensed, and the sales price per gallon equivalent of motor fuel sold. Information concerning the sale of motor fuels by gallon equivalents may be provided at the point of sale in literature, signs, or other advertisements. Street sign advertisements regarding the sale of motor fuels by gallon equivalents may abbreviate the term "gallon gasoline equivalent" as "gallon G.E." and the term "gallon diesel equivalent" as "gallon D.E.".

(b) In addition to the information required by paragraph (a) of this subsection (2), the face of a dispenser that is used for the sale of motor fuel in gallon equivalents shall prominently display the conversion factor that is being used by the seller to determine the number of gallon equivalents sold based upon the type and amount of actual measured units of motor fuel that is dispensed. The information displayed on such a dispenser shall include, but is not limited to, the following statements concerning the conversion factor:

(I) "One gallon diesel equivalent of (type of motor fuel) is equivalent to (amount of actual units of measurement) of (type of motor fuel)."

(II) "One gallon diesel equivalent of (type of motor fuel) contains an average lower heating value of 128,000 BTUs of energy, but in no case contains a lower heating value of less than 124,000 BTUs of energy."

(III) "One gallon gasoline equivalent of (type of motor fuel) is equivalent to (amount of actual units of measurement) of (type of motor fuel)."

(IV) "One gallon gasoline equivalent of (type of motor fuel) contains an average lower heating value of 114,000 BTUs of energy, but in no case contains a lower heating value of less than 110,000 BTUs of energy."

(3) Any seller using gallon equivalents for motor fuel sales shall calculate the conversion factor used by the seller to convert the actual units by which a motor fuel is measured at the dispenser to gallon equivalent units based on the inferred energy content of such motor fuel as measured by one of the following methods:

(a) For conversions to gallon diesel equivalents:

(I) If the motor fuel is actually measured at the dispenser as a volume, the gallon diesel equivalent measurement shall be calculated by determining the number of measured volumetric units required to provide an average lower heating value of one hundred twenty-eight thousand BTUs (British thermal units), but in no case a lower heating value of less than one hundred twenty-four thousand BTUs.

(II) If the motor fuel is actually measured at the dispenser as a mass, the gallon diesel equivalent measurement shall be calculated by determining the number of measured mass units required to provide an average lower heating value of one hundred twenty-eight thousand BTUs (British thermal units), but in no case a lower heating value of less than one hundred twenty-four thousand BTUs.

(b) For conversions to gallon gasoline equivalents:

(I) If the motor fuel is actually measured at the dispenser as a volume, the gallon gasoline equivalent measurement shall be calculated by determining the number of measured volumetric units required to provide an average lower heating value of one hundred fourteen thousand BTUs (British thermal units), but in no case a lower heating value of less than one hundred ten thousand BTUs.

(II) If the motor fuel is actually measured at the dispenser as a mass, the gallon gasoline equivalent measurement shall be calculated by determining the number of measured mass units required to provide an average lower heating value of one hundred fourteen thousand BTUs (British thermal units), but in no case a lower heating value of less than one hundred ten thousand BTUs.



(4) The actual unit of measurement for a motor fuel sold in terms of gallon equivalents shall be calibrated by the seller with appropriate precision to ensure conformance with any required dispensing accuracies.

(5) Repealed.

**Source:** L. 93: Entire section added, p. 270, § 3, effective July 1. L. 97: (5) repealed, p. 138, § 3, effective March 28.

**Cross references:** For the legislative declaration contained in the 1993 act enacting this section, see section 1 of chapter 79, Session Laws of Colorado 1993.

**8-20-233. Declaration on invoice.** (1) The sale of petroleum products shall include on the sales statement a definite, plain, and conspicuous declaration of:

(a) The quantity of goods sold;

(b) The weight or basis for measurement of either gross volume or volume adjusted to standard temperature of sixty degrees Fahrenheit.

**Source:** L. 73: p. 1068, § 6. C.R.S. 1963: § 100-2-33.

**8-20-234. Temperature compensator permanent.** Whenever a temperature compensating meter is used to determine the amount of liquid fuels or liquefied petroleum gas offered for sale in the liquid state, such compensating meter shall be installed permanently on all meters within a geographical location owned by a user in Colorado and used exclusively for at least a period of one year and the temperature compensating devices shall not be disconnected, deactivated, or removed at any time except for repairs or for tests by the director of the division of oil and public safety. If a temperature compensating device is disconnected, deactivated, or removed for reasons other than repair, it shall not be reactivated for a period of one year from the date of removal. Notification of such removal or installation shall be in accordance with the provisions of section 8-20-408 (2).

**Source:** L. 73: p. 1068, § 6. C.R.S. 1963: § 100-2-34. L. 2001: Entire section amended, p. 1120, § 22, effective June 5.

**8-20-235. Measuring gasoline and special fuel for sale to distributors.** Notwithstanding any other provision of this part 2, the method of determining gallonage of gasoline or special fuel sold to distributors, as defined in section 39-27-101 (7), C.R.S., shall be on a gross or net gallons basis at the option of the distributor. Such election shall be for a twelve-month period.

**Source:** L. 81: Entire section added, p. 1892, § 1, effective May 18. L. 98: Entire section amended, p. 1040, § 12, effective July 1. L. 2003: Entire section amended, p. 1818, § 5, effective August 6.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 278, Session Laws of Colorado 2003.

### PART 3

#### CONTAINERS OF GAS OR GASEOUS COMPOUNDS

**8-20-301. Unlawful use of container.** No person, firm, or corporation, except the owner thereof or persons authorized in writing by the owner, shall sell or offer for sale, or deliver any gas or gaseous compound used for heating or cooking, which is shipped, consigned, or delivered in steel containers, or containers made of other metal, plastic, or other substance, if such container bears upon the surface thereof, in plainly legible characters the name, initials, or trademark of the owner. The term "gas or gaseous

compound” as used in this part 3 includes any material which is composed predominantly of any of the following hydrocarbons, or mixtures of the same: Propane, propylene, butanes, normal butane and isobutane, and butylenes.

**Source:** L. 43: p. 598, § 1. CSA: C. 165, § 25. CRS 53: § 100-4-1. C.R.S. 1963: § 100-4-1.

**8-20-302. Refill container unlawful.** No person, firm, or corporation, other than the owner or person authorized by the owner shall refill or use in any manner a container or receptacle which has imprinted thereon the name, initials, or trademark of the owner, for any gas or gaseous compound used for cooking or heating.

**Source:** L. 43: p. 598, § 2. CSA: C. 165, § 26. CRS 53: § 100-4-2. C.R.S. 1963: § 100-4-2.

**8-20-303. Reuse of container unlawful.** No person, firm, or corporation to whom such gas or gaseous compound has been sold or delivered in such containers shall sell, loan, deliver, or permit to be delivered such containers to any person other than such owner, or persons authorized by such owner to receive the delivery of such containers.

**Source:** L. 43: p. 598, § 3. CSA: C. 165, § 27. CRS 53: § 100-4-3. C.R.S. 1963: § 100-4-3.

**8-20-304. Applicable - when.** Sections 8-20-301 to 8-20-303 shall not apply to any gas or gaseous compound referred to in section 8-20-301, contained in such containers, unless the title to the containers is retained by the owner or his representative, and unless the gas or gaseous substance contained in the containers is sold and delivered upon the understanding and agreement that the container in which it was delivered shall be returned to the owner or its representative when the contents have been used up by the purchaser.

**Source:** L. 43: p. 599, § 4. CSA: C. 165, § 28. CRS 53: § 100-4-4. C.R.S. 1963: § 100-4-4.

**8-20-305. Penalty for violation.** Any fuel distributor who fills a fuel tank with liquified petroleum gas without the approval of the owner of the tank shall be liable in a civil action for treble damages in addition to costs and reasonable attorney fees.

**Source:** L. 43: p. 599, § 5. CSA: C. 165, § 29. CRS 53: § 100-4-5. C.R.S. 1963: § 100-4-5. L. 2003: Entire section amended, p. 1825, § 11, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

## PART 4

### LIQUEFIED PETROLEUM GAS - RULES

**8-20-401. Definitions.** As used in this part 4, unless the context otherwise requires:

- (1) Repealed.
- (2) “GPA” means the gas processors association.
- (3) “GPA 2140” means the publication number 2140 produced by the gas processors association.
- (4) and (5) Repealed.
- (6) “Liquefied petroleum gas”, referred to as LPG, means and includes any material which is composed predominantly of any of the following hydrocarbons, or mixtures of the same: Propane, propylene, butanes, normal butane or isobutane, and butylenes.



(7) Repealed.

(8) The definitions as set forth in section 8-20-201, except section 8-20-201 (1), shall also apply to this part 4.

**Source:** L. 45: p. 496, § 1. CSA: C. 118, § 74. CRS 53: § 100-5-1. C.R.S. 1963: § 100-5-1. L. 73: p. 1069, § 7. L. 91: Entire section amended, p. 1346, § 2, effective April 19. L. 2003: (1), (4), (5), and (7) repealed, p. 1825, § 12, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act repealing subsections (1), (4), (5), and (7), see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-402. Rules of director.** The director of the division of oil and public safety shall make, promulgate, and enforce rules setting forth minimum general standards consistent with the provisions of section 8-20-405 covering the design, construction, location, installation, and operation of equipment for storing, handling, transporting, dispensing, and utilizing liquefied petroleum gases, and specifying the odorization of said gases and the degree thereof and the odorizing agent to be used therein. These rules shall be such as are reasonably necessary for the protection of the health, welfare, and safety of the public and persons using these materials and shall be in substantial conformity with the generally accepted standards of safety concerning the same subject matter. Such rules shall be adopted by the director of the division of oil and public safety only after a public hearing thereon.

**Source:** L. 45: p. 496, § 2. CSA: C. 118, § 75. CRS 53: § 100-5-2. C.R.S. 1963: § 100-5-2. L. 2001: Entire section amended, p. 1120, § 23, effective June 5. L. 2003: Entire section amended, p. 1825, § 13, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

#### **8-20-403. Penalty for violation. (Repealed)**

**Source:** L. 45: p. 496, § 3. CSA: C. 118, § 76. CRS 53: § 100-5-3. C.R.S. 1963: § 100-5-3. L. 2001: Entire section amended, p. 1120, § 24, effective June 5. L. 2003: Entire section repealed, p. 1826, § 14, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act repealing this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-404. Conflicting rules forbidden.** No municipality or other political subdivision shall adopt or enforce any ordinance or regulation in conflict with the provisions of this part 4 or with the rules promulgated under section 8-20-402.

**Source:** L. 45: p. 497, § 4. CSA: C. 118, § 77. CRS 53: § 100-5-4. C.R.S. 1963: § 100-5-4. L. 2011: Entire section amended, (HB 11-1303), ch. 264, p. 1149, § 4, effective August 10.

**8-20-405. Minimum standards.** (1) The design, construction, location, installation, and operation of liquefied petroleum gas systems and equipment, and the transportation and handling of liquefied petroleum gas, and the odorization of liquefied petroleum gas, the degree thereof, and the odorizing agent to be used therein, shall conform to the minimum standards therefor as prescribed by the applicable sections of the 2001 edition of the national fire code published by the national fire protection association, as revised by the association from time to time. The minimum standards as prescribed in this section shall also apply to marine and pipeline terminals, natural gasoline plants, refineries, tank farms, underground storage facilities such as salt and coal mines, aboveground storage facilities, and to chemical plants utilizing liquefied petroleum gas in the manufacture of their

products. Copies of the pamphlets shall be kept and maintained in the office of the director of the division of oil and public safety at all times for examination by any interested person.

(2) Any changes to any standards promulgated by the national fire protection association after January 1, 2003, shall be reviewed by the director of the division of oil and public safety. After such review, the director may adopt such changes by rule.

**Source:** L. 63: p. 733, § 1. C.R.S. 1963: § 100-5-5. L. 67: p. 149, § 1. L. 73: p. 1069, § 8. L. 2001: Entire section amended, p. 1121, § 25, effective June 5. L. 2003: Entire section amended, p. 1826, § 15, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

#### ANNOTATION

**This section and § 8-20-411 do not apply to private individuals.** Where a home builder installed a 20-pound liquid petroleum tank in a crawl space to prevent water pipes from freezing during the construction of a home, the court

found that statutory provisions for handling liquid petroleum systems and equipment did not apply to the builder. *Trinity Universal Ins. Co. v. Streza*, 8 P.3d 613 (Colo. App. 2000).

**8-20-406. Submittal of plans.** (1) Plans for all installations utilizing liquefied petroleum gas storage containers of over two thousand gallons water capacity shall be submitted to the director of the division of oil and public safety for approval before construction of such installations begins.

(2) Plans for any of the following shall be submitted to the director of the division of oil and public safety for approval before installation:

- (a) Service stations supplying liquefied petroleum gas for motor fuel;
- (b) Installations for filling of cylinders (bottles) or other portable containers meeting surface transportation board specifications;
- (c) Industrial bulk storage installations and all other bulk storage installations utilizing storage containers for liquefied petroleum gas of over two thousand gallons aggregate water capacity.

**Source:** L. 63: p. 733, § 2. C.R.S. 1963: § 100-5-6. L. 2001: (1) and IP(2) amended, p. 1121, § 26, effective June 5; (2)(b) amended, p. 1266, § 3, effective June 5.

**8-20-407. Reports of accidents.** (1) Reports of accidents, fires, explosions, injuries, damage to property, or loss of life at installations using liquefied petroleum gas shall be reported to the director of the division of oil and public safety within twenty-four hours after their occurrence.

(2) Subsection (1) of this section includes accidents resulting from the improper use of equipment, appliances, and appurtenances to liquefied petroleum gas systems. The director of the division of oil and public safety may, at his or her discretion, investigate such occurrences and shall maintain a written record of his or her findings, which shall be available to public examination.

**Source:** L. 63: p. 734, § 3. C.R.S. 1963: § 100-5-7. L. 2001: Entire section amended, p. 1121, § 27, effective June 5.

#### ANNOTATION

**Law reviews.** For article, "Regulation of Spill of Hazardous Materials", see 12 Colo. Law. 277 (1983).



**8-20-408. Meter inspection.** (1) No person, firm, partnership, or corporation shall use a liquefied petroleum gas liquid metering system for the sale of liquefied petroleum gas unless the system has been inspected, approved, and sealed by the director of the division of oil and public safety. Operation or use of a liquefied petroleum gas liquid metering system that has not been properly inspected and sealed constitutes a violation of sections 8-20-405 to 8-20-411, except under the circumstances outlined in subsection (2) of this section.

(2) The director of the division of oil and public safety shall be notified immediately when a new metering system is placed in service or when the seal on an operating metering system is broken for any purpose. Such systems may be operated on a temporary basis until reinspected and sealed by the director of the division of oil and public safety. Upon such notification, it is the responsibility of the director of the division of oil and public safety to make a field inspection within a reasonable period of time.

**Source:** L. 63: p. 734, § 4. C.R.S. 1963: § 100-5-8. L. 2001: Entire section amended, p. 1121, § 28, effective June 5. L. 2003: (1) amended, p. 1826, § 16, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (1), see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-409. Requirements for appliances.**

(1) (Deleted by amendment, L. 2003, p. 1827, § 17, effective May 21, 2003.)

(2) Appliances and components shall not be used or installed unless certified by or listed in standards established by rules promulgated by the director of the division of oil and public safety pursuant to section 8-20-102.

**Source:** L. 63: p. 734, § 5. C.R.S. 1963: § 100-5-9. L. 2001: (2) amended, p. 1122, § 29, effective June 5. L. 2003: Entire section amended, p. 1827, § 17, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-410. Tank delivery truck, semitrailer, or truck trailer for bulk storage.** No tank delivery truck, semitrailer, or truck trailer shall be used as a bulk storage plant for liquefied petroleum gas unless the same has been inspected and approved by the director of the division of oil and public safety.

**Source:** L. 63: p. 735, § 6. C.R.S. 1963: § 100-5-10. L. 2001: Entire section amended, p. 1122, § 30, effective June 5.

**8-20-411. Location and charging of containers.** (1) Permanently installed American petroleum institute-American society of mechanical engineers or United States department of transportation containers or surface transportation board containers provided with excess flow or back-flow check valves shall be located and filled in accordance with the applicable requirements of basic rules of the national fire code described in section 8-20-405. Private streets, roads, or rights-of-way shall not be classed as public streets or highways for the purpose of sections 8-20-405 to 8-20-411.

(2) DOT containers not provided with excess flow or back-flow check valves shall not be filled within the limits or boundaries of an area in which two or more mobile vehicles are situated. Such containers shall be filled in accordance with the applicable provisions of basic rules and of the national fire code, at a properly equipped container filling plant. Such plant shall be located at least fifty feet from the nearest trailer, important building, or line of property that may be built upon, and at least twenty-five feet from any public road, street, or highway. Such filling plant shall be enclosed by man-proof fencing or otherwise protected from tampering or physical damage. The area shall be kept locked when unattended.

(3) Container charging operations shall be performed only by qualified personnel.

**Source:** L. 63: p. 735, § 7. C.R.S. 1963: § 100-5-11. L. 2001: (1) and (2) amended, p. 1266, § 4, effective June 5. L. 2003: (1) amended, p. 1827, § 18, effective May 21. L. 2005: (2) amended, p. 1348, § 20, effective August 8.

**Cross references:** For the legislative declaration contained in the 2003 act amending subsection (1), see section 1 of chapter 279, Session Laws of Colorado 2003.

#### ANNOTATION

**This section and § 8-20-405 do not apply to private individuals.** Where a home builder installed a 20-pound liquid petroleum tank in a crawl space to prevent water pipes from freezing during the construction of a home, the court

found that statutory provisions for handling liquid petroleum systems and equipment did not apply to the builder. *Trinity Universal Ins. Co. v. Streza*, 8 P.3d 613 (Colo. App. 2000).

#### **8-20-412. Violations of sections 8-20-405 to 8-20-414. (Repealed)**

**Source:** L. 63: p. 735, § 8. C.R.S. 1963: § 100-5-12. L. 74: Entire section amended, p. 417, § 59, effective April 11. L. 2003: Entire section repealed, p. 1827, § 19, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act repealing this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-413. Specifications of liquefied petroleum gas as defined in GPA 2140.** (1) Liquefied petroleum gas shall comply with the specifications of GPA 2140, "liquefied petroleum gas specification", as revised as of January 1, 2003, including revisions that refer to ASTM international test of specifications.

(2) (Deleted by amendment, L. 2003, p. 1827, § 20, effective May 21, 2003.)

(3) Any changes to any standards promulgated by the GPA after January 1, 2003, shall be reviewed by the director of the division of oil and public safety. After such review, the director may adopt any such changes by rule.

**Source:** L. 73: p. 1069, § 9. C.R.S. 1963: § 100-5-13. L. 91: Entire section amended, p. 1345, § 1, effective April 19. L. 2003: Entire section amended, p. 1827, § 20, effective May 21.

**Cross references:** For the legislative declaration contained in the 2003 act amending this section, see section 1 of chapter 279, Session Laws of Colorado 2003.

**8-20-414. Restrictions on use of butane and butane-propane mixtures.** Liquefied petroleum gas containing more than five percent liquid volume butane or butylenes shall be designated as butane-propane mixtures and shall be sold for use only in those applications approved by the director of the division of oil and public safety and for which special use permits have been granted.

**Source:** L. 73: p. 1069, § 9. C.R.S. 1963: § 100-5-14. L. 2001: Entire section amended, p. 1122, § 31, effective June 5.

**8-20-415. Liability limited.** (1) No legal action shall be commenced or maintained against any person engaged in this state in the business of selling at retail, supplying, handling, or transporting liquefied petroleum gas if the alleged injury, damage, or loss was caused by:



(a) The alteration, modification, or repair of liquefied petroleum gas equipment or a liquefied petroleum gas appliance if the alteration, modification, or repair was done without the knowledge and consent of the liquefied petroleum gas seller, supplier, handler, or transporter; or

(b) The use of liquefied petroleum gas equipment or a liquefied petroleum gas appliance in a manner or for a purpose other than that for which the equipment or appliance was intended and that could not reasonably have been expected.

(2) A person who follows the applicable procedures established by the standards of the national fire code pursuant to section 8-20-405 as adopted by the director of the division of oil and public safety and rules promulgated pursuant to section 8-20-402 shall not be deemed to be grossly negligent or willful and wanton.

**Source: L. 2004:** Entire section added, p. 616, § 1, effective August 4.

## PART 5

### UNDERGROUND STORAGE TANKS

#### 8-20-501 to 8-20-513. (Repealed)

**Source: L. 95:** Entire part repealed, p. 420, § 12, effective July 1.

**Editor's note:** This part 5 was added in 1989. For amendments to this part 5 prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** For current provisions concerning underground storage tanks, see part 2 of article 20.5 of this title.

## PART 6

### UNDERGROUND STORAGE TANK INSTALLERS

#### 8-20-601 to 8-20-608. (Repealed)

**Source: L. 95:** Entire part repealed, p. 420, § 12, effective July 1.

**Editor's note:** This part 6 was added in 1989. For amendments to this part 6 prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

## PART 7

### ABOVEGROUND STORAGE TANKS

#### 8-20-701 to 8-20-705. (Repealed)

**Source: L. 95:** Entire part repealed, p. 420, § 12, effective July 1.

**Editor's note:** This part 7 was added in 1990. For amendments to this part 7 prior to its repeal in 1995, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

**Cross references:** For current provisions concerning aboveground storage tanks, see part 3 of article 20.5 of this title.

## PART 8

## COLORADO ANTIFREEZE LAW

**Editor's note:** This part 8 was added with relocations in 1994 containing relocated provisions of some sections formerly located in part 1 of article 10 of title 42. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

**8-20-801. Short title.** This part 8 shall be known and may be cited as the "Colorado Antifreeze Law".

**Source: L. 94:** Entire part added with relocations, p. 2536, § 2, effective January 1, 1995.

**Editor's note:** This section is similar to former § 42-10-101 as it existed prior to 1994.

**8-20-802. Definitions.** As used in this part 8, unless the context otherwise requires:

(1) "Antifreeze" means all substances and preparations intended for use as the cooling medium, or to be added to the cooling liquid, in the cooling system of internal combustion engines to prevent freezing of the cooling liquid or to lower its freezing point.

(2) "Person" means individuals, partnerships, corporations, companies, and associations.

**Source: L. 94:** Entire part added with relocations, p. 2536, § 2, effective January 1, 1995.

**Editor's note:** This section is similar to former § 42-10-102 as it existed prior to 1994.

**8-20-803. Annual inspection of sample - permit authorizing sale - reinspection.**

(1) Before any antifreeze is sold, exposed for sale, or held with intent to sell within this state, a sample thereof must be inspected annually by the director of the division of oil and public safety at an inspection laboratory designated by the director of the division of oil and public safety. Upon application of the manufacturer, packer, seller, or distributor, and the payment of a fee not to exceed twenty-five dollars for each sample of antifreeze submitted, the director of the division of oil and public safety shall inspect the antifreeze submitted as set forth in this subsection (1), but in no case shall an approved antifreeze be inspected more than one time for each antifreeze marketing year beginning May 1 and ending April 30, except as set forth in this section.

(2) If the antifreeze is not adulterated or misbranded, meets the standards of the director of the division of oil and public safety, and is not in violation of this part 8, the director of the division of oil and public safety shall give the applicant a written permit authorizing the sale by any person of such antifreeze in this state for the marketing year for which the inspection fee is paid. If the director of the division of oil and public safety at a later date finds that the product to be sold, exposed for sale, or held with intent to sell has been materially altered or adulterated, or that a change has been made in the name, brand, or trademark under which the antifreeze is sold, or that it violates the provisions of this part 8, the director of the division of oil and public safety shall notify the applicant and the permit shall be cancelled.

(3) In the event a manufacturer, packer, seller, or distributor changes the composition, content, or formula of any antifreeze which the manufacturer, packer, seller, or distributor is marketing under a permit from the director of the division of oil and public safety, it is the duty of said manufacturer, packer, seller, or distributor to immediately notify the director of the division of oil and public safety and submit a sample for test in compliance with this section.

**Source: L. 94:** Entire part added with relocations, p. 2536, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1122, § 32, effective June 5.

**Editor's note:** This section is similar to former § 42-10-103 as it existed prior to 1994.



**8-20-804. When deemed adulterated.** (1) An antifreeze shall be deemed to be adulterated:

(a) If it consists in whole or in part of any substances which will render it injurious to the cooling system of an internal combustion engine or will make the operation of any internal combustion engine dangerous to the user; or

(b) If its strength, quality, or purity falls below the standard of strength, quality, or purity under which it is sold.

**Source: L. 94:** Entire part added with relocations, p. 2537, § 2, effective January 1, 1995.

**Editor's note:** This section is similar to former § 42-10-104 as it existed prior to 1994.

**8-20-805. When deemed misbranded.** (1) Antifreeze shall be deemed to be misbranded:

(a) If its labeling is false or misleading in any particular; or

(b) If in package form it does not bear a label containing the name and place of business of the manufacturer, packer, seller, or distributor, and an accurate statement of the quantity of the contents in terms of weight or measure on the outside of the package.

**Source: L. 94:** Entire part added with relocations, p. 2537, § 2, effective January 1, 1995.

**Editor's note:** This section is similar to former § 42-10-105 as it existed prior to 1994.

**8-20-806. Director to enforce.** The director of the division of oil and public safety shall enforce the provisions of this part 8 by inspections, chemical analysis, or any other appropriate methods. All samples for inspection or analysis shall be taken from the stocks in the state or intended for sale in the state, or the director of the division of oil and public safety, through his or her agents, may call upon the manufacturer or distributor applying for an inspection of antifreeze to supply such samples thereof for analysis. The director of the division of oil and public safety, or his or her agents, shall have free access during business hours to all places of business, buildings, vehicles, cars, and vessels used in the manufacture, transportation, sale, or storage of any antifreeze, and may open any box, carton, parcel, or package containing or supposed to contain any antifreeze and may take samples for analysis.

**Source: L. 94:** Entire part added with relocations, p. 2537, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1123, § 33, effective June 5.

**Editor's note:** This section is similar to former § 42-10-106 as it existed prior to 1994.

**8-20-807. Rules.** The director of the division of oil and public safety has authority to promulgate such rules as are necessary to promptly and effectively enforce the provisions of this part 8.

**Source: L. 94:** Entire part added with relocations, p. 2537, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1123, § 34, effective June 5.

**Editor's note:** This section is similar to former § 42-10-107 as it existed prior to 1994.

**8-20-808. List of brands may be furnished.** The director of the division of oil and public safety may furnish, upon request, a list of the brands and trademarks of antifreeze inspected by the director during the marketing year that have been found to be in accord with this part 8.

**Source: L. 94:** Entire part added with relocations, p. 2537, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1123, § 35, effective June 5.

**Editor's note:** This section is similar to former § 42-10-108 as it existed prior to 1994.

**8-20-809. False advertising prohibited.** No advertising literature relating to any antifreeze in this state shall contain any statement that the antifreeze advertised for sale has been approved by the director of the division of oil and public safety unless the said antifreeze has been inspected by the director of the division of oil and public safety and found to meet the standards of the division of oil and public safety and not to be in violation of this part 8, in which case such statement may be contained in any advertising literature where such brand or trademark of antifreeze is being advertised for sale.

**Source: L. 94:** Entire part added with relocations, p. 2538, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1124, § 36, effective June 5.

**Editor's note:** This section is similar to former § 42-10-109 as it existed prior to 1994.

**8-20-810. District attorney to bring actions.** Whenever the director of the division of oil and public safety discovers any antifreeze is being sold or has been sold in violation of this part 8, it is the director's duty to bring this violation to the attention of the district attorney in the director's respective district, or the attorney general in cases where the district attorney refuses to act, to enforce the provisions of this part 8 by appropriate action in courts of competent jurisdiction.

**Source: L. 94:** Entire part added with relocations, p. 2538, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1124, § 37, effective June 5.

**Editor's note:** This section is similar to former § 42-10-110 as it existed prior to 1994.

**8-20-811. Disposition of fees.** All fees provided for in this part 8 shall be collected by the department of revenue and remitted to the state treasurer to be credited to the general fund of the state.

**Source: L. 94:** Entire part added with relocations, p. 2538, § 2, effective January 1, 1995.

**Editor's note:** This section is similar to former § 42-10-111 as it existed prior to 1994.

**8-20-812. Penalty.** If any person violates the provisions of this part 8, or fails to comply with any of the provisions of this part 8, such person is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars for each offense.

**Source: L. 94:** Entire part added with relocations, p. 2538, § 2, effective January 1, 1995.

**Editor's note:** This section is similar to former § 42-10-112 as it existed prior to 1994.

## PART 9

### BRAKE FLUID

**Editor's note:** This part 9 was added with relocations in 1994 containing relocated provisions of some sections formerly located in part 2 of article 10 of title 42. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.



**8-20-901. Sale of approved brake fluid.** It is unlawful for any person, partnership, corporation, or association to sell or offer for sale brake fluid for automotive use which has not been approved by the director of the division of oil and public safety.

**Source: L. 94:** Entire part added with relocations, p. 2538, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1124, § 38, effective June 5.

**Editor's note:** This section is similar to former § 42-10-201 as it existed prior to 1994.

**8-20-902. Brake fluid specifications - list of approved brands.** The director of the division of oil and public safety shall establish specifications or requirements for approved-type brake fluid; but the specifications or requirements shall not be lower in standard than the specifications and requirements of the society of automotive engineers, numbered J-70 b, approved May, 1963. The director shall compile and furnish upon request a list of brands and trademarks of brake fluid inspected by the director that have been so approved.

**Source: L. 94:** Entire part added with relocations, p. 2538, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1124, § 39, effective June 5.

**Editor's note:** This section is similar to former § 42-10-202 as it existed prior to 1994.

**8-20-903. District attorney to bring actions.** Whenever the director of the division of oil and public safety discovers that any person, partnership, corporation, or association has sold or is offering for sale any brake fluid that does not conform to the minimum specifications established, the director shall notify the seller to immediately discontinue the sale of such nonconforming brake fluid. If such seller continues to offer the same for sale, it is the duty of the director to bring such violation to the attention of the district attorney in such respective district to enforce the provisions of this part 9 by appropriate action or injunctive relief in courts of competent jurisdiction.

**Source: L. 94:** Entire part added with relocations, p. 2538, § 2, effective January 1, 1995. **L. 2001:** Entire section amended, p. 1124, § 40, effective June 5.

**Editor's note:** This section is similar to former § 42-10-203 as it existed prior to 1994.

**8-20-904. Penalty.** If any person, partnership, corporation, or association violates the provisions of this part 9, or fails to comply with any of the provisions of this part 9, such person, partnership, corporation, or association is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars for each offense.

**Source: L. 94:** Entire part added with relocations, p. 2539, § 2, effective January 1, 1995.

**Editor's note:** This section is similar to former § 42-10-204 as it existed prior to 1994.

## PART 10

### AMUSEMENT RIDES

**8-20-1001. Definitions.** As used in this part 10, unless the context otherwise requires:

- (1) "Amusement ride" means a ride or device, or a combination of rides or devices, as defined by rule of the division; except that "amusement ride" shall not include inflatable amusement rides.

- (2) "Certificate of inspection" means documentation of an amusement ride inspection conducted by an inspector.

(3) "Director" means the director of the division or his or her designee.

(4) "Division" means the division of oil and public safety within the department of labor and employment.

(5) "Injury" means an injury that results in death or requires medical treatment administered by a physician or by registered professional personnel under the standing orders of a physician. For purposes of this subsection (5), "medical treatment" does not include first aid treatment or one-time treatment and subsequent observation of minor scratches, cuts, burns, splinters, or other minor injuries that do not ordinarily require medical care even though treatment is provided by a physician or by registered professional personnel.

(6) "Inspection" means a procedure conducted by an inspector to determine whether an amusement ride is being constructed, assembled, maintained, tested, operated, or inspected in accordance with the division's standards, the manufacturer's standards and criteria, or the insurer's standards, whichever is the most stringent, and that determines the current operational safety of the amusement ride.

(7) "Inspector" means a person certified to inspect amusement rides under criteria determined by rule of the division.

(8) "Operator" means an individual, corporation, or company or agent thereof who owns or controls, or has the duty to control, the operation of an amusement ride.

(9) "Registration" means the filing of a properly completed application with the division and approval of the application by the director.

**Source: L. 2008:** Entire part added, p. 1021, § 3, effective May 21.

**8-20-1002. Duties of director - standards - certification of inspectors - fees - rules.**

(1) The director shall promulgate rules for the registration, construction, repair, and maintenance of amusement rides and for the financial responsibility of operators. The rules shall require operators to submit a periodic certificate of inspection to the division for each amusement ride. The director shall establish minimum standards for the certification of inspectors and shall require each operator to submit the inspector's qualifications to the division with an annual registration application. The inspector for each amusement ride shall be an independent third-party inspector.

(2) The director shall establish annual registration fees by rule to cover the costs of the division's oversight of amusement rides. All fees collected by the division pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the public safety inspection fund created by section 8-1-151.

(3) The director may prohibit the operation of an amusement ride that does not meet the registration, construction, repair, inspection, and maintenance requirements established by the division pursuant to subsection (1) of this section.

**Source: L. 2008:** Entire part added, p. 1022, § 3, effective May 21.

**8-20-1003. Notification to division.** (1) The operator of an amusement ride shall notify the division, within such times and in such manner as established by rule of the director, regarding:

- (a) Any injury caused by an equipment failure of an amusement ride;
- (b) The installation of any new amusement rides; and
- (c) The schedule for the location of the operation of amusement rides.

**Source: L. 2008:** Entire part added, p. 1022, § 3, effective May 21.

**8-20-1004. Rules.** The director has the authority to promulgate rules as necessary for the implementation of this part 10.

**Source: L. 2008:** Entire part added, p. 1022, § 3, effective May 21.



ARTICLE 20.5  
Petroleum Storage Tanks

**Editor's note:** This article was added with relocations in 1995 containing relocated provisions of some sections formerly located in parts 5, 6, and 7 of article 20 of this title and article 18 of title 25. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated.

PART 1		8-20.5-205.	More stringent requirements prohibited.
ADMINISTRATION		8-20.5-206.	Financial responsibility for petroleum underground storage tanks.
8-20.5-101.	Definitions.		
8-20.5-102.	Registration - fees.	8-20.5-207.	Financial responsibility for regulated substances other than petroleum.
8-20.5-103.	Petroleum storage tank fund - creation - rules - repeal.		
8-20.5-104.	Rules - petroleum storage tank committee.	8-20.5-208.	Reporting of releases - investigation.
8-20.5-105.	Confidentiality.	8-20.5-209.	Regulated substances releases - corrective actions.
8-20.5-106.	Injunctions.		
8-20.5-107.	Enforcement orders - civil penalties.	PART 3	
8-20.5-108.	Petroleum storage tank administration - transfer to department of labor and employment - legislative declaration.	ABOVEGROUND STORAGE TANKS	
		8-20.5-301.	Legislative declaration.
		8-20.5-302.	Duties of director of division of oil and public safety.
		8-20.5-303.	Financial responsibility for aboveground storage tanks.
		8-20.5-304.	Regulated substances releases - corrective actions.
PART 2			
UNDERGROUND STORAGE TANKS			
8-20.5-201.	Legislative declaration.		
8-20.5-202.	Duties of director of division of oil and public safety.	PART 4	
8-20.5-203.	Performance of duties by owner or operator.	UNDERGROUND STORAGE TANKS INSTALLERS	
8-20.5-204.	Installation and upgrading of underground storage tanks.	8-20.5-401 to 8-20.5-407.	(Repealed)

PART 1  
ADMINISTRATION

**8-20.5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Abandoned tank" means an underground or aboveground petroleum storage tank that the current tank owner or operator or current property owner did not install, has never operated or leased to another for operation, and had no reason to know was present on the site at the time of site acquisition.

(2) (a) "Aboveground storage tank" means any one or a combination of containers, vessels, and enclosures, including structures and appurtenances connected to them, constructed of nonearthen materials, including but not limited to concrete, steel, or plastic, which provide structural support, used to contain or dispense fuel products and the volume of which, including the pipes connected thereto, is ninety percent or more above the surface of the ground.

(b) "Aboveground storage tank" does not include:

(I) A wastewater treatment tank system that is part of a wastewater treatment facility;

(II) Equipment or machinery that contains regulated substances for operational purposes;

(III) (A) Farm and residential tanks or tanks used for horticultural or floricultural operations.

(B) Nothing in sub-subparagraph (A) of this subparagraph (III), as amended by House Bill 05-1180, as enacted at the first regular session of the sixty-fifth general assembly, shall be construed as changing the property tax classification of property owned by a horticultural or floricultural operation.

(IV) Aboveground storage tanks located at natural gas pipeline facilities that are regulated under state or federal natural gas pipeline acts;

(V) Aboveground storage tanks associated with natural gas liquids separation, gathering, and production;

(VI) Aboveground storage tanks associated with crude oil production, storage, and gathering;

(VII) Aboveground storage tanks at transportation-related facilities regulated by the federal department of transportation;

(VIII) Aboveground storage tanks used to store heating oil for consumptive use on the premises where stored;

(IX) Aboveground storage tanks used to store flammable and combustible liquids at mining facilities and construction and earthmoving projects, including gravel pits, quarries, and borrow pits where, in the opinion of the director of the division of oil and public safety, tight control by the owner or contractor and isolation from other structures make it unnecessary to meet the requirements of this article;

(X) Any other aboveground tank excluded by regulation.

(2.5) "Alternative fuel" means a motor fuel that combines petroleum-based fuel products with renewable fuels.

(3) "Closure" means the abandonment of an underground storage tank in place or the removal and disposal of an underground storage tank.

(4) "Department" means the department of labor and employment, created in section 24-1-121, C.R.S.

(5) "Designee" means a qualified municipality, city, home rule city, city and county, county, fire protection district, or any other political subdivision of the state, including a county or district public health agency created pursuant to section 25-1-506, C.R.S., which county or district public health agency is acting under agreement or contract with the department for the implementation of the provisions of this article.

(5.5) "Fee lands" means land owned in fee simple within the exterior boundaries of the Southern Ute Indian reservations in Colorado. "Fee land" does not mean land owned by an Indian tribe or the federal government or held in trust by the federal government for the use or benefit of an Indian tribe or its members.

(6) "Fuel products" means all gasoline, aviation gasoline, diesel, aviation turbine fuel, jet fuel, fuel oil, biodiesel, biodiesel blends, kerosene, all alcohol blended fuels, gas or gaseous compounds, and other volatile, flammable, or combustible liquids, produced, compounded, and offered for sale or used for the purpose of generating heat, light, or power in internal combustion engines or fuel cells, for cleaning or for any other similar usage.

(7) "Municipality" means any city or any town operating under general or special laws of the state of Colorado or any home rule city or town, the charter or ordinances of which contain no provisions inconsistent with the provisions of part 3 of this article.

(8) "Operator" means any person in control of, or having responsibility for, the operation of an underground or aboveground storage tank.

(9) "Orphan tank" means an underground storage tank which is:

(a) Owned or operated by an unidentified owner as defined in this article; or

(b) No longer in use and was not closed in accordance with the procedures required by this article and the property has changed ownership prior to December 22, 1988, and such property is no longer used to dispense fuels.

(10) (a) "Owner" means:

(I) In the case of an underground storage tank in use on or after November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances;



(II) In the case of an underground storage tank in use before November 8, 1984, but no longer in use on or after November 8, 1984, any person who owned such tank immediately before the discontinuation of its use; or

(III) Any person who owns an aboveground storage tank.

(b) For purposes of corrective action for petroleum releases, the term "owner" does not include any person who, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect a security interest in or lien on the tank or the property where the tank is located.

(11) "Person" means any individual, trust, firm, joint-stock company, corporation (including a government corporation), partnership, association, commission, municipality, state, county, city and county, political subdivision of a state, interstate body, consortium, joint venture, commercial entity, or the government of the United States.

(12) "Property owner" means a person having a legal or equitable interest in real or personal property that is subject to this article.

(13) "Regulated substance" means:

(a) Any substance defined in section 101 (14) of the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", as amended, but not including any substance regulated as a hazardous waste under subtitle (C) of Title II of the federal "Resource Conservation and Recovery Act of 1976", as amended;

(b) Petroleum, including crude oil, and crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute);

(c) Alternative fuel; or

(d) Renewable fuel.

(14) "Release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of a regulated substance from an underground storage tank into groundwater, surface water, or subsurface soils.

(14.5) "Renewable fuel" means a motor vehicle fuel that is produced from plant or animal products or wastes, as opposed to fossil fuel sources.

(15) "Reportable quantities" means quantities of a released regulated substance which equal or exceed the reportable quantity under the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", as amended, and petroleum products in quantities of twenty-five gallons or more.

(16) "Tank" means a stationary device designed to contain an accumulation of a regulated substance, constructed primarily of nonearthen materials which provide structural support including, but not limited to, wood, concrete, steel, or plastic.

(17) (a) "Underground storage tank" means any one or combination of tanks, including underground pipes connected thereto, except those identified in paragraph (b) of this subsection (17), that is used to contain an accumulation of regulated substances and the volume of which, including the volume of underground pipes connected thereto, is ten percent or more beneath the surface of the ground.

(b) "Underground storage tank" does not include:

(I) Any farm or residential tank with a capacity of one thousand one hundred gallons or less used for storing motor fuel for noncommercial purposes;

(II) Any tank used for storing heating oil for consumptive use on the premises where stored;

(III) Any septic tank;

(IV) Any pipeline facility, including its gathering lines, regulated under the federal "Natural Gas Pipeline Safety Act of 1968", as amended, or the federal "Hazardous Liquid Pipeline Safety Act of 1979", as amended, or regulated under Colorado law if such facility is an intrastate facility;

(V) Any surface impoundment, pit, pond, lagoon, or landfill;

(VI) Any storm-water or wastewater collection system;

(VII) Any flow-through process tank;

(VIII) Any liquid trap or associated gathering lines directly related to oil or gas production and gathering operations;

(IX) Any storage tank situated in an underground area, such as a basement, cellar, mine-working, drift, shaft, or tunnel area, if the tank is situated upon or above the surface of the floor;

(X) Any pipes connected to any tank described in subparagraphs (I) to (IX) of this paragraph (b); or

(XI) Any other underground tank excluded by regulation.

(18) "Upgrade" means the addition or retrofit of some systems such as cathodic protection, lining, modification of the system piping, or spill and overfill controls to improve the ability of a petroleum storage tank system to prevent the release of product.

**Source:** **L. 95:** Entire article added, p. 389, § 1, effective July 1. **L. 96:** (1) and (2)(b) amended and (17)(b)(XI) added, pp. 710, 711, §§ 2, 3, effective May 15. **L. 2001:** (2)(b)(IX) amended, p. 1125, § 41, effective June 5. **L. 2005:** (5.5) added, p. 418, § 4, effective July 1; (2)(b)(III) amended, p. 347, § 2, effective August 8; (6) amended, p. 1348, § 21, effective August 8. **L. 2007:** (2.5) and (14.5) added and (13) amended, p. 1760, §§ 3, 4, effective June 1. **L. 2008:** (5) amended, p. 2051, § 4, effective July 1. **L. 2009:** (13)(a) amended, (SB 09-292), ch. 369, p. 1939, § 6, effective August 5.

**Editor's note:** This section is similar to §§ 8-20-501, 8-20-601, 8-20-702, and 25-18-102 as they existed prior to 1995.

**Cross references:** For the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", see Pub.L. 96-510, codified at 42 U.S.C. § 9601 et seq. For the federal "Resource Conservation and Recovery Act of 1976", see Pub.L. 94-580, codified at 42 U.S.C. § 6901 et seq.

**8-20.5-102. Registration - fees.** (1) Each owner or operator of an underground or aboveground storage tank shall register such tank with the director of the division of oil and public safety within thirty days after the first day on which the tank is actually used to contain a regulated substance or, in the case of an aboveground storage tank, on or before July 1, 1993, or, thereafter, within thirty days after the first day on which the tank is actually used to contain a regulated substance. Each owner or operator shall renew such registration annually on or before the calendar day and month of initial registration for each year in which the storage tank is in use. An underground storage tank is considered to be in use at all times, except when the tank has been either removed from the ground or permanently closed in accordance with the rules promulgated pursuant to section 8-20.5-202 (1.5) that relate to the closure of such tanks.

(2) To register or renew registration of an underground or aboveground storage tank, the owner or operator of the tank shall submit to the director of the division of oil and public safety a completed registration or renewal form and payment of the fee established in subsection (3) of this section. The director of the division of oil and public safety shall provide registration and renewal forms.

(3) The registration and renewal fee shall be thirty-five dollars for each tank for each year. The fees collected pursuant to this subsection (3) shall be credited to the petroleum storage tank fund created in section 8-20.5-103.

(4) The director of the division of oil and public safety shall collect delinquent registration and renewal fees and assess a penalty of up to twice the amount of such fees and reasonable costs associated with the collection of such fees.

**Source:** **L. 95:** Entire article added, p. 392, § 1, effective July 1. **L. 2001:** (1), (2), and (4) amended, p. 1125, § 42, effective June 5. **L. 2007:** (4) amended, p. 386, § 2, effective April 3; (1) amended, p. 981, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-20-506 as it existed prior to 1995.

**8-20.5-103. Petroleum storage tank fund - creation - rules - repeal.** (1) There is hereby created in the state treasury the petroleum storage tank fund, which shall be an enterprise fund. Such fund shall consist of the following:



- (a) Registration and annual renewal fees collected from owners or operators of above-ground and underground storage tanks pursuant to section 8-20.5-102 (3);
- (b) Civil penalties collected pursuant to section 8-20.5-107;
- (c) Fees collected pursuant to section 8-20.5-102 (4);
- (d) Surcharge funds collected pursuant to section 8-20-206.5;
- (e) Moneys reimbursed to the department in payment for costs incurred in the investigation of a release and performance of corrective action pursuant to section 8-20.5-209;
- (f) Any moneys appropriated to the fund by the general assembly;
- (g) Any moneys granted to the department from a federal agency for administration of the underground storage tank program; and
- (h) Moneys from bonds issued pursuant to subsection (8) of this section.

(2) (a) The moneys in the petroleum storage tank fund and all interest earned on moneys in the fund shall not be credited or transferred to the general fund at the end of the fiscal year.

(b) (I) Notwithstanding any provision of paragraph (a) of this subsection (2) to the contrary, on March 27, 2002, the state treasurer shall deduct four million dollars from the petroleum storage tank fund and transfer such sum to the general fund.

(II) In order to restore the amount transferred from the petroleum storage tank fund pursuant to subparagraph (I) of this paragraph (b), moneys from the general fund shall be transferred to the petroleum storage tank fund in accordance with section 24-75-217, C.R.S.

(3) The moneys in the petroleum storage tank fund shall be continuously appropriated to the division of oil and public safety; except that moneys for the purposes specified in paragraphs (b), (f), and (g) of this subsection (3) shall be subject to annual appropriation by the general assembly. The fund shall be used for:

(a) Petroleum corrective action purposes and third-party liability where the costs exceed the minimum financial responsibility requirements of the owner or operator provided for in section 8-20.5-206; except that moneys from the fund may not be used for initial abatement and corrective action regarding fuels that are especially prepared and sold for use in aircraft or railroad equipment or locomotives;

(b) Administrative costs, limited each year to the amount of the registration fee stated in section 8-20.5-102, including costs for contract services and costs related to the delegation of duties to units of local government which are incurred by the department of labor and employment in carrying out administrative responsibilities pursuant to this article;

(c) Any costs related to the abatement of fire and safety hazards as ordered by the director of the division of oil and public safety pursuant to section 8-20.5-208 (3);

(d) Investigation of releases or suspected releases and performance of corrective action for petroleum releases by the department or its designated agent pursuant to section 8-20.5-209;

(e) Any federal program pertaining to petroleum underground storage tanks, which program requires state-matching dollars;

(f) (I) Costs related to petroleum storage tank facility inspections and meter calibrations.

(II) This paragraph (f) is repealed, effective July 1, 2018.

(g) Administrative costs necessary for the implementation of this article and section 8-20-206.5.

(3.5) Moneys in the petroleum storage tank fund may be used as incentives to underground storage tank owners and operators to upgrade existing systems. The division of oil and public safety shall promulgate rules to implement this subsection (3.5).

(4) Appropriations of moneys out of the fund for the purpose of initial abatement response or for corrective action purposes in the cleanup of releases shall be used only for those stated purposes and shall not be used for any administrative costs incurred by the department. Any amounts used for initial abatement response or for corrective action purposes shall be reported annually to the general assembly and the joint budget committee.

(5) Subject to section 8-20.5-104, the fund shall be available only to those underground and aboveground storage tanks owners or operators who are in compliance with the provisions of section 8-20.5-209 and regulations promulgated pursuant to sections 8-20.5-202 and 8-20.5-302.

(6) Moneys in the petroleum storage tank fund shall not be used:

(a) Repealed.

(b) To fund any programs that are not specifically stated within this section.

(7) (a) Subject to sections 8-20.5-206 (6) and 8-20.5-303 (6), owners and operators of underground and aboveground storage tanks on fee lands shall be eligible for access to the fund if the tank owner or operator:

(I) Has registered such tanks pursuant to section 8-20.5-102 and paid the surcharges imposed by section 8-20-206.5;

(II) Can demonstrate that the owner or operator is in compliance with the rules promulgated pursuant to sections 8-20.5-202 and 8-20.5-302; and

(III) Can demonstrate that the owner or operator has complied with sections 8-20.5-209 and 8-20.5-304 and any other rules, policies, and procedures of the department concerning corrective action.

(b) Underground and aboveground storage tank owners and operators who have been denied access to the fund prior to July 1, 2005, based upon a determination that the tanks are on fee lands, are eligible to reapply for reimbursement from the fund if the application is filed prior to December 31, 2005, and is not barred by settlement or other agreement.

(c) Nothing in this subsection (7) shall be construed to modify the department's authority to regulate operation of or corrective action for underground and aboveground storage tanks on fee lands.

(8) The executive director of the department is authorized to issue bonds to reimburse assessment and corrective action costs to remediate petroleum contamination. The petroleum storage tank committee may temporarily raise such bonding limits in the event of extraordinary circumstances or environmental conditions.

**Source:** **L. 95:** Entire article added, p. 393, § 1, effective July 1. **L. 2000:** (3)(f) and (6) added, p. 1383, §§ 1, 2, effective May 30. **L. 2001:** (3)(c) amended, p. 1126, § 43, effective June 5. **L. 2002:** (2) amended, p. 150, § 2, effective March 27; (3)(f) amended, p. 950, § 1, effective August 7. **L. 2003:** (3)(g) added and (6)(a) repealed, p. 2665, §§ 3, 2, effective June 5. **L. 2005:** IP(1) amended and (1)(h) and (8) added, p. 1326, §§ 1, 2, effective July 1; (7) added, p. 416, § 1, effective July 1. **L. 2007:** IP(3), (3)(a), and (3)(f)(II) amended, p. 387, § 3, effective April 3; (3.5) added, p. 980, § 1, effective July 1. **L. 2010:** (3)(f)(II) amended, (HB 10-1185), ch. 82, p. 276, § 2, effective August 11.

**Editor's note:** This section is similar to former § 25-18-109 as it existed prior to 1995.

**8-20.5-104. Rules - petroleum storage tank committee.** (1) The governor shall appoint a petroleum storage tank committee, which shall consist of seven members who have technical expertise and knowledge in fields related to corrective actions taken to mitigate underground and aboveground storage tank releases. The director of the division of oil and public safety or the director's designee, the executive director of the department or the designee of the executive director, and an owner or operator shall be permanent members of the committee. The remaining four members of the committee shall be chosen from among the following groups, with no more than one member representing each group: Fire protection districts; elected local governmental officials; companies that refine and retail motor fuels in Colorado; companies that wholesale motor fuels in Colorado; owners and operators of independent retail outlets; companies that conduct corrective actions or install and repair underground and aboveground storage tanks; and private citizens or interest groups. The department shall provide staff to support the activities of the committee.

(2) Members of the committee shall serve three-year terms. All vacancies shall be filled by the governor to serve the remainder of the unexpired term.

(3) Members of the committee shall receive no additional salary or per diem reimbursement for their services as members of the committee, but shall be allowed travel and parking costs and maintenance expenses while on official committee business conducted more than one hundred miles from their respective residences.



(4) The committee shall be required to meet no more than twice in any month. The committee shall recommend all regulatory actions proposed by the committee to the director of the division of oil and public safety for adoption or ratification. The committee shall conduct the following activities in accordance with section 24-4-105, C.R.S., as its routine business:

(a) Establish procedures, practices, and policies governing the committee's activities;

(b) Review standards and regulations governing underground and aboveground storage tanks;

(c) Establish procedures, practices, and policies governing the form and procedures for applications to the petroleum storage tank fund for reimbursement compensation;

(d) (I) Establish procedures, practices, and policies governing any and all aspects of processing, adjusting, defending, or paying claims against the fund. To encourage tank owners and operators to report and remediate contamination and achieve compliance with rules promulgated by the director of the division of oil and public safety, the committee may approve claims involving tanks not operated in substantial compliance, but may also determine the amount, if any, by which such claims may be reduced for noncompliance. Before imposing any reduction for noncompliance the committee shall determine whether the rules issued by the director of the division of oil and public safety are both substantially and procedurally no more stringent than United States environmental protection agency regulations under 42 U.S.C. sec. 6991 and whether the areas of noncompliance were brought into compliance prior to application to the fund, where possible. The committee shall use the following guidelines when imposing a reduction for noncompliance:

(A) Up to a ten percent reduction for failure to register a tank;

(B) Up to a twenty-five percent reduction for improper release detection;

(C) Up to a ten percent reduction for improper release reporting;

(D) Up to a twenty percent reduction for improper out-of-service and closure.

(II) Nothing in this article shall be construed to require the committee to approve a claim involving substantial noncompliance. The committee shall establish specific criteria to define when denial for substantial noncompliance may be imposed.

(e) Establish priorities governing the types of corrective actions which shall be reimbursed from the fund;

(f) Review corrective action plans submitted pursuant to section 8-20.5-209, for which no agreement has been reached through informal conferences between the department and the owner or operator, and make a recommendation to the department, upon request from the department or the owner or the operator, as to the corrective action that is acceptable;

(g) Issue public notices and hold public hearings to obtain comment on the activities described in this subsection (4);

(h) (I) (A) Pay interest to all persons who file a properly and fully completed claim for reimbursement and are not reimbursed in a timely manner. For purposes of this paragraph (h), interest shall accrue on the amount approved for payment by the committee at the rate determined pursuant to section 39-21-110.5, C.R.S., for each day a properly and fully completed application is not processed in a timely manner.

(B) Notwithstanding this paragraph (h), if a claimant cannot be reimbursed in a timely manner because insufficient moneys in the petroleum storage tank fund prevent the issuance of a reimbursement check within thirty days after approval of the disbursement, interest shall not begin to accrue on the claim until thirty-one days after sufficient moneys are available in said fund.

(II) For purposes of this paragraph (h), "timely manner" means:

(A) That an application filed with the petroleum storage tank fund on or after January 1, 1996, shall be submitted for review by the committee within ninety working days of receipt;

(B) That an application filed with the petroleum storage tank fund on or after July 1, 1995, but before January 1, 1996, shall be submitted for review by the committee within one hundred twenty working days of receipt;

(C) That an application filed with the petroleum storage tank fund before July 1, 1995, shall be submitted for review by the committee no later than December 31, 1995;

(D) That reimbursement checks shall be issued within thirty days after disbursement is approved by the committee.

(5) The committee may, in order to perform any or all of its responsibilities and functions under subsection (4) of this section, contract for the use of outside experts, consultants, or services.

(6) Reductions determined by the committee because of noncompliance shall be cumulative and shall apply to all eligible costs approved by the committee in the initial and all supplemental claims for the occurrence as defined in section 8-20.5-206 (2); except that in no instance shall cumulative reductions for noncompliance apply to claims submitted in accordance with section 8-20.5-206 (3) or 8-20.5-303 (3).

(7) The reductions described in subsections (4) (d) and (6) of this section pertain to this section only and shall not be construed to have any impact on cost-recovery actions taken in accordance with section 8-20.5-209 or any civil or criminal penalties imposed as part of an enforcement proceeding.

(8) At its first meeting of each fiscal year, on or about July 1, the committee shall establish and set aside for reimbursements to those individuals who are eligible to make application to the fund in accordance with section 8-20.5-206 (3) or 8-20.5-303 (3), an amount equal to twenty percent of the total budget of the department from the petroleum storage tank fund, which amount shall be used for the purpose of conducting remediation activities in accordance with sections 8-20.5-206 (3), 8-20.5-209, and 8-20.5-303 (3) and shall protect the integrity of the fund as a financial assurance mechanism for tank owners and operators. The committee shall reexamine on a quarterly basis the unencumbered balance of this allocation and may set aside lesser or additional amounts for reimbursements to such applicants based on the relative number of requested reimbursements from the owners and operators of active sites, with preference given to the remediation of recently contaminated locations and to active tank sites based on their higher potential for environmental impact.

(9) The petroleum storage tank committee shall exercise its powers and perform its duties and functions specified by this section under the department of labor and employment and the executive director thereof as if the same were transferred to the department by a **type 1** transfer, as such transfer is defined in section 24-1-105, C.R.S.

**Source:** **L. 95:** Entire article added, p. 394, § 1, effective July 1. **L. 96:** (4)(h)(I) amended, p. 711, § 4, effective May 15. **L. 2001:** (1), IP(4), and IP(4)(d)(I) amended, p. 1126, § 44, effective June 5. **L. 2007:** (8) amended, p. 387, § 4, effective April 3.

**Editor's note:** This section is similar to former § 25-18-105 as it existed prior to 1995.

**8-20.5-105. Confidentiality.** (1) Any records, reports, and information obtained from any person under the provisions of this article shall be available to the public; except that any records granted confidentiality by the director of the division of oil and public safety or a designee, or granted confidentiality under existing Colorado statutes or rules, shall remain confidential.

(2) Any person making such confidential records available to any person or organization without authorization from the affected operator or owner commits a class 3 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.

(3) Confidential records may be disclosed to officers, employees, or authorized representatives of the state or of the United States who have been charged with administering this article or subtitle I of the federal "Resource Conservation and Recovery Act of 1976", as amended. Such disclosure shall not constitute a waiver of confidentiality.

**Source:** **L. 95:** Entire article added, p. 397, § 1, effective July 1. **L. 2001:** (1) amended, p. 1126, § 45, effective June 5. **L. 2002:** (2) amended, p. 1467, § 19, effective October 1.

**Editor's note:** This section is similar to former § 25-18-106 as it existed prior to 1995.



**Cross references:** (1) For the legislative declaration contained in the 2002 act amending subsection (2), see section 1 of chapter 318, Session Laws of Colorado 2002.

(2) For the "Resource Conservation and Recovery Act of 1976", as amended, see Pub.L. 94-580, codified at 42 U.S.C. § 6901 et seq.

**8-20.5-106. Injunctions.** In addition to the remedies provided in this article, the director of the division of oil and public safety is authorized to apply to the district court, in the judicial district where the violation has occurred, for a temporary or permanent injunction restraining any person from violating any provision of this article, regardless of whether there is an adequate remedy at law.

**Source:** **L. 95:** Entire article added, p. 398, § 1, effective July 1. **L. 2001:** Entire section amended, p. 1127, § 46, effective June 5.

**Editor's note:** This section is similar to former § 8-20-513 as it existed prior to 1995.

**8-20.5-107. Enforcement orders - civil penalties.** (1) A notice of violation may be issued by the director of the division of oil and public safety to any person who is believed to have violated any provision of this article, any rule promulgated pursuant thereto, or any warrant issued pursuant to section 8-20.5-208. The notice of violation shall be served personally or by certified mail, return receipt requested, upon the alleged violator.

(2) The notice of violation shall set forth the facts which allegedly constitute the violation and the provisions which have allegedly been violated of either this article or any regulation promulgated pursuant thereto. The notice of violation may require the alleged violator to take any actions necessary to correct the alleged violation.

(3) Within ten working days after service of the notice of violation, the alleged violator may file a written request with the director of the division of oil and public safety for an informal conference regarding the notice of violation. If the alleged violator fails to timely request an informal conference, all provisions of the notice of violation shall become final and not subject to further administrative review. The director of the division of oil and public safety may then seek judicial enforcement of the notice of violation.

(4) Upon receipt of the written request, the director of the division of oil and public safety shall provide the alleged violator with a written notice of the date, time, and place of the informal conference. The director of the division of oil and public safety or a designee shall preside at the informal conference, during which the alleged violator and the entity that issued the notice of violation may present information and arguments regarding the allegations and requirements of the notice of violation.

(5) Within twenty working days after the informal conference, the director of the division of oil and public safety shall uphold, modify, or strike the allegations of the notice of violation and may issue an enforcement order. The decision shall be served upon the alleged violator personally or by certified mail, return receipt requested. Such notice of violation or enforcement order may be appealed within twenty working days to the executive director of the department. The executive director may either conduct the hearing personally or appoint an administrative law judge from the office of administrative courts in the department of personnel to conduct the hearing. The executive director may review such decision in accordance with the provisions of section 24-4-105, C.R.S., and final agency action shall be determined in accordance with the provisions of said section. Such final agency action shall be subject to judicial review in accordance with section 24-4-106, C.R.S.

(6) The enforcement order may require the alleged violator to pay a civil penalty not to exceed five thousand dollars per tank for each day of violation.

(7) The director of the division of oil and public safety may file suit in the district court for the judicial district in which violations have occurred to obtain judicial enforcement of the provisions of any enforcement order. The petroleum storage tank fund may be subrogated to the rights of an owner or operator with respect to a claimed amount at the time a claim is filed with the fund.

**Source:** L. 95: Entire article added, p. 398, § 1, effective July 1; (5) amended, p. 634, § 12, effective July 1. L. 2001: (1), (3), (4), (5), and (7) amended, p. 1127, § 47, effective June 5. L. 2005: (5) amended, p. 853, § 8, effective June 1.

**Editor's note:** This section is similar to former § 8-20-512 as it existed prior to 1995.

**8-20.5-108. Petroleum storage tank administration - transfer to department of labor and employment - legislative declaration.** (1) (a) The general assembly hereby finds, determines, and declares that there is a significant backlog in the processing of claims being made against the petroleum storage tank fund. Claims for reimbursement for cleaning up petroleum contamination are not acted upon in a timely manner, which places the storage tank owner in financial jeopardy. Lenders are reluctant to write loans on contaminated property, causing the next phase of remediation to be delayed and allowing contamination to spread, threatening the environment and unnecessarily escalating future cleanup expenses.

(b) The general assembly further finds, determines, and declares that it is in the best interest of this state to transfer petroleum storage tank administrative functions performed by the department of public health and environment to the department of labor and employment, and thereby consolidate the administration and regulation of petroleum storage tanks in this state under one department, which will minimize the cost of such functions and centralize management.

(2) (a) The administrative functions of the petroleum storage tank fund, including claims processing, corrective action plan review and approval, and any other responsibilities for petroleum storage tank programs performed by the department of public health and environment prior to July 1, 1995, are transferred to the department of labor and employment. All employees of the department of public health and environment, excluding any contract labor, who perform the functions transferred pursuant to this subsection (2) and whose employment in the department of labor and employment is deemed necessary by the executive director of the said department are transferred to the department of labor and employment and shall become employees thereof.

(b) Such employees shall retain all rights to the state personnel system and retirement benefits under the laws of this state, and their services shall be deemed to have been continuous. All transfers and any abolishment of positions in the state personnel system shall be made and processed in accordance with state personnel system laws and rules.

(c) On July 1, 1995, all items of property, real and personal, including office furniture and fixtures, books, documents, and records of the department of public health and environment pertaining to the duties and functions transferred to the department of labor and employment pursuant to this subsection (2) are transferred to the department of labor and employment and shall become the property of such department.

(3) Repealed.

**Source:** L. 95: Entire article added, p. 399, § 1, effective July 1.

**Editor's note:** Subsection (3)(c) provided for the repeal of subsection (3), effective December 31, 1996. (See L. 95, p. 399.)

## PART 2

### UNDERGROUND STORAGE TANKS

**Law reviews:** For article, "Colorado New Underground Storage Tank Law", see 19 Colo. Law. 233 (1990); for article, "Availability of the Colorado UST Fund to Property Owners and Mortgagees", see 23 Colo. Law. 873 (1994).

**8-20.5-201. Legislative declaration.** The general assembly hereby finds and declares that the leakage of regulated substances from underground storage tanks constitutes a potential threat to the waters and the environment of the state of Colorado and presents a



potential menace to the public health, safety, and welfare of the people of the state of Colorado and that, to that end, it is the purpose of this part 2 to establish a program for the protection of the environment and of the public health and safety by preventing and mitigating the contamination of the subsurface soil, groundwater, and surface water which may result from leaking underground storage tanks.

**Source: L. 95:** Entire article added, p. 400, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-20-501 as it existed prior to 1995.

**8-20.5-202. Duties of director of division of oil and public safety.** (1) The director of the division of oil and public safety shall promulgate and enforce rules that are no more stringent than the requirements contained in 42 U.S.C. sec. 6991 et seq., and the regulations promulgated thereunder, except as allowed by federal law, including the federal "Energy Policy Act of 2005", Pub.L. 109-58, as amended, for:

- (a) Notification requirements for owners and operators of underground storage tanks;
- (b) Design, performance, construction, and installation standards for new underground storage tanks;
- (c) Design, performance, construction, and installation standards for the upgrading of existing underground storage tanks;
- (d) General operating requirements;
- (e) Release detection;
- (f) Release reporting, investigation, and confirmation; and
- (g) (Deleted by amendment, L. 2007, p. 980, § 2, effective July 1, 2007.)
- (h) Financial responsibility for underground storage tank systems containing regulated substances.

(1.5) The director of the division of oil and public safety shall promulgate and enforce rules for out-of-service underground storage tank systems and closure of such tanks.

(1.7) Within one hundred twenty days after January 1, 2008, the director of the division of oil and public safety shall promulgate, and the division shall enforce, rules concerning the placement of underground storage tanks that contain renewable fuels. Such rules shall be promulgated with the purpose of developing a uniform statewide standard of issuing permits for underground storage tanks to promote the use of renewable fuels so that the process of obtaining a permit for an underground storage tank that contains renewable fuels may be more efficient and affordable.

(2) The director of the division of oil and public safety shall ensure that:

- (a) All releases from underground storage tank systems are promptly assessed and that further releases are stopped;
  - (b) Actions are taken to identify, contain, and mitigate any immediate fire and safety hazards that are posed by a release;
  - (c) All releases from underground storage tank systems are investigated to determine if there are impacts of reportable quantities on subsurface soil, groundwater, and any nearby surface water;
  - (d) All releases above reportable quantities are reported to the director of the division of oil and public safety.
- (3) The director of the division of oil and public safety shall, if necessary, negotiate and enter into memoranda of agreement with and apply for and receive grants from the United States environmental protection agency pursuant to the provisions of this article.
- (4) The director of the division of oil and public safety shall establish criteria pursuant to subsection (1) of this section for delegation of authority to local agencies.
- (5) Repealed.

**Source: L. 95:** Entire article added, p. 401, § 1, effective July 1. **L. 97:** (5) repealed, p. 1474, § 8, effective June 3. **L. 2001:** IP(1), IP(2), (2)(d), (3), and (4) amended, p. 1128,

§ 48, effective June 5. **L. 2007:** IP(1) amended, p. 387, § 5, effective April 3; (1.7) added, p. 1760, § 5, effective June 1; IP(1) and (1)(g) amended and (1.5) added, p. 980, § 2, effective July 1.

**Editor's note:** (1) This section is similar to former § 8-20-503 as it existed prior to 1995.

(2) Amendments to the introductory portion to subsection (1) by Senate Bill 07-031 and Senate Bill 07-247 were harmonized.

**8-20.5-203. Performance of duties by owner or operator.** Duties imposed by this part 2 on the owner or the operator may be performed by either the owner or the operator. If neither the owner nor the operator performs the duties imposed by this part 2, both shall be considered in violation of this part 2.

**Source:** **L. 95:** Entire article added, p. 402, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-20-504 as it existed prior to 1995.

**8-20.5-204. Installation and upgrading of underground storage tanks.** (1) Plans for any installation of a new underground storage tank and plans for the complete upgrading of an existing underground storage tank shall be submitted by the owner or operator of the proposed or existing underground storage tank to the director of the division of oil and public safety for approval prior to such installation or upgrading.

(2) Plans for the installation of a new underground storage tank or for the complete upgrading of an existing underground storage tank shall be in compliance with the rules promulgated pursuant to section 8-20.5-202 (1). The director of the division of oil and public safety or a designee shall approve or reject proposed plans and amendments thereto within twenty working days after submittal of the plan. If no action is taken by the director of the division of oil and public safety or a designee within twenty working days after submittal, the plans shall be deemed approved.

(3) In an emergency situation the director of the division of oil and public safety shall respond to plans within twenty-four hours.

(4) The director of the division of oil and public safety or a designee shall make an on-site inspection of every new installation and every upgrading of an existing underground storage tank prior to the operational start-up of such tank to ensure that all of the standards established in this part 2 have been met. The director of the division of oil and public safety or a designee shall complete the on-site inspection within ten calendar days prior to the anticipated operational start-up date. For the purposes of this subsection (4), a designee may be an underground storage tank inspector when licensed as such by the director of the division of oil and public safety.

(5) All installations and inspections of underground storage tanks shall be performed in accordance with the rules promulgated by the director of the division of oil and public safety pursuant to section 8-20.5-202 (1).

(6) The director of the division of oil and public safety shall establish a fee to be paid by each person submitting plans pursuant to subsection (1) of this section for on-site inspection. The fees paid pursuant to this subsection (6) shall be:

(a) Used for the administration of this section; and

(b) No more than necessary to offset the direct costs of the inspections conducted pursuant to subsections (4) and (5) of this section, but in no event more than one hundred fifty dollars.

**Source:** **L. 95:** Entire article added, p. 402, § 1, effective July 1. **L. 2001:** (1) to (5) and IP(6) amended, p. 1128, § 49, effective June 5.

**Editor's note:** This section is similar to former § 8-20-505 as it existed prior to 1995.

**8-20.5-205. More stringent requirements prohibited.** (1) No municipality, city, home rule city, city and county, county, or other political subdivision of the state shall adopt



or enforce any requirement more stringent than the provisions of this part 2. This section does not apply to requirements established pursuant to the uniform fire code or the national fire protection association codes, nor does it apply to requirements established pursuant to local zoning regulations.

(2) The limitation in subsection (1) of this section shall not apply to any municipality, city, home rule city, city and county, county, or other political subdivision of the state which has received an exemption from the committee created in section 8-20.5-104. The committee may grant a site-specific exemption when the applicant demonstrates that such an exemption would be cost beneficial and serve the health, safety, or economic interest of its citizens based on consideration of local hydrologic, geologic, or other conditions, including location of population concentrations or commercial areas.

**Source:** L. 95: Entire article added, p. 403, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-20-508 as it existed prior to 1995.

**8-20.5-206. Financial responsibility for petroleum underground storage tanks.**

(1) (a) Moneys in the petroleum storage tank fund, created pursuant to section 8-20.5-103, and referred to in this section as the "fund", may be used by certain owners and operators of petroleum storage tanks to demonstrate their compliance with the financial responsibility requirements in federal regulations. Owners and operators not eligible for access to the fund shall be solely responsible for securing independent financial assistance, but may use any federally approved financial assurance mechanism identified in 40 CFR 280.94 through 280.103 to help fund the cost of complying with such requirements.

(b) (I) After payment is made from the fund for remediation expenses, the owner or operator on whose behalf the payment was made shall pay to the fund the remediation amount or ten thousand dollars, whichever is less.

(II) The payment required pursuant to subparagraph (I) of this paragraph (b) shall be waived if:

(A) The owner or operator discovers the contamination while upgrading tanks to meet the December 22, 1998, deadline for corrosion protection, spill and overfill prevention, or monthly monitoring;

(B) The upgrade is completed no later than December 22, 1997; and

(C) The annual throughput of petroleum products at the site does not exceed six hundred thousand gallons during the year preceding the discovery of contamination.

(c) After payment is made from the fund for personal injury or property damage settlement expenses, or a combination of both, the owner or operator on whose behalf the payment was made shall pay to the fund the aggregate settlement payment amount or twenty-five thousand dollars, whichever is less.

(d) Moneys in the fund shall not be used for any remediation activity at a location that is within a site identified by the national priorities list, or where a response action by this state has begun pursuant to the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980".

(e) If an owner or operator cannot meet the financial requirements of paragraphs (b) and (c) of this subsection (1), another approved financial assurance mechanism must be identified for such owner or operator to remain in compliance with this section and to be allowed to continue operation of an underground petroleum storage tank.

(2) The maximum amount of liability of the fund under this section shall be three million dollars aggregate during a state fiscal year for multiple occurrences involving tanks that are the responsibility of an individual owner or operator, but in no event shall the liability of the fund exceed two million dollars per occurrence. For purposes of this section, an "occurrence" means the period of time from identification through remediation of a leak, spill, or release of a petroleum product from an underground storage tank. In the event the cost of remediation or third-party claims exceeds the amount available to pay such costs, such costs and claims shall be paid on a pro rata basis as determined by the committee created in section 8-20.5-104. Any balance owed shall be paid as moneys become available in the fund. Any excess costs that are not paid by the fund or by the federal leaking

underground storage tank trust fund shall be paid by and are the sole responsibility of the responsible owner or operator.

(3) Moneys in the fund shall be available to pay required cleanup costs and third-party liability payments with no deductibles for the following applicants who are deemed to bear no responsibility for the release:

(a) A current or former property owner who has never owned, operated, leased, or managed petroleum underground storage tanks at the property where the release occurred, provided such property was acquired on or before June 3, 1992, and in the case of a preexisting release, the property owner had no reason to know that a release had occurred prior to acquiring the property;

(b) When an orphan or abandoned petroleum underground storage tank is involved and the applicant is a current or former owner, operator, or property owner who has never operated the tank or tanks and had no reason to know that a release had occurred prior to acquiring the property;

(c) A current owner or operator of petroleum underground storage tanks if at the time the owner or operator acquired such tanks such owner or operator had no reason to know that a release had already occurred, if such owner or operator has operated the tanks in accordance with sections 8-20.5-202 and 8-20.5-302, and if the release was detected on or before December 22, 1998;

(d) Any mortgagee or holder of an evidence of debt secured by a deed of trust who, through foreclosure of the mortgage or deed of trust or through receipt of a deed to the property in lieu of foreclosure, acquires property on which an underground storage tank is located, and such mortgage or deed of trust is dated on or before January 1, 1993;

(e) (I) (A) Any mortgagee or holder of an evidence of debt secured by a deed of trust who, through foreclosure of the mortgage or deed of trust or through receipt of a deed to the property in lieu of foreclosure, acquires property on which an underground storage tank is located, and such mortgage or deed of trust is dated after January 1, 1993, and the mortgagee or holder of an evidence of debt secured by a deed of trust has obtained a certificate of eligibility regarding the property in accordance with the rules of the director of the division of oil and public safety; or

(B) Any mortgagee or holder of an evidence of debt as described in sub-subparagraph (A) of this subparagraph (I), who sells the property on which an underground storage tank is located in lieu of remediating such property and transfers the certificate of eligibility to the purchaser. Such purchaser may receive fund moneys pursuant to this subsection (3).

(II) The director of the division of oil and public safety shall promulgate rules necessary to implement this program.

(4) In lieu of seeking reimbursement directly from the fund, an owner, operator, or current property owner who bears no responsibility for the release, under the provisions of subsection (3) of this section, may request that the department perform the cleanup using funds from the petroleum storage tank fund without further proving eligibility for such use. In addition to any purpose provided for in section 8-20.5-103, moneys in the petroleum storage tank fund may be appropriated by the general assembly to the department for the purpose of providing for the cleanup authorized in this section.

(5) Whenever appropriate, to pay costs that exceed the maximum allowed to be paid from the fund under this section, the state shall seek funding from the federal leaking underground storage tank trust fund.

(6) Underground storage tanks containing petroleum or other regulated substances that are owned or operated by, or are on property owned or leased by, an Indian tribe or the federal government, or an agency or subcontractor performing services on behalf of the federal government shall be subject to federal financial responsibility regulations. Any financial responsibility requirements for damages caused by such tanks are not the responsibility of the fund unless the tanks are owned or operated by a person, other than the federal government or such agency or subcontractor, and located on property that is leased from or otherwise occupied pursuant to a permit or other agreement with the United States or any agency thereof other than the department of defense or the department of energy.

(7) Nothing in this article shall create any liability for the state of Colorado that exceeds the amount available in the fund.



(8) Subject to subsection (6) of this section, owners and operators of underground storage tanks that are on fee lands may use the fund to demonstrate compliance with the financial responsibility requirements in federal regulations if the owners and operators have registered such tanks pursuant to section 8-20.5-102.

**Source:** **L. 95:** Entire article added, p. 403, § 1, effective July 1. **L. 96:** (1)(b), (2), and (7) amended, p. 711, § 5, effective May 15. **L. 2001:** (3)(e)(I)(A) and (3)(e)(II) amended, p. 1129, § 50, effective June 5. **L. 2005:** (2), IP(3), (3)(a), and (3)(b) amended, p. 1326, § 3, effective July 1; (6) amended and (8) added, p. 417, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-20-509 as it existed prior to 1995.

**Cross references:** For the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", see Pub.L. 96-510, codified at 42 U.S.C. § 9601 et seq.

### ANNOTATION

**Annotator's note.** Since § 8-20.5-206 is similar to repealed § 8-20-509, a relevant case construing that provision has been included in the annotations to this section.

**Promulgation of regulation establishing eligibility cut-off date for reimbursement claims from underground storage tank fund was within department of labor and employ-**

**ment's statutory authority**, because statute required fund claimants to be in compliance with all applicable regulations, and regulatory cut-off date was set at earliest possible date by which claimants could comply with regulations. *Diamond Shamrock Ref. and Mktg. Co. v. Colo. Dept. of Labor and Employment*, 976 P.2d 286 (Colo. App. 1998).

**8-20.5-207. Financial responsibility for regulated substances other than petroleum.** Owners and operators of underground storage tanks containing regulated substances other than petroleum may demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damages by using any one or more of the mechanisms allowable under 40 CFR sections 280.95, 280.96, 280.97, 280.98, 280.99, 280.102, and 280.103. Owners and operators of underground storage tanks containing regulated substances other than petroleum shall not be eligible to participate in the petroleum storage tank fund, but shall be subject to federal financial responsibility regulations.

**Source:** **L. 95:** Entire article added, p. 406, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-20-510 as it existed prior to 1995.

**8-20.5-208. Reporting of releases - investigation.** (1) If a release is detected or suspected, the owner or operator shall immediately take all actions necessary to mitigate or stop the release and shall mitigate fire and safety hazards.

(2) Upon detection of any release of reportable quantities of a regulated substance from an underground storage tank, the owner or operator shall report such release to the director of the division of oil and public safety within twenty-four hours of its detection. However, the local fire authority shall be notified immediately if such release exceeds reportable quantities. If the director of the division of oil and public safety determines that the release of such reportable quantity will affect subsurface soils, groundwater, or surface water, the department may require the owner or operator to take corrective action in accordance with section 8-20.5-209.

(3) If the director of the division of oil and public safety or a designee finds that a release has occurred, and the owner or the operator cannot be identified, or is unwilling to mitigate or stop the release or mitigate fire and safety hazards, the director of the division of oil and public safety or a designee may initiate free product removal and whatever other actions are necessary to mitigate fire and safety hazards.

(4) For the purpose of enforcing this section, if a release poses an imminent and substantial threat to human health and the environment, the director of the division of oil

and public safety or a designee is authorized to take such action as is necessary under the circumstances, including but not limited to:

(a) Entering any property, premises, or place where an underground storage tank is located;

(b) Monitoring or testing or requiring the owner or the operator to monitor or test any underground storage tank or any surrounding soils, groundwater, or surface water. A duplicate sample taken for testing shall be provided to any person, at such person's request, who the director of the division of oil and public safety or a designee reasonably believes may be responsible for the release. A duplicate copy of the analytical report pertaining to the samples taken pursuant to this paragraph (b) shall be provided as soon as practicable to any person who the director of the division of oil and public safety or a designee reasonably believes may be responsible for the release. When such tests are performed, the director of the division of oil and public safety shall notify, when possible, any person reasonably believed to be an owner or operator.

(c) Entering any site or premises in which records relevant to the operation of an underground storage tank are maintained and to inspect and copy such records.

(5) If such entry or inspection is denied or not consented to, the director of the division of oil and public safety or a designee shall obtain, from the district or county court for the judicial district or county in which such property, premises, or place is located, a warrant to enter and inspect any such property, premises, or place prior to entry and inspection. The district and county courts of the state of Colorado are authorized to issue such warrants upon proper showing of the need for such entry and inspection.

(6) If requested by the director of the division of oil and public safety or a designee, the owner or the operator of an underground storage tank shall provide any information in such owner's or operator's possession regarding the tank.

**Source:** **L. 95:** Entire article added, p. 406, § 1, effective July 1. **L. 96:** (2) amended, p. 712, § 6, effective May 15. **L. 2001:** (2), (3), IP(4), (4)(b), (5), and (6) amended, p. 1129, § 51, effective June 5.

**Editor's note:** This section is similar to former § 8-20-507 as it existed prior to 1995.

**8-20.5-209. Regulated substances releases - corrective actions.** (1) If a release has occurred at a site where the owner or the operator cannot be identified, after the director of the division of oil and public safety or a designee has mitigated fire and safety hazards in accordance with section 8-20.5-208 and determined that a release exceeds reportable quantities, the director of the division of oil and public safety may initiate corrective action to mitigate any threat to subsurface soil, groundwater, or surface water and develop a plan for cleanup in accordance with subsection (3) of this section and shall recover costs pursuant to section 8-20.5-103.

(2) If the release has occurred at a site where the owner or the operator can be identified, and after fire and safety hazards have been mitigated in accordance with section 8-20.5-208 and the director of the division of oil and public safety has determined that the release exceeds reportable quantities, then the owner or the operator shall provide the director of the division of oil and public safety with a corrective action plan to clean up subsurface soil, groundwater, and surface water as a result of the release. In addition to the corrective action plan, the owner or operator shall prepare a summary of the costs associated with the preferred corrective action, taking into account economic and technological feasibility, in accordance with the rules promulgated pursuant to section 8-20.5-104 (4) (d) and shall submit the summary to the committee created in said section. The director of the division of oil and public safety shall review and approve or disapprove the plan and, if the plan is disapproved, shall provide the owner or the operator with a statement specifying the deficiencies in the plan. The owner or the operator shall submit a revised plan within twenty working days after receipt of the statement, and the owner or the operator shall be given an opportunity to take necessary and appropriate actions to clean up subsurface soils, groundwater, and surface water. If the owner or the operator is unable or unwilling to take such necessary and appropriate actions, the director of the division of oil and public safety may



conduct corrective action to the extent appropriate to protect subsurface soils, groundwater, or surface water as a result of that release. Such action shall be taken after consideration of the risks posed to the public health and shall be determined in light of current economic and technological feasibility.

(3) After the director of the division of oil and public safety mitigates the threat to subsurface soils, groundwater, and surface water as specified in subsections (1) and (2) of this section, and the owner or the operator of the tank from which petroleum has been released is identified, the owner or the operator shall pay the required costs pursuant to the financial responsibility requirements set forth in sections 8-20.5-206, 8-20.5-207, and 8-20.5-303, incurred in the investigation of the release and mitigation of threats to subsurface soils, groundwater, and surface water. The director of the division of oil and public safety may file suit in the district court for the judicial district in which the release occurred to recover such costs. The moneys obtained as a result of any suit brought pursuant to this section shall be credited to the petroleum storage tank fund created in section 8-20.5-103.

(4) The director of the division of oil and public safety may order the owner or the operator of an underground storage tank from which a regulated substance has been released to implement a corrective action plan approved under subsection (2) of this section. Such order shall be served personally or by certified mail, return receipt requested, upon the owner or the operator.

(5) If the director of the division of oil and public safety disapproves or fails to approve the plan within thirty days after the plan's submission, the director shall immediately provide a statement of findings of fact outlining the reasons for such disapproval or failure to approve, including the reasons the proposed plan fails to meet the criteria outlined in this section. The statement shall be provided by formal notice or by certified mail to the owner or the operator within ten days after the director's decision.

(6) The director of the division of oil and public safety may waive the requirement for such a plan if the director determines that reasonable steps have been taken to prevent further releases and that any previously released regulated substance has been cleaned up to the extent appropriate to protect subsurface soils, groundwater, or surface water as a result of that release at that specific location. Such action shall be taken after consideration of the risks posed to the public health and shall be determined in light of current economic and technological feasibility.

(7) Within ten days after notification of disapproval of the plan, the owner or the operator may file a written request with the director of the division of oil and public safety for an informal conference regarding the disapproval. Upon receipt of such a request, the director shall provide the owner or the operator with a written notice of the date, time, and place of the informal conference. The executive director of the department or a designee shall preside at the informal conference, during which the owner or the operator and the director or the director's designee may present information and arguments regarding the issues raised in the statement of findings of fact.

(8) Within twenty days after the conference, the owner or operator may resubmit a modified plan which addresses the deficiencies identified by the department in the original plan. The department shall review the modifications to the plan and, within twenty days, approve or disapprove the resubmitted plan. If, after the conference, the owner, the operator, or the department determines that the issues identified in the statement of findings of fact cannot be reasonably resolved, the owner, the operator, or the department may request that the committee, created in section 8-20.5-104, schedule and hold a hearing within thirty days to resolve the issues identified in the statement of findings of fact.

(9) At any time after the receipt of the statement of findings of fact, the owner, the operator, or the department may request, in writing, a formal hearing before the committee created in section 8-20.5-104. Upon such request, the committee shall meet and review the initial plan and statement of findings of fact.

(10) The committee shall recommend such plan if any current release has been mitigated and if any regulated substance which has been released has been or will be cleaned up to the extent appropriate to protect subsurface soils, groundwater, or surface water as a result of the release at that specific location. The department shall give serious

consideration to the recommendation of the committee. Such action shall be taken after consideration of the risks posed to the public and shall be determined in light of current economic and technological feasibility. If the committee finds that a current release has not been mitigated or that any regulated substance which has been released will not be cleaned up to the extent appropriate, the committee shall issue a statement of findings of fact and recommendations to the department for revisions to the plan. Such revisions, if approved by the department, shall be incorporated into the plan by the department, and the revised plan shall then be approved as provided in subsection (2) of this section.

(11) Within thirty days following mitigation and cleanup, the department shall notify the owner or the operator, in writing, that the owner or the operator has complied with the requirements for mitigation and cleanup as outlined in this section.

(12) For the purpose of implementing the provisions of this section, the department or its designee is authorized for justifiable cause:

(a) To enter the property, premises, or place where a release or suspected release from an underground storage tank is located;

(b) To monitor or test or require the owner or the operator to monitor or test an underground storage tank or any surrounding soils, groundwater, or surface water where a suspected release from an underground storage tank has occurred. A duplicate sample taken for testing shall be provided to any owner or operator who the department reasonably believes may be responsible for the violation upon request of such person. A duplicate copy of the analytical report pertaining to the samples taken pursuant to this paragraph (b) shall be provided as soon as practicable to any person the department or its designee reasonably believes may be responsible for the violation. When such tests are performed, the department shall notify, when possible, any person reasonably believed to be an owner or operator.

(13) If such entry or inspection is denied, the department shall obtain, from the district or county court for the judicial district or county in which such property, premises, or place is located, a warrant to enter and inspect any such property, premises, or place prior to entry and inspection. The district and county courts of the state of Colorado are authorized to issue such warrants upon proper showing of the need for such entry and inspection.

(14) If requested by the department or its designee, the owner or operator of an underground storage tank shall provide any information in such owner's or operator's possession regarding the tank.

(15) The department may consider water quality standards adopted by the water quality control commission as guidelines for cleanup but must assure that cleanup requirements are appropriate, in light of economic and technical feasibility and after consideration of the risks to public health, to protect subsurface soils, groundwater, or surface water as a result of a release at a specific location.

(16) The department shall, if necessary, negotiate and enter into memoranda of agreement with and apply for and receive grants from the United States environmental protection agency pursuant to the provisions of this article.

**Source:** L. 95: Entire article added, p. 407, § 1, effective July 1. L. 96: (4) amended, p. 712, § 7, effective May 15. L. 2001: (1) to (7) amended, p. 1130, § 52, effective June 5.

**Editor's note:** This section is similar to former § 25-18-104 as it existed prior to 1995.

### PART 3

#### ABOVEGROUND STORAGE TANKS

**8-20.5-301. Legislative declaration.** The general assembly hereby finds and declares that the rising expense of operating and maintaining aboveground storage tanks, including but not limited to the cost of liability insurance, has resulted in the discontinuance of business by several small gasoline service station operators and imposes an increasing hardship on those service stations still in operation. The general assembly further finds that the viability of aboveground storage tanks is being recognized and that rules and regulations



for aboveground storage tanks have been promulgated and endorsed by the western fire chiefs association's uniform fire code committee and the national fire protection association's automotive and service station code committee. The general assembly further finds that aboveground storage tanks for fuel products are feasible and economical and should be permitted under certain narrowly drawn circumstances.

**Source: L. 95:** Entire article added, p. 411, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-20-701 as it existed prior to 1995.

**8-20.5-302. Duties of director of division of oil and public safety.** (1) The director of the division of oil and public safety shall make, promulgate, and enforce rules for aboveground storage tanks installed before July 1, 1993, which rules shall be no more stringent than the rules in place on the date of installation, except as mandated by federal spill prevention, control, and countermeasures regulations promulgated by the United States environmental protection agency.

(2) The director of the division of oil and public safety shall make, promulgate, and enforce rules concerning the design, construction, installation, and operation of aboveground storage tanks permitted to be used and installed on or after July 1, 1993, which rules shall be no more stringent, either substantially or procedurally, than the requirements contained in the current edition of the national fire code published by the national fire protection association, as revised by the association from time to time, and in spill prevention control and countermeasures regulations promulgated by the United States environmental protection agency.

(3) Within one hundred twenty days after January 1, 2008, the director of the division of oil and public safety shall promulgate, and the division shall enforce, rules concerning the placement of aboveground storage tanks that contain renewable fuels. Such rules shall be promulgated with the purpose of developing a uniform statewide standard of issuing permits for aboveground storage tanks to promote the use of renewable fuels so that the process of obtaining a permit for an aboveground storage tank that contains renewable fuels may be more efficient and affordable.

**Source: L. 95:** Entire article added, p. 411, § 1, effective July 1. **L. 2001:** Entire section amended, p. 1132, § 53, effective June 5. **L. 2007:** (3) added, p. 1760, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-20-703 as it existed prior to 1995.

**8-20.5-303. Financial responsibility for aboveground storage tanks.** (1) (a) Moneys in the petroleum storage tank fund, created pursuant to section 8-20.5-103 and referred to in this section as the "fund", may be used by certain owners and operators of aboveground storage tanks. Any owner or operator of an aboveground storage tank with a capacity of at least six hundred sixty gallons and less than forty thousand gallons shall be eligible to participate in the fund.

(b) After payment is made from the fund for remediation expenses, the owner or operator on whose behalf the payment was made shall pay to the fund the remediation amount or ten thousand dollars, whichever is less.

(c) After payment is made from the fund for personal injury or property damage after a court judgment or a settlement agreed to by the attorney general's office, or a combination of both, the owner or operator on whose behalf the payment was made shall pay to the fund the aggregate settlement payment amount or twenty-five thousand dollars, whichever is less.

(d) Moneys in the fund shall not be used for any remediation activity at a location that is within a site identified by the national priorities list, or where a response action by this state has begun pursuant to the federal "Comprehensive Environmental Response, Compensation, and Liability Act of 1980".

(e) If an owner or operator cannot meet the financial requirements of this subsection (1), another approved financial assurance mechanism shall be identified for such owner or operator to remain in substantial compliance with this section and to be allowed to continue operation of an aboveground storage tank.

(2) The maximum amount of liability of the fund under this section shall be three million dollars aggregate during a fiscal year for multiple occurrences involving tanks that are the responsibility of an individual owner or operator, but in no event shall the liability of the fund exceed two million dollars per occurrence. For purposes of this section, an "occurrence" means the period of time from identification through remediation of a leak, spill, or release of a petroleum product from an aboveground storage tank. In the event the cost of remediation or third-party claims exceeds the amount available to pay such costs, such costs and claims shall be paid on a pro rata basis as determined by the committee created in section 8-20.5-104. Any balance owed shall be paid as moneys become available in the fund. Any excess costs that are not paid by the fund shall be paid by and are the sole responsibility of the responsible owner or operator.

(3) Moneys in the fund shall be available to pay required cleanup costs and third-party liability payments with no deductibles for the following applicants who are deemed to bear no responsibility for the release:

(a) A current or former property owner who has never owned, operated, leased, or managed aboveground storage tanks at the property where the release occurred, provided such property was acquired on or before June 3, 1992, and in the case of a preexisting release, the property owner had no reason to know that a release had occurred prior to acquiring the property;

(b) When an orphan or abandoned aboveground storage tank is involved and the applicant is a current or former owner, operator, or property owner who has never operated the tank or tanks and had no reason to know that a release had occurred prior to acquiring the property;

(c) A current owner or operator of aboveground storage tanks if, at the time the owner or operator acquired such tanks, such owner or operator had no reason to know that a release had already occurred, if such owner or operator has operated the tanks in accordance with sections 8-20.5-202 and 8-20.5-302;

(d) Any mortgagee or holder of an evidence of debt secured by a deed of trust who, through foreclosure of the mortgage or deed of trust or through receipt of a deed to the property in lieu of foreclosure, acquires property on which an aboveground storage tank is located, and such mortgage or deed of trust is dated on or before January 1, 1993; or

(e) (I) Any mortgagee or holder of an evidence of debt secured by a deed of trust who, through foreclosure of the mortgage or deed of trust or through receipt of a deed to the property in lieu of foreclosure, acquires property on which an aboveground storage tank is located, and such mortgage or deed of trust is dated after January 1, 1993, and the mortgagee or holder of an evidence of debt secured by a deed of trust has obtained a certificate of eligibility regarding the property in accordance with the rules of the director of the division of oil and public safety. The director of the division of oil and public safety shall promulgate rules necessary to implement this program.

(II) Any mortgagee or holder of an evidence of debt as described in subparagraph (I) of this paragraph (e) who sells the property on which an aboveground storage tank is located in lieu of remediating such property and transfers the certificate of eligibility to the purchaser. Such purchaser may receive funds pursuant to this subsection (3).

(4) In lieu of seeking reimbursement directly from the fund, an owner, operator, or current property owner who bears no responsibility for the release as set forth in subsection (3) of this section may request that the department perform the cleanup using moneys from the petroleum storage tank fund without further proving eligibility for such use. In addition to any purpose provided for in section 8-20.5-103, moneys in the petroleum storage tank fund may be appropriated by the general assembly to the department for the purpose of providing for the cleanup authorized in this section.

(5) An owner or operator of an aboveground storage tank or a person deemed to bear no responsibility for the release pursuant to subsection (3) of this section shall be eligible



to participate in the fund if eligibility requirements established by the petroleum storage tank committee, created pursuant to section 8-20.5-104, are met.

(6) Aboveground storage tanks containing petroleum or other regulated substances that are owned or operated by, or are on property owned or leased by, an Indian tribe or the federal government or an agency or subcontractor performing services on behalf of the federal government shall be subject to federal financial responsibility regulations. Any financial responsibility requirements for damages caused by such tanks are not the responsibility of the fund unless such tanks are owned or operated by a person, other than the federal government or such agency or subcontractor, and located on property that is leased from or otherwise occupied pursuant to a permit or other agreement with the United States or any agency thereof other than the department of defense or the department of energy.

(7) Nothing in this article shall create any liability for the state of Colorado that exceeds the amount available in the fund.

(8) Subject to subsection (6) of this section, owners and operators of aboveground storage tanks that are on fee lands may use the fund to demonstrate compliance with the financial responsibility requirements in federal regulations if the owners and operators have registered such tanks pursuant to section 8-20.5-102.

**Source:** **L. 95:** Entire article added, p. 411, § 1, effective July 1. **L. 96:** (1)(a), (2), (3)(b), (3)(c), (5), and (7) amended, p. 713, § 8, effective May 15. **L. 2001:** (3)(e)(1) amended, p. 1132, § 54, effective June 5. **L. 2005:** (2), IP(3), (3)(a), and (3)(b) amended, p. 1327, § 4, effective July 1; (6) amended and (8) added, p. 417, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-20-705 as it existed prior to 1995.

**Cross references:** For the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", see Pub.L. 96-510, codified at 42 U.S.C. § 9601 et seq.

**8-20.5-304. Regulated substances releases - corrective actions.** (1) If a release has occurred at a site where the owner or operator cannot be identified, after the director of the division of oil and public safety or a designee has mitigated fire and safety hazards in accordance with section 8-20.5-208 and determined that a release exceeds reportable quantities, the director of the division of oil and public safety may initiate corrective action to mitigate any threat to subsurface soil, groundwater, or surface water and develop a plan for cleanup in accordance with subsection (3) of this section and shall recover costs pursuant to section 8-20.5-103.

(2) If a release has occurred at a site where the owner or operator can be identified, and after fire and safety hazards have been mitigated in accordance with section 8-20.5-208 and the director of the division of oil and public safety has determined that the release exceeds reportable quantities, then the owner or operator shall provide the director of the division of oil and public safety with a corrective action plan to clean up subsurface soil, groundwater, and surface water as a result of the release. In addition to the corrective action plan, the owner or operator shall prepare a summary of the costs associated with the preferred corrective action, taking into account economic and technological feasibility, in accordance with the rules promulgated pursuant to section 8-20.5-104 (4) (d) and shall submit the summary to the committee created in said section. The director of the division of oil and public safety shall review and approve or disapprove the plan and, if the plan is disapproved, the director shall provide the owner or operator with a statement specifying the deficiencies in the plan. Within twenty working days after receiving such statements, the owner or operator shall submit a revised plan and shall be given an opportunity to take necessary and appropriate actions to clean up subsurface soils, groundwater, and surface water. If the owner or operator is unable or unwilling to take such necessary and appropriate actions, the director of the division of oil and public safety may conduct corrective action to the extent appropriate to protect subsurface soils, groundwater, or surface water as a result of that release. Such action shall be taken after consideration of the risks posed to the public health and shall be determined in light of current economic and technological feasibility.

(3) After the director of the division of oil and public safety mitigates the threat to subsurface soils, groundwater, and surface water as specified in subsections (1) and (2) of this section, and the owner or operator of the tank from which petroleum has been released is identified, the owner or operator shall pay the required costs of investigation and mitigation pursuant to the financial responsibility requirements set forth in sections 8-20.5-206, 8-20.5-207, and 8-20.5-303. The director of the division of oil and public safety may file suit in the district court for the judicial district in which the release occurred to recover such costs. The moneys obtained as a result of any suit brought pursuant to this section shall be credited to the petroleum storage tank fund created in section 8-20.5-103.

(4) The director of the division of oil and public safety may order the owner or operator of an aboveground storage tank from which a regulated substance has been released to implement a corrective action plan approved under subsection (2) of this section. Such order shall be served personally or by certified mail, return receipt requested, upon the owner or operator.

(5) (a) If the director of the division of oil and public safety disapproves or fails to approve the plan within thirty days following its submission, the director shall immediately provide a statement of findings of fact outlining the reasons for such disapproval or failure to approve, including the reasons the proposed plan fails to meet the criteria outlined in this section. The statement shall be provided by formal notice or by certified mail to the owner or operator within ten days after the director's decision.

(b) The director of the division of oil and public safety may waive the requirement for such a plan if the director determines that reasonable steps have been taken to prevent further releases and that any previously released regulated substance has been cleaned up to the extent appropriate to protect subsurface soils, groundwater, or surface water as a result of that release at that specific location. Such action shall be taken after consideration of the risks posed to the public health and shall be determined in light of current economic and technological feasibility.

(6) (a) Within ten days after notification of disapproval of the plan, the owner or operator may file a written request with the director of the division of oil and public safety for an informal conference regarding the disapproval. Upon receipt of such a request, the director shall provide the owner or operator with a written notice of the date, time, and place of the informal conference. The executive director of the department or a designee shall preside at the informal conference, during which the owner or operator and the director or the director's designee may present information and arguments regarding the issues raised in the statement of findings of fact.

(b) Within twenty days after the conference, the owner or operator may resubmit a modified plan which addresses the deficiencies identified by the department in the original plan. The department shall review the modifications to the plan and, within twenty days, approve or disapprove the resubmitted plan. If, after the conference, the owner or operator or the department determines that the issues identified in the statement of findings of fact cannot be reasonably resolved, the owner or operator or the department may request that the committee, created in section 8-20.5-104, schedule and hold a hearing within thirty days to resolve the issues identified in the statement of findings of fact.

(7) (a) At any time after receiving the statement of findings of fact, the owner or operator or the department may request, in writing, a formal hearing before the committee created in section 8-20.5-104. Upon such request, the committee shall meet and review the initial plan and statement of findings of fact.

(b) The committee shall recommend such plan if any current release has been mitigated and if any regulated substance which has been released has been or will be cleaned up to the extent appropriate to protect subsurface soils, groundwater, or surface water as a result of the release at that specific location. The department shall give serious consideration to the recommendation of the committee. Such action shall be taken after consideration of the risks posed to the public and shall be determined in light of current economic and technological feasibility. If the committee finds that a current release has not been mitigated or that any regulated substance which has been released will not be cleaned up to the extent appropriate, the committee shall issue a statement of findings of fact and recommendations to the department for revisions to the plan. Such revisions, if approved by the department,



shall be incorporated into the plan by the department, and the revised plan shall then be approved as provided in subsection (2) of this section.

(8) Within thirty days following mitigation and cleanup, the department shall notify the owner or operator, in writing, that the owner or operator has complied with the requirements for mitigation and cleanup as outlined in this section.

(9) (a) For the purpose of implementing the provisions of this section, the department or its designee is authorized for justifiable cause:

(I) To enter the property, premises, or place where a release or suspected release from an aboveground storage tank is located;

(II) To monitor or test or require the owner or operator to monitor or test an aboveground storage tank or any surrounding soils, groundwater, or surface water where a suspected release from an aboveground storage tank has occurred. A duplicate sample taken for testing shall be provided to any owner or operator who the department reasonably believes may be responsible for the violation upon request of such person. A duplicate copy of the analytical report pertaining to the samples taken pursuant to this subparagraph (II) shall be provided as soon as practicable to any person the department or its designee reasonably believes may be responsible for the violation. When such tests are performed, the department shall notify, when possible, any person reasonably believed to be an owner or operator.

(b) If such entry or inspection is denied, the department shall obtain, from the district or county court for the judicial district or county in which such property, premises, or place is located, a warrant to enter and inspect any such property, premises, or place prior to entry and inspection. The district and county courts of the state of Colorado are authorized to issue such warrants upon proper showing of the need for such entry and inspection.

(c) If requested by the department or its designee, the owner or operator of an aboveground storage tank shall provide any information in such owner's or operator's possession regarding the tank.

(10) (a) The department may consider water quality standards adopted by the water quality control commission as guidelines for cleanup but shall assure that cleanup requirements are appropriate, in light of economic and technical feasibility and after consideration of the risks to public health, to protect subsurface soils, groundwater, or surface water as a result of a release at a specific location.

(b) The department shall, if necessary, negotiate and enter into memoranda of agreement with and apply for and receive grants from the United States environmental protection agency.

**Source: L. 96:** Entire section added, p. 714, § 9, effective May 15. **L. 2001:** (1) to (5) and (6)(a) amended, p. 1133, § 55, effective June 5.

## PART 4

### UNDERGROUND STORAGE TANKS INSTALLERS

#### 8-20.5-401 to 8-20.5-407. (Repealed)

**Editor's note:** (1) This part 4 was added with relocations in 1995 containing relocated provisions of some sections formerly located in part 6 of article 20 of this title and was not amended prior to its repeal in 1996. For the text of this part 4 prior to 1996, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

(2) Section 8-20.5-407 provided for the repeal of this part 4, effective July 1, 1996. (See L. 95, p. 418.)

## LABOR II - WORKERS' COMPENSATION AND RELATED PROVISIONS

### Workers' Compensation

**Editor's note:** Prior to July 1, 1990, the "Workmen's Compensation Act of Colorado" was located in articles 40 to 54 of this title.

**Cross references:** For the "Workers' Compensation Cost Containment Act", see article 14.5 of this title.

## ARTICLE 40

### General Provisions

**Editor's note:** This article was numbered as article 1 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Cross references:** For application of workers' compensation law to volunteer civil defense workers, see part 22 of article 32 of title 24.

**Law reviews:** For article, "1991 Update on Workers' Compensation Law", see 10 Colo. Law. 223 (1991); for article, "The Colorado Worker's Compensation Act and the ADA: An Incompatible Combination", see 21 Colo. Law. 2391 (1992); for article, "State Laws: A Growing Minefield for Employers", see 23 Colo. Law. 1089 (1984); for article, "Workers' Compensation, the ADA and the FMLA: The Top Ten Questions Most Commonly Asked by Colorado Employers", see 24 Colo. Law. 2293 (1995); for article, "Recent Workers' Compensation Decisions: An Update", see 24 Colo. Law. 2375 (1995); for article, "Recent Appellate Decisions in Workers' Compensation Law - Part I", see 26 Colo. Law. 79 (April 1997); for article, "Recent Appellate Decisions in Workers' Compensation Law - Part II", see 26 Colo. Law. 103 (May 1997); for article, "Recent Appellate Decisions in Workers' Compensation Law", see 26 Colo. Law. 51 (December 1997); for article, "Recent Colorado Appellate Decisions in Workers' Compensation Law", see 27 Colo. Law. 107 (September 1998); for article, "Update of Colorado Appellate Decisions in Workers' Compensation Law", see 28 Colo. Law. 83 (January 1999); for article, "Update on Colorado Appellate Decisions in Workers' Compensation", see 28 Colo. Law. 77 (May 1999); for article, "Update on Colorado Appellate Decisions in Workers' Compensation", see 28 Colo. Law. 71 (December 1999); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 29 Colo. Law. 83 (June 2000); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 29 Colo. Law. 97 (September 2000); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 30 Colo. Law. 65 (January 2001); for article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (February 2001); for article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 31 Colo. Law. 89 (September 2002); for article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 32 Colo. Law. 87 (March 2003); for article, "Workers' Compensation: Rules, Rules, Rules, and More Rules", see 39 Colo. Law. 41 (December 2010).

PART 1		8-40-202.	Employee.
SHORT TITLE - LEGISLATIVE DECLARATION		8-40-203.	Employer.
		PART 3	
8-40-101.	Short title.	SCOPE AND APPLICABILITY	
8-40-102.	Legislative declaration.		
PART 2		8-40-301.	Scope of term "employee".
DEFINITIONS		8-40-302.	Scope of term "employer".
8-40-201.	Definitions - repeal.		



## PART 1

## SHORT TITLE - LEGISLATIVE DECLARATION

**8-40-101. Short title.** Articles 40 to 47 of this title shall be known and may be cited as the "Workers' Compensation Act of Colorado".

**Source:** L. 90: Entire article R&RE, p. 468, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-40-101 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Purposes of the Act.
- III. Construction of the Act.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Workmen's Compensation Law", see 1 Den. B. Ass'n Rec. 4 (1924). For article, "Practice and Procedure Under the Workmen's Compensation Act of Colorado", see 6 Dicta 3 (1929). For article, "Current Trends in Basic Principles of Workmen's Compensation", see 20 Rocky Mt. L. Rev. 1 (1947) and 20 Rocky Mt. L. Rev. 117 (1948). For comment on Continental Oil Co. v. Sirhall appearing below, see 23 Rocky Mt. L. Rev. 364 (1951). For article, "Damages, Workmen's Compensation and Labor Law", see 31 Dicta 460 (1954). For symposium article on workmen's compensation, see 31 Rocky Mt. L. Rev. 397 (1959). For article, "One Year Review of Corporations, Partnership and Agency", see 37 Dicta 11 (1960). For article, "One Year Review of Torts", see 38 Dicta 93 (1961). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "Labor Law", see 59 Den. L.J. 319 (1982). For article, "Conflict Between Workers' Compensation Exclusive Remedy and Common Law Actions for Psychic Injuries", see 14 Colo. Law 1992 (1985). For article, "Work-Related Stress Claims", see 18 Colo. Law. 1529 (1989). For article, "Workers' Compensation Fraud: 'Trashing the System'", see 20 Colo. Law. 1119 (1991).

**Annotator's note.** Since § 8-40-101 is similar to § 8-40-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, relevant cases construing that provision have been included in the annotations to this section.

**Act does not violate constitutional guarantees of equal protection.** Difference in methods of calculating benefits for partial and total injuries is rationally related to the governmental

interest in providing benefits efficiently and fairly, notwithstanding that the classification is not perfect and that inequality may result in individual cases. *Duran v. Indus. Claim Appeals Office*, 883 P.2d 477 (Colo. 1994).

**Because the workers' compensation act implicates no fundamental rights, the rational basis test provides the appropriate gauge** in determining whether a statutory classification comports with equal protection. *Young v. Indus. Claim Appeals Office*, 969 P.2d 735 (Colo. App. 1998).

**The workmen's compensation act was passed under the police power of the state.** *Sch. Dist. No. 1 v. Indus. Comm'n*, 66 Colo. 580, 185 P. 348 (1919).

**The workmen's compensation act deals exclusively with matters growing out of the relationship of employer and employee, and is binding only upon such as elect to come within its provisions.** All others are strangers to the act and their usual lawful rights and remedies are unaffected by it. *Rocky Mt. Fuel Co. v. Indus. Comm'n*, 105 Colo. 220, 96 P.2d 413 (1939).

**Applied** in *Riley v. Indus. Comm'n*, 628 P.2d 147 (Colo. App. 1981).

## II. PURPOSES OF THE ACT.

**The purpose of the act** is to protect all workmen, save those specifically excluded, and provide an award of compensation in favor of an injured employee against all persons who may be liable therefor. *Empire Zinc Co. v. Indus. Comm'n*, 102 Colo. 26, 77 P.2d 130 (1938); *Sechler v. Pastore*, 103 Colo. 139, 84 P.2d 61 (1938); *Fast Freight v. Walker*, 103 Colo. 347, 85 P.2d 720 (1938); *Drake v. Hodges*, 114 Colo. 10, 161 P.2d 338 (1945); *Univ. of Denver v. Memeht*, 127 Colo. 385, 257 P.2d 423 (1953); *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

**The purpose of the workmen's compensation act** is to protect employees who sustain injuries arising out of their employment. *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982).

**The purpose of the act** is to speedily and justly compensate employees for injuries in-

curred in performing their jobs regardless of the fault of the employee or the employer. *Pub. Serv. Co. v. United Cable Television of Jeffco, Inc.*, 816 P.2d 289 (Colo. App. 1991).

The purpose of the Act is to provide the exclusive remedy to a covered employee for injuries sustained while performing services arising out of and in the course of employment and which are proximately caused by injury or occupational disease arising out of and in the course of employment. *Ferris v. Local 26*, 867 P.2d 38 (Colo. App. 1993).

Purposes of act, as stated in 1991 repeal and reenactment, cited in *Duran v. Indus. Claim Appeals Office*, 883 P.2d 477 (Colo. 1994).

**The act provides a remedy in areas where remedies do not exist at common law.** *Chartier v. Winslow Crane Serv. Co.*, 142 Colo. 294, 350 P.2d 1044 (1960).

**Another purpose of the workmen's compensation act** is to provide a method whereby claims arising out of industrial accidents may be speedily resolved. *Stanley Hotel v. Thomas*, 153 Colo. 503, 387 P.2d 27 (1963); *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982).

**Primary purpose of the workmen's compensation act** is to afford workmen compensation for job-related injuries, regardless of fault. *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**Compensation legislation is a system of benefits one of whose independent social objectives is to prevent destitution among dependents of workmen who lose their lives in industrial activity.** *In re Hampton v. State*, 31 Colo. App. 141, 500 P.2d 1186 (1972).

**Employee is compensated and employer immunized from common-law claims.** The workmen's compensation act grants the employee compensation from the employer, even though the employee may be negligent and even if the employer is not negligent. In return, the employer who is responsible under the workmen's compensation act is granted immunity from common-law claims. *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**But workmen's compensation act is not to shield third-party tortfeasors from liability for damages resulting from their negligence.** *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**Consideration of the mental state of a third party is consistent with no-fault character of workers' compensation act**, as it is the fault of the claimant and employer that is generally disregarded. *Bralish v. Indus. Claim Appeals Office*, 81 P.3d 1091 (Colo. App. 2003).

**Bad-faith handling of a claim** by an insurer is similarly not a risk contemplated by the general coverage provisions of the act. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *McKelvy v. Liberty Mut. Ins. Co.*, 983 P.2d 42 (Colo. App. 1998).

Independent insurance adjusting firm, acting on behalf of a self-insured employer, owes a duty of good faith to an injured claimant in investigating and processing a claim despite lack of contractual privity. *Johnson v. Scott Wetzel Servs., Inc.*, 797 P.2d 786 (Colo. App. 1990), *aff'd*, 821 P.2d 804 (Colo. 1991).

**Retaliation violates public policy.** Since an employee is granted the specific right to apply for and receive compensation under this Act, an employer's retaliation for the exercise of such right violates public policy and provides the basis for a common-law claim by the employee to recover damages sustained by him as a result of that violation. *Lathrop v. Entenmann's, Inc.*, 770 P.2d 1367 (Colo. App. 1989).

### III. CONSTRUCTION OF THE ACT.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with the power, previously exercised by the industrial commission, to enforce and administer the workmen's compensation act.

**Act to be liberally construed.** The workmen's compensation act is highly remedial and beneficent in purpose, and should be liberally construed so as to accomplish its evident intent and purpose. *Indus. Comm'n v. Johnson*, 64 Colo. 461, 172 P. 422 (1918); *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 65 Colo. 283, 176 P. 314 (1918); *Karoly v. Indus. Comm'n*, 63 Colo. 239, 176 P. 284 (1918); *Central Sur. & Ins. Corp. v. Indus. Comm'n*, 84 Colo. 481, 271 P. 617 (1928); *Danielson v. Indus. Comm'n*, 96 Colo. 522, 44 P.2d 1011 (1935); *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935); *McNeil Coal Corp. v. Indus. Comm'n*, 105 Colo. 263, 96 P.2d 889 (1939); *Skjoldahl v. Indus. Comm'n*, 108 Colo. 140, 113 P.2d 871 (1941); *Pacific Employers Ins. Co. v. Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (1943); *Great Am. Indem. Co. v. Indus. Comm'n*, 114 Colo. 91, 162 P.2d 413 (1945); *Arvas v. McNeil Coal Corp.*, 119 Colo. 289, 203 P.2d 906 (1949); *Nat'l Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950); *Cont'l Oil Co. v. Sirhall*, 122 Colo. 332, 222 P.2d 612 (1950); *L.B. Cole Produce Co. v. Indus. Comm'n*, 123 Colo. 278, 228 P.2d 808 (1951); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Indus. Comm'n v. Corwin Hosp.*, 126 Colo. 358, 250 P.2d 135 (1952); *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953); *Indus. Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957); *Graden Coal Co. v. Yturalde*, 137 Colo. 527, 328 P.2d 105 (1958); *Univ. of Denver v. Indus. Comm'n*, 138 Colo. 505, 335 P.2d 292 (1959); *Indus. Comm'n v. Baldwin*, 139 Colo. 268, 338 P.2d 103 (1959);



Snyder v. Indus. Comm'n, 138 Colo. 523, 335 P.2d 543 (1959); Idarado Mining Co. v. Barnes, 148 Colo. 166, 365 P.2d 36 (1961); Martin Marietta Corp. v. Faulk, 158 Colo. 441, 407 P.2d 348 (1965); In re Hampton v. State, 31 Colo. App. 141, 500 P.2d 1186 (1972); James v. Irrigation Motor & Pump Co., 180 Colo. 195, 503 P.2d 1025 (1972); Conley v. Indus. Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979); Martinez v. Indus. Comm'n, 709 P.2d 49 (Colo. App. 1985).

The workmen's compensation laws are to be liberally construed to accomplish the beneficial social and protective purposes of such enactments. Puffer Mercantile Co. v. Arellano, 34 Colo. App. 434, 528 P.2d 966 (1974), rev'd on other grounds, 190 Colo. 138, 546 P.2d 481 (1975); Mountain City Meat Co. v. Oqueda, 919 P.2d 246 (Colo. 1996).

The workmen's compensation act is broadly and liberally construed so as to provide just compensation for workmen and their families for injuries during employment. Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed.2d 644 (1974).

The act is remedial and beneficent in purpose, and should be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families. Colo. Counties, Inc. v. Davis, 801 P.2d 10 (Colo. App. 1990).

**The courts will construe the workmen's compensation law and interpret the legislative intent** as it may appear from a consideration of the purpose and intent of the entire enactment. Univ. of Denver v. Indus. Comm'n, 138 Colo. 505, 335 P.2d 292 (1959).

**The workmen's compensation provisions must not be pushed beyond the limits of their purpose**, nor its funds diverted to those not clearly entitled thereto. Indus. Comm'n v. Baldwin, 139 Colo. 268, 338 P.2d 103 (1959).

**Nonexistent provision may not be read into the act.** The provision that the workmen's compensation act shall be liberally construed cannot be extended to clothe the court with power to read into it a provision which does not exist. Maley v. Martin, 111 Colo. 545, 144 P.2d 558 (1943); Maryland Cas. Co. v. Indus. Comm'n, 116 Colo. 58, 178 P.2d 426 (1947); Snyder v. Indus. Comm'n, 138 Colo. 523, 335 P.2d 543 (1959).

**The tort of wrongful termination in violation of public policy does not arise under the workers' compensation laws of Colorado.** Rundle v. Frontier-Kemper Constructors, Inc., 170 F. Supp.2d 1075 (D. Colo. 2001).

**Where the provisions of the workmen's compensation act do not expressly limit the employee with respect to remedies**, a court is not disposed to read or interpret such limitations into this act. Chartier v. Winslow Crane Serv. Co., 142 Colo. 294, 350 P.2d 1044 (1960).

However, consideration of the statute as a whole, together with its clear legislative intent, may persuade a court to impose such a limitation. Buzard v. Super Walls, Inc., 681 P.2d 520 (Colo. 1984).

**And hypertechnical refinements in construction should be avoided.** In order to carry out the intended purpose of the workmen's compensation act, it is necessary to avoid hypertechnical refinements in the construction of the terms and provisions of the act, especially where there is no prejudice to the employer. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); Martinez v. Indus. Comm'n, 709 P.2d 49 (Colo. App. 1985).

**Mandatory provisions cannot be ignored.** The doctrine of liberal construction to be applied to the act does not clothe the industrial commission with power to ignore its mandatory provisions. Stahura v. Indus. Comm'n, 103 Colo. 451, 86 P.2d 1080 (1939).

**All portions should be construed together.** To give full import to the purposes of the workmen's compensation act, all portions thereof should be read together and harmonized if possible. McBride v. Indus. Comm'n, 97 Colo. 166, 49 P.2d 386 (1935).

**In workers' compensation cases, the substantive rights and liabilities of the parties are determined by the statute in effect at the time of a claimant's injury, while procedural changes in the statute become effective during the pendency of a claim.** Am. Comp. Ins. Co. v. McBride, 107 P.3d 973 (Colo. App. 2004); Colo. Comp. Ins. Auth. v. Jones, 131 P.3d 1074 (Colo. App. 2005); Brownson-Rausin v. Indus. Claim Appeals Office, 131 P.3d 1172 (Colo. App. 2005).

**Workers' compensation carrier is responsible for pro rata payment of plaintiff's attorney fees and costs in third-party action**, where carrier is subrogated against third-party tortfeasor, despite no active contribution by carrier to the prosecution of the claim or its settlement. Colo. Counties, Inc. v. Davis, 801 P.2d 10 (Colo. App. 1990).

**Both the Colorado Auto Accident Reparations Act and this act apply** when a person is injured in an auto accident during the course and scope of employment. County Workers Comp. Pool v. Folk, 895 P.2d 1083 (Colo. App. 1994).

**8-40-102. Legislative declaration.** (1) It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation, recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights

and defenses by employers and employees alike.

(2) The general assembly hereby finds that the determination of whether an individual is an employee for purposes of the "Workers' Compensation Act of Colorado" is subject to a great deal of speculation and litigation. It is the intent of the general assembly to provide an easily ascertainable standard for determining whether an individual is an employee. In order to further this objective, the test for determining whether an individual is an employee for the purposes of the "Workers' Compensation Act of Colorado" shall be based on the nine criteria found in section 8-40-202 (2) (b) (II) which shall supersede the common law. The fact that an individual performs services exclusively or primarily for another shall not be conclusive evidence that the individual is an employee.

**Source: L. 90:** Entire article R&RE, p. 468, § 1, effective July 1. **L. 91:** Entire section amended, p. 1291, § 3, effective July 1. **L. 93:** Entire section amended, p. 355, § 1, effective April 12. **L. 95:** (2) amended, p. 343, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-40-101.5 as it existed prior to 1990.

### ANNOTATION

**Claimant has burden** of establishing rights to workers' compensation benefits. *Younger v. City & County of Denver*, 810 P.2d 647 (Colo. 1991).

Subsection (1) applied in *Weld County Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

**Subsection (1) does not confer eligibility for unemployment compensation benefits** upon a claimant who is otherwise ineligible. *McClafflin v. Indus. Claim Appeals Office*, 126 P.3d 288 (Colo. App. 2005).

## PART 2

### DEFINITIONS

**8-40-201. Definitions - repeal.** As used in articles 40 to 47 of this title, unless the context otherwise requires:

(1) "Accident" means an unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; or the effect of an unknown cause or, the cause, being known, an unprecedented consequence of it.

(2) "Accident", "injury", or "injuries" includes disability or death resulting from accident or occupational disease as defined in subsection (14) of this section.

(2.5) (a) "Adverse action" means that the director, pursuant to part 5 of article 43 of this title or section 8-42-101 (3.6), has retroactively denied payment of fees, recommended a change in treating physician, or excluded a health care provider from the workers' compensation system by revoking the accreditation of any such health care provider under section 8-42-101 (3.6).

(b) (I) This subsection (2.5) is repealed, effective July 1, 2014.

(II) Prior to such repeal, the accreditation process created by section 8-42-101 (3.5) and (3.6) shall be reviewed as provided for in section 24-34-104, C.R.S.

(3) "Board" means the board of directors of Pinnacol Assurance.

(3.4) "Chief executive officer" means the chief executive officer of Pinnacol Assurance.

(3.5) Repealed.

(3.6) "Claimant" means a person who either:

(a) Receives benefits under articles 40 to 47 of this title; or

(b) Has or asserts, in any administrative or judicial forum or in any communication with the director, the division, or an employer, insurer, or self-insured employer, a right to receive such benefits.



(4) "Division" means the division of workers' compensation in the department of labor and employment.

(5) "Director" means the director of the division of workers' compensation.

(6) "Employee" has the meaning set forth in section 8-40-202 and the scope of such term is set forth in section 8-40-301.

(7) "Employer" has the meaning set forth in section 8-40-203 and the scope of such term is set forth in section 8-40-302.

(8) "Employment" means any trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position, or process of manufacture in which any person may be engaged; except that it shall not include participation in a ridesharing arrangement, as defined in section 39-22-509 (1) (a) (II), C.R.S., and participation in such a ridesharing arrangement shall not affect the wages paid to or hours or conditions of employment of an employee; nor shall it include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program.

(9) "Examiner" means one of the industrial claim appeals examiners appointed to the industrial claim appeals panel in the industrial claim appeals office.

(10) "Executive director" means the executive director of the department of labor and employment.

(11) (Deleted by amendment, L. 2002, p. 1882, § 27, effective July 1, 2002.)

(11.5) "Maximum medical improvement" means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

(12) "Mediation" means a process through which parties involved in a dispute concerning matters arising under articles 40 to 47 of this title meet with a mediator to discuss such matter or matters, defining and articulating the issues and their positions on such issues, with a goal of resolving such dispute or disputes.

(13) "Mediator" means an individual who is trained to assist disputants in reaching a mutually acceptable resolution of their disputes through the identification and evaluation of alternatives.

(13.5) (a) "Medical treatment guidelines" means a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury and disease that will assure appropriate medical care at a reasonable cost.

(b) (I) This subsection (13.5) is repealed, effective July 1, 2014.

(II) Prior to such repeal, the accreditation process created by section 8-42-101 (3.5) and (3.6) shall be reviewed as provided for in section 24-34-104, C.R.S.

(14) "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

(15) "Order" means and includes any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge.

(15.5) "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

(16) "Panel" means the industrial claim appeals panel that conducts administrative appellate review pursuant to articles 40 to 47 of this title.

(16.5) (a) "Permanent total disability" means the employee is unable to earn any wages in the same or other employment. Except as provided in paragraph (b) of this subsection (16.5), the burden of proof shall be on the employee to prove that the employee is unable to earn any wages in the same or other employment.

(b) Total loss of or total loss of use of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof shall create a rebuttable presumption of permanent total disability. "Total loss of use" shall be a medical determination, based upon objective findings, made by an independent medical examiner who is a level II accredited physician in the appropriate field.

(17) "Place of employment" means every place whether indoors, outdoors, or underground and the premises, workplaces, works, and plants appertaining thereto or used in connection therewith where either temporarily or permanently any industry, trade, or business is carried on; or where any process or operation directly or indirectly relating to any industry, trade, or business is carried on; or where any person is directly or indirectly employed by another for direct or indirect gain or profit.

(18) "State" includes any state or territory of the United States, the District of Columbia, and any province of Canada.

(18.5) "Temporary help contracting firm" means any person who is in the business of employing individuals and, for compensation from a third party, providing those individuals to perform work for the third party, under the supervision of the third party.

(19) (a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

(b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment. Medicaid and other indigent health care programs are not health insurance plans for the purposes of this section.

(c) No per diem payment shall be considered wages under this subsection (19) unless it is also considered wages for federal income tax purposes.

**Source:** **L. 90:** Entire article R&RE, p. 469, § 1, effective July 1; (6) and (7) amended, p. 1843, § 28, effective July 1. **L. 91:** (2.5), (3.5), (11.5), (13.5), and (16.5) added and (4), (5), (8), (12), (15), and (19) amended, p. 1292, § 4, effective July 1. **L. 94:** (19) amended, p. 1285, § 1, effective May 22; (16.5) amended, p. 2000, § 1, effective July 1. **L. 95:** (2.5) and (3.5) amended, p. 12, § 1, effective March 9. **L. 96:** (2.5) amended, p. 151, § 1, effective July 1; (18.5) added, p. 827, § 1, effective July 1. **L. 97:** (3.6) and (15.5) added, p. 112, § 1, effective July 1. **L. 98:** (13.5) amended, p. 168, § 1, effective April 6. **L. 2002:** (3) and (11) amended and (3.4) added, p. 1882, § 27, effective July 1. **L. 2003:** (2.5) and (13.5) amended, p. 917, § 1, effective July 1. **L. 2004:** (8) amended, p. 904, § 26, effective May 21. **L. 2010:** (19)(b) amended, (SB 10-187), ch. 310, p. 1456, § 1, effective July 1.

**Editor's note:** (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 1990. For a detailed comparison, see the comparative tables located in the back of the index.

(2) Subsection (3.5)(b)(I) provided for the repeal of subsection (3.5), effective July 1, 1996. (See L. 95, p. 12.)



(3) Subsection (3.4) was originally numbered as (3.5) in House Bill 02-1135 but has been renumbered on revision for ease of location.

## ANNOTATION

- I. General Consideration.
- II. Accident and Injuries.
- III. Employment.
- IV. Occupational Disease.
- V. Order.
- VI. Overpayment.
- VII. Permanent Total Disability.
- VIII. Place of Employment.
- IX. State.
- X. Wages.
  - A. Generally.
  - B. Computation of Average Weekly Wage.
  - C. Computation.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Independent Contractors and the Colorado Workers' Compensation Act — Parts I and II", see 22 Colo. Law. 545 and 1281 (1993). For article, "Anderson v. Brinkoff: Finally, a Meaningful Definition of 'Occupational Disease'", see 23 Colo. Law. 383 (1994). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 83 (April 2004).

**Annotator's note.** (1) Since § 8-40-201 is similar to §§ 8-41-102, 8-41-103, 8-41-108, and 8-46-201 as they existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, relevant cases construing those provisions have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under the act to the industrial claim appeals office.

### II. ACCIDENT AND INJURIES.

**Law reviews.** For article, "A Significant Change in the Colorado Workmen's Compensation Act: 'Accidents', 'Injuries' and Heart Attack", see 41 Den. L. Ctr. J. 189 (1964). For article, "The Enterprise Liability Theory of Torts", see 47 U. Colo. L. Rev. 153 (1976).

**The definition of "accident" under this section** is an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury. *T & T Loveland Chinchilla Ranch v. Bourn*, 173 Colo. 267, 477 P.2d 457 (1970).

An "accident" under the workmen's compensation act is an occurrence traceable to a definite time, place, and cause. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 154 Colo. 240, 392 P.2d 174 (1964); *Miceli v. State Comp. Ins. Fund*, 157 Colo. 204, 401 P.2d 835 (1965).

Prior to this section, the workmen's compensation statute did not contain any definition of the word "accident". *Indus. Comm'n v. Milka*, 159 Colo. 114, 410 P.2d 181 (1966).

But an "accident" under the act had been interpreted to mean any unintended or unexpected loss or hurt apart from its cause. The term "accidental injury" was not then confined to a situation where the means or cause was an accident for it also included any injury which was itself an accident. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

And this section is not intended to and does not alter the meaning of "accident" as that term came to be accepted by reason of court decisions. *Denver-Golder Corp. v. Minikus*, 159 Colo. 188, 410 P.2d 636 (1966); *Indus. Comm'n v. Milka*, 159 Colo. 114, 410 P.2d 181 (1966).

Thus, by this section, the general assembly has done nothing more than to adopt and to place into the act the court's determination of what is an accident. *Indus. Comm'n v. Milka*, 159 Colo. 114, 410 P.2d 181 (1966).

Since case law not overruled, demonstrative external violence need not be shown. The general assembly has not overruled the "case law"; therefore, it does not have to be shown that some demonstrative external violence was visited upon the body "causing a wounding, breaking, tearing, puncturing or disruption of the continuity of the body of the injured employee or his bodily tissue". *Indus. Comm'n v. Milka*, 159 Colo. 114, 410 P.2d 181 (1966).

The former definitions of "accident" and "injury" in this section made them inseparably linked to trauma, but this traumatic connection was entirely eliminated in the 1965 amendment. For example, in the 1965 definition of "accident" there are the terms, "an unforeseen event, occurring without the will or design of the person whose mere act causes it" and "an unexpected, unusual, or undesigned occurrence". *T & T Loveland Chinchilla Ranch v. Bourn*, 173 Colo. 267, 477 P.2d 457 (1970).

**"Personal injury" limited.** Because "personal injury" is not defined by the workmen's compensation act, it does not include damages which are based mainly on mental suffering and humiliation, and only peripherally on physical suffering and pain. *Luna v. City & County of Denver*, 537 F. Supp. 798 (D. Colo. 1982).

**Courts distinguish between "accident" and "injury".** *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

**In that accident is the cause and injury is the effect.** It does not follow in every instance that the two occur simultaneously. At least, in many instances, the total or ultimate effect is not immediately apparent. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Indus. Comm'n v. Bysom*, 166 Colo. 502, 444 P.2d 627 (1968); *Crest Fence Co. v. Cec*, 175 Colo. 21, 485 P.2d 709 (1971).

**And an injury takes place when one, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury.** *Crest Fence Co. v. Cec*, 175 Colo. 21, 485 P.2d 709 (1971).

**Therefore, to interpret the act in such a way that a person who reasonably discovers his injury long after the accident and is entitled to compensation is not entitled to his medical expenses is absurd, and a defeat of the purpose of the act.** *Crest Fence Co. v. Cec*, 175 Colo. 21, 485 P.2d 709 (1971).

**Series of traumatic events compensable.** The fact that an injury results from a series of traumatic events does not prevent that injury from being compensable as proximately caused by accident. *Martinez v. Indus. Comm'n*, 40 Colo. App. 485, 580 P.2d 36 (1978).

**The traditional test for distinguishing between accidental and occupational injuries is whether the injury can be traced to a particular time, place, and cause.** Because the employee's ulnar nerve entrapment injury resulted from the conditions of her employment, rather than a specific accident or trauma, the injury is an occupational disease within the meaning of subsection (14). *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

**If one can prove that the injury was a result of work,** then the date of injury is irrelevant for purposes of medical compensation. The injured worker is entitled to medical compensation regardless of date of injury if he or she can prove injury as a result of work. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

**A claimant suffering from an occupational disease is entitled to reasonably necessary medical benefits,** even if the disease has not yet become disabling. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251\* (Colo. App. 1999).

**Applied in** *Eisnach v. Indus. Comm'n*, 633 P.2d 502 (Colo. App. 1981); *High v. Indus. Comm'n*, 638 P.2d 818 (Colo. App. 1981); *Stephen Equip. Co. v. Baca*, 703 P.2d 1332 (Colo. App. 1985); *City of Aurora v. Indus. Comm'n*, 710 P.2d 1122 (Colo. App. 1985).

### III. EMPLOYMENT.

**This section is to be construed in relation to § 8-48-101.** *Betz v. Indus. Comm'n*, 109 Colo. 385, 125 P.2d 958 (1942).

**Determination of employment relationship depends upon facts in each case.** *Schultz v. Indus. Comm'n*, 34 Colo. App. 122, 523 P.2d 164 (1974).

**And determination must properly be made by commission rather than court,** even though the facts are largely undisputed, because this matter is not within the court's scope of review. *Schultz v. Indus. Comm'n*, 34 Colo. App. 122, 523 P.2d 164 (1974).

**One may be employee by virtue of the statute and not by common-law definition.** An obligation to pay workmen's compensation may, in proper cases, be imposed against an owner where the common-law relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition. *Finnerman v. McCormick*, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed.2d 644 (1974).

**Doubt resolved in claimant's favor.** Any reasonable doubt as to whether a compensable accidental injury or death arose out of and in the course of employment must be resolved in favor of the claimant. *Conley v. Indus. Comm'n*, 43 Colo. App. 10, 601 P.2d 648 (1979).

**A company whose business is essentially that of processing, is within the meaning of "process of manufacture or any method of carrying on any such trade or process of manufacture" as used in this section.** *Betz v. Indus. Comm'n*, 109 Colo. 385, 125 P.2d 958 (1942).

**Harm or injury sustained by an employee while going to or from his work is not compensable,** in the absence of special circumstances, and except in certain unusual circumstances. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967); *J. C. Carlile Corp. v. Antaki*, 162 Colo. 376, 426 P.2d 549 (1967).

**But injuries which occur to an employee while going to or from work may be compensable** when it appears that at the time of such injuries he is engaged in doing an act, or performing a duty, which he is definitely charged with doing as a part of his contractual service, or under the express or implied direction of his employer. *State Comp. Ins. Fund v. Keane*, 160 Colo. 292, 417 P.2d 8 (1966); *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967); *J. C. Carlile v. Antaki*, 162 Colo. 376, 426 P.2d 549 (1967).

**And an injury suffered by an employee while performing an act for the mutual ben-**



efit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly, an injury resulting from such an act arises out of, and in the course of, the employment; and this rule is applicable, even though the advantage to the employer is slight. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967).

**Thus, the test in brief is this:** If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967).

**The test for whether reimbursed travel is within the course and scope of employment necessitates the following findings of fact:** (1) The number of miles traveled; (2) the cost of driving the distance on a daily basis; (3) the extent to which the reimbursement covers actual travel costs; (4) the extent to which other employees travel to reach the job site; and (5) the difficulties of travel that provide a special benefit to the employer or poses an unusual risk to the employee. *Sturgeon Elec. v. Indus. Claim Appeals Office*, 129 P.3d 1057 (Colo. App. 2005).

**Decedent's death arises out of his employment** if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects. *Conley v. Indus. Comm'n*, 43 Colo. App. 10, 601 P.2d 648 (1979).

**Claim not barred by off-duty status.** The fact that decedent police officer was off duty prior to the onset of the emergency does not bar a claim for compensation. *Conley v. Indus. Comm'n*, 43 Colo. App. 10, 601 P.2d 648 (1979).

**Voluntary participation in recreational event held during nonwork hours** and off of employer's premises, with only benefit to employer being improvement of employee morale, held not to constitute compensable situation if injury to employee occurs. *Wilson v. Scientific Software-Intercomp*, 738 P.2d 400 (Colo. App. 1987).

**Even if the employer promoted the event, subsection (8) requires that the claimant's motive for participation be determined** and that compensation be denied if participation in the activity was voluntary. *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

**An administrative law judge may consider evidence concerning whether an employer promoted, sponsored, or supported an activity** because it is within the employer's power to enlarge the scope of employment. *Dover Eleva-*

*tor Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

**Causation may be established in the absence of the time and place factors set forth in *City and County of Denver v. Lee*, 168 Colo. 208, 450 P.2d 352 (1969), if there is a strong showing of the other factors.** *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

**The fact that there was no evidence that anyone was punished for not having attended a party did not preclude a determination that attendance at the party was voluntary.** *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

**The provision of this section providing that employment does not include participation in a ridesharing arrangement precludes a vicarious liability claim against the employer for injuries sustained by an employee in a car pooling arrangement.** *Smith v. Pinner*, 891 F.2d 784 (10th Cir. 1989).

**In the context of workers' compensation, the determination whether an accident occurred within the scope of employment depends on an examination of the totality of the circumstances,** and if an employee's travel is at the express or implied request of the employer, or if the travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, then the travel is within the scope of employment. *Capra v. Tucker*, 857 P.2d 1346 (Colo. App. 1993).

**Where the employer agrees to provide its employee with the means of transportation or to pay the employee's cost of commuting to and from work,** the scope of employment inferentially enlarges to include the employee's transportation. *Capra v. Tucker*, 857 P.2d 1346 (Colo. App. 1993).

**Where claimant worked full-time and there was no evidence that he was hired for the completion of single tasks, or on a per task basis, ALJ erred in concluding that he was not an actual employee.** The "relative nature of the work" test, if applied, would show that the claimant was an actual employee under this section. *Stampados v. Colo. D & S Enters.*, 833 P.2d 815 (Colo. App. 1992).

**The term "employment" is applied in *Loffland Brothers Co. v. Indus. Comm'n*, 714 P.2d 509 (Colo. App. 1985).**

#### IV. OCCUPATIONAL DISEASE.

**Former section provided that an occupational disease would not be compensated as an accident.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 162 Colo. 68, 424 P.2d 382 (1967).

**Employment conditions acting on preexisting allergy or weakness in "occupational disease".** Where employment conditions act upon a claimant's individual allergy, hypersensitivity,

or preexisting weakness so as to disable him, he has a compensable occupational disease, provided other requirements for compensability have been met. *Denver v. Hansen*, 650 P.2d 1319 (Colo. App. 1982); *IML Freight v. Indus. Comm'n*, 676 P.2d 1205 (Colo. App. 1983).

**As is condition acting on preexisting injury.** Where, as a condition of his employment, claimant was required to wear safety shoes, which developed blistering on a foot on which he had previously suffered severe burns, this injury fits within the definition of occupational disease. *CF & I Steel Corp. v. Indus. Comm'n*, 650 P.2d 1332 (Colo. App. 1982).

**Standard for disease.** Disability benefits are not given only in those cases in which the disease is so overwhelming that it physically prevents a worker from attempting to perform his duties. *Jefferson County Schs. v. Headrick*, 734 P.2d 659 (Colo. App. 1986).

**Under the definition of "occupational disease",** the statute does not invite a weighing of hazards to which a worker has been exposed in his lifetime in determining whether a particular disease is occupational, it operates to ensure that a disease results from an occupational hazard. Where there is no evidence that occupational exposure to a hazard is a necessary prerequisite to the development of the disease, a claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

If any hazard encountered by a worker outside the worker's employment setting was at least an equal contributor to the employee's disease, no compensation can be awarded. *Hall v. Indus. Claim Appeals Office*, 757 P.2d 1132 (Colo. App. 1988); *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Therefore, if two or more causes contribute to a diseased condition, it is necessary to determine the extent to which the nonindustrial cause contributed to that condition. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

However, similar to the requirement that a tortfeasor assumes the burden of proving the ability to apportion responsibility between two or more causes of a disability, a disabled worker's employer bears the burden of proving the extent to which a nonoccupational hazard has contributed to that worker's disability. The failure to sustain this burden will render inapplicable the statutory exclusion from the general rule of compensation in this section. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

**The fact that an occupational disease becomes acutely symptomatic does not ipso facto transform it into an accidental injury.** *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

**Occupational diseases are subject to a more rigorous test than occupational accidents/injuries before they can be found compensable.** If the general assembly intended to subject occupational disease only to the "arising out of" test, there would be no need to include the language concerning hazards to which the worker would have been equally exposed outside of employment. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

**The four-part test applied to determine whether an occupational disease is compensable amounts to a legislative declaration** that it is necessary to limit the scope of occupational diseases to those diseases which result from working conditions which are characteristic of the vocation. It is this proof of causation that ensures that the Workers' Compensation Act will not become a general health insurance act. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993) (decided under law in effect prior to 1990 repeal and reenactment).

**Occupational exposure as a contributory factor in disability.** When there is no evidence that occupational exposure was a necessary precondition to development of the disease with which the claimant is afflicted, the claimant has sustained an occupational disease only to the extent that the occupational exposure contributed to his overall disability. *Masdin v. Gardner-Denver-Copper Indus., Inc.*, 689 P.2d 714 (Colo. App. 1984).

## V. ORDER.

**Written authority from the division of labor for the employer to close its file is not equivalent to an order finally adjudicating the claim,** especially since there was no request made of claimant to advise whether he agreed that his case was closed. *Granite Constr. Co. v. Leonard*, 40 Colo. App. 20, 568 P.2d 500 (1977).

**Letter of director was not an "order"** within the meaning of this section but instead gave rise to a "controversy" which was properly submitted to a hearing officer for resolution. *Romans v. Hewitt Elec. Corp.*, 723 P.2d 161 (Colo. App. 1986).

## VI. OVERPAYMENT.

**The statutory definition of the term "overpayment" is clear and unambiguous.** *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

**There are three categories of possible overpayment included in the statutory definition of "overpayment" under subsection (15.5).** The first category is for overpayments created when a claimant receives money that exceeds the amount that should have been paid. The



second category is for money received that a claimant was not entitled to receive. The third category is for money received that results in duplicate benefits because of offsets that reduce disability or death benefits payable under articles 40 to 47 of this title. *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

The disjunctive "or" in subsection (15.5) plainly demarcates three different categories of overpayments, only one of which involves statutory setoff. The statutory phrase "because of offsets that reduce disability or death benefits payable under said articles" applies only to the third category of overpayments in subsection (15.5). *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

## VII. PERMANENT TOTAL DISABILITY.

Classification for purposes of determining eligibility for permanent total disability is constitutional and does not violate equal protection guarantees. *Lobb v. Indus. Claim Appeals Office*, 948 P.2d 115 (Colo. App. 1997).

Position offered to claimant in which she would engage in a variety of activities and be compensated at a rate of \$10 per hour, constituted "employment" within the meaning of subsection (8), making her ineligible for permanent total disability benefits. Administrative law judge's finding that the offer was a bona fide offer of employment rather than a charitable offer from claimant's former employer was supported by the record and is binding on appeal. *Lobb v. Indus. Claim Appeals Office*, 948 P.2d 115 (Colo. App. 1997).

Determination of "permanent total disability" is based on several factors, not just medical impairment. The 1991 amendment limiting determination of permanent partial disability to consideration of medical impairment does not limit determination of permanent total disability in the same manner. Thus, in determining permanent total disability, the ALJ was correct in considering claimant's physical condition, employment history, and educational background. *Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1995).

In making the determination whether a claimant is permanently and totally disabled, the ALJ may consider human factors such as education, ability, and former employment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

The determination of whether a claimant is permanently and totally disabled is a factual determination and thus, an ALJ's resolution that is supported by substantial evidence is binding on review. *Holly Nursing Care Ctr. v. Indus.*

*Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

A claimant who would not be able to access the labor market in the area where the claimant lives, a "reasonable commutable distance from home", is not capable of securing employment, was unable to earn any wages, and therefore was permanently and totally disabled. *Brush Greenhouse Partners v. Godinez*, 942 P.2d 1278 (Colo. App. 1996), aff'd sub. nom. *Weld County Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

Access to or availability of employment in a claimant's commutable labor market may be considered in determining a claimant's eligibility for permanent total disability benefits. The crux of the inquiry is whether employment exists that is reasonably available to the claimant given his or her circumstances and can only be answered on a case-by-case basis. *Weld County Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

The legislative history of the 1991 amendment to subsection (16.5)(a) indicates that the new definition of permanent total disability was intended to tighten and restrict eligibility for permanent total disability benefits. There is no evidence that the legislature intended to go further by abolishing consideration of a claimant's accessible labor market. *Weld County Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

## VIII. PLACE OF EMPLOYMENT.

The place of employment under the workmen's compensation act is not expressly limited to the state. *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957).

## IX. STATE.

Law reviews. For note, "The Conflicts Problem as Applied to Workmen's Compensation in Colorado", see 22 *Rocky Mt. L. Rev.* 77 (1949).

Extraterritorial provisions reciprocal. The very inclusion of "any province of Canada" within the purview of this subdivision argues convincingly that the basic principle of the subdivision is the mutual recognition of extraterritorial provisions by voluntary reciprocal action of the various governing units contemplated by this subdivision; that the extraterritorial principle becomes applicable only to the extent that one state and then another enacts a similar reciprocal law. The fact that two neighboring states, Utah and Wyoming, have enacted simultaneously with this state very similar laws would seem to be persuasive in adopting this view. *Frankel Carbon & Ribbon Co. v. Aaron*, 113 Colo. 429, 158 P.2d 929 (1945).

Applied in *State Comp. Ins. Fund v. Howington*, 133 Colo. 583, 298 P.2d 963 (1956).

## X. WAGES.

### A. Generally.

**Question whether subsection (19) is unconstitutional** by virtue of preemption by federal legislation was properly a matter within the court of appeals' jurisdiction, and was not a matter subject to review by the administrative law judge. *Celebrity Custom Builders v. Indus. Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

**Exclusion of fringe benefits of employment from definition of "wages" of employees in agricultural industry violates equal protection guarantees.** *Higgs v. Western Landscaping & Sprinkler Sys., Inc.*, 804 P.2d 161 (Colo. 1991).

**Barring a claimant who is capable of earning wages in "any" amount from receiving permanent total disability benefits does not offend equal protection guarantees.** *Christie v. Coors Transp. Co.*, 919 P.2d 857 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997).

**The exclusion of per diem payments in the calculation of wages does not result in disparate calculation of wages**, but rather, serves to differentiate between payments intended to reimburse the employee for expenses incurred as a result of his employment and those meant to provide economic advantage, and is not a violation of equal protection. *Young v. Indus. Claim Appeals Office*, 969 P.2d 735 (Colo. App. 1998).

**Inclusion of cost of continuing health insurance in definition of "wages" does not require preemption of subsection (19) under federal Employee Retirement Income Security Act of 1974 (ERISA).** *Celebrity Custom Builders v. Indus. Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

**Actual purchase of health insurance not required in order for cost of benefits to be included in calculating claimant's average weekly wage.** *Avalanche Indus. v. Indus. Claim Appeals Office*, 166 P.3d 147 (Colo. App. 2007), *aff'd*, 198 P.3d 589 (Colo. 2008).

ERISA does not preempt former § 8-47-101 (1) and (2), as effective in May 1989, to the extent those subsections required that the value of ERISA-plan benefits be included in calculating an employee's average weekly wage for workers' compensation purposes. *Hewlett-Packard Co. v. Diringier*, 42 F. Supp.2d 1038 (D. Colo. 1999).

**Purpose of subsection (19) definition of "wages"** (now found in subsection (19)(b)) is to calculate the money rate at which services are paid under the contract of hire in force at the time of injury, and to include any advantage or fringe benefit provided to the employee in lieu of wages. *Celebrity Custom Builders v. Indus. Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

**Non-cash benefits can comprise a substantial amount of a worker's wages.** *Celebrity Custom Builders v. Indus. Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995); *Young v. Indus. Claim Appeals Office*, 969 P.2d 735 (Colo. App. 1998); *Iler v. Indus. Claim Appeals Office*, 207 P.3d 945 (Colo. App. 2009).

**Subsection (19) contains no requirement that the employer provide any level of coverage for the employee.** *Celebrity Custom Builders v. Indus. Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

**The term "wages" does not include employer's FICA tax payments** for the purpose of calculating a claimant's average weekly wage even though employer's PERA contributions are included as "wages" for the same purpose. Case finds that there are significant differences between such payments which justify such different treatment. *Floyd v. AMF Tuboscope, Inc.*, 817 P.2d 534 (Colo. App. 1990).

**The phrase "any wages" in subsection (16.5)(a) cannot encompass the pre-injury wage rate level referred to in subsection (19)(a).** *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

**Subsection (16.5)(a) and § 8-43-303 (3) are distinguishable** because they affect persons who are not similarly situated to each other. The purpose of subsection (16.5)(a) is to define permanent total disability for purposes of initially determining whether a claimant is eligible for permanent total disability benefits. In contrast, the purpose of § 8-43-303 (3) is to set a standard which employers must meet before a case can be reopened to determine whether an employee who has already been awarded permanent total disability benefits should continue to receive such benefits. *Christie v. Coors Transp. Co.*, 933 P.2d 1330 (Colo. 1997).

**"Any wages" means that a claimant is disqualified from permanent disability benefits if he or she is capable of earning wages in any amount.** *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995); *Christie v. Coors Transp. Co.*, 919 P.2d 857 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997).

**Employer cannot evade responsibility under Workers' Compensation Act by labeling a portion of compensation as "expense reimbursement"** where there is no rational or realistic relationship between the employee's actual expenses and the amount claimed as reimbursement. *Sneath v. Express Messenger*, 881 P.2d 453 (Colo. App. 1994).

**In determining the "money rate at which the services are rendered" pursuant to subsection (19), there must be included the value of the rate of accrual of the employee's leave time.** *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996).

**Pension contributions are excluded** from the determination of claimant's average weekly



wage. *City of Lamar v. Koehn*, 968 P.2d 164 (Colo. App. 1998).

**Panel correctly declined to include the value of claimant's vacation and sick leave in determining claimant's average weekly wage** since the leave was subject to forfeiture after a specified maximum number of days had accrued and since the value of the claimant's leave time was dependent upon actual usage and would decline if not used. *City of Lamar v. Koehn*, 968 P.2d 164 (Colo. App. 1998).

**Income from an investment or from a personally operated business does not necessarily constitute "wages"**. Because the general assembly did not intend to prohibit disabled persons from securing income other than wage income, claimant was not disqualified from receiving permanent total disability benefits simply because he received unspecified income from his investment in a bingo parlor and his former land scraper business. *Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1995).

#### B. Computation of Average Weekly Wage.

**A claimant's average weekly wage is to be determined according to the contract of hire in force at the time of the injury.** *Drywall Prods. v. Constable*, 832 P.2d 957 (Colo. App. 1991).

**Expense reimbursement of four cents per mile was not considered wages** for federal income tax purposes and therefore could not be considered wages for purposes of computing a claimant's average weekly wage. *Ernie Baylog, Inc. v. Indus. Claim Appeals Office*, 923 P.2d 361 (Colo. App. 1996).

**The cost of medicare insurance benefits is included in an injured claimant's average weekly wage** once the continuation of the employers' group health insurance plan is terminated. *Schelly v. Indus. Claim Appeals Office*, 961 P.2d 547 (Colo. App. 1997).

**Average weekly wage includes both the employer's and employee's contribution to group health insurance premiums.** *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001), *aff'd*, 145 P.3d 661 (Colo. 2006).

Claimant is not required to present proof that he or she actually purchased replacement coverage. The statute merely seeks to ensure that the claimant will have funds available to make the purchase. *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001); *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891 (Colo. App. 2005).

**Average weekly wage includes the cost of health insurance only when a claimant has continued the employer's coverage at his or her own cost pursuant to COBRA or § 10-**

**16-108, and thereafter, when that coverage ends and the claimant has converted to other coverage.** An employee's contribution to his or her health care premium during the period of employment does not represent an amount included as wages for the purpose of calculating average weekly wages. *Midboe v. Indus. Claim Appeals Office*, 88 P.3d 643 (Colo. App. 2003).

**An employee who has been terminated from employment, however, following an injury is not required to purchase a continuing policy and convert to an individual plan before that employee becomes entitled to have the cost of continuing the employer's plan included in the average weekly wage.** Subsection (19)(b) does not require proof that the claimant has actually purchased coverage. *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001); *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891 (Colo. App. 2005).

**Subsection (19)(b) states that the cost of converting to a similar or lesser insurance plan is included in the average weekly wage computation.** When an employee converts to coverage comparable to or lesser than the employer's plan, the cost to the employee of the converted insurance is added to the employee's average weekly wage. *Sears Roebuck & Co. v. Indus. Claim Appeals Office*, 140 P.3d 336 (Colo. App. 2006).

**The absence of comparable market forces does not preclude a claimant from proving a reasonable sum for room and board.** *Iler v. Indus. Claim Appeals Office*, 207 P.3d 945 (Colo. App. 2009).

**The mandate in subsection (19)(b) to include the cost of room and board does not require direct proof of actual cost or market value of the room and board, and it does not exclude replacement cost as a viable measure.** Hence, claimant's testimony, based on claimant's expenses in Colorado, about the replacement value of food and lodging received while employed in Antarctica established a prima facie case and led to the reasonable inference that the room and board provided by the employer had some value. *Iler v. Indus. Claim Appeals Office*, 207 P.3d 945 (Colo. App. 2009).

#### C. Computation.

**Increase in benefits was correctly applied retroactively.** The case of *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991), did not establish a new rule of law in finding that the benefits for an occupational disease should be based on the claimant's wages at the time the claimant became disabled rather than on wages at the time of the last injurious exposure. *Subsequent Injury Fund v. Indus. Claim Appeals Office*, 899 P.2d 220 (Colo. App. 1994).

**8-40-202. Employee.** (1) "Employee" means:

(a) (I) (A) Every person in the service of the state, or of any county, city, town, or irrigation, drainage, or school district or any other taxing district therein, or of any public institution or administrative board thereof under any appointment or contract of hire, express or implied; and every elective official of the state, or of any county, city, town, or irrigation, drainage, or school district or any other taxing district therein, or of any public institution or administrative board thereof; and every member of the military forces of the state of Colorado while engaged in active service on behalf of the state under orders from competent authority. Police officers and firefighters who are regularly employed shall be deemed employees within the meaning of this paragraph (a), as shall also sheriffs and deputy sheriffs, regularly employed, and all persons called to serve upon any posse in pursuance of the provisions of section 30-10-516, C.R.S., during the period of their service upon such posse, and all members of volunteer fire departments, including any person receiving a retirement pension under section 31-30-1122, C.R.S., who serves as an active volunteer firefighter of a fire department subsequent to retirement pursuant to section 31-30-1132, C.R.S., or any person ordered by the chief or a designee of the chief's at the scene of an emergency or during the period of an emergency to become a member of that department for the duration of an emergency, and to perform the duties of a firefighter, and only if the person who is so ordered reports any claim within ten days of the cessation of the emergency, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams in any county, city, town, municipality, or legally organized fire protection district or ambulance district in the state of Colorado, and all members of the civil air patrol, Colorado wing, while said persons are actually performing duties as volunteer firefighters or as members of such volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, or volunteer search teams or as members of the civil air patrol, Colorado wing, and while engaged in organized drills, practice, or training necessary or proper for the performance of such duties. Members of volunteer police departments, volunteer police reserves, and volunteer police teams or groups in any county, city, town, or municipality, while actually performing duties as volunteer police officers, may be deemed employees within the meaning of this paragraph (a) at the option of the governing body of such county or municipality.

(B) Notwithstanding the provisions of sub-subparagraph (A) of this subparagraph (I), any elected or appointed official of any county, city, town, or irrigation, drainage, or school district or taxing district who receives no compensation for service rendered as such an official, other than reimbursement of actual expenses, may be deemed not to be an employee within the meaning of this paragraph (a) at the option of the governing body of such county, city, town, or district. The option to exclude such officials as employees within the meaning of this paragraph (a) may be exercised as to any category of officials or as to any combination of categories of officials. Any such option may be exercised for any policy year by the filing of a statement with the division not less than forty-five days before the start of the policy year for which the option is to be exercised. If such a statement is in effect as to any category of such uncompensated officials, no official in said category shall be deemed an employee within the meaning of this paragraph (a). The governing body shall notify each official of such action promptly at the time such election to exclude is exercised.

(II) The rate of compensation of such persons accidentally injured, or, if killed, the rate of compensation for their dependents, while serving upon such posse or as volunteer firefighters or as members of such volunteer police departments, volunteer police reserves, or volunteer police teams or groups or as members of such volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, or volunteer search teams or as members of the civil air patrol, Colorado wing, and of every nonsalaried person in the service of the state, or of any county, city, town, or irrigation, drainage, or school district therein, or of any public institution or administrative board thereof under any appointment or contract of hire, express or implied, including nonsalaried elective officials of the state, and of all members of the military forces of the state of Colorado shall be at the maximum rate provided by articles 40 to 47 of this title; except that this subparagraph (II) shall apply to an official described in sub-subparagraph (B) of subparagraph (I) of this



paragraph (a) only if no statement exercising the option to exclude such official as an employee within the meaning of this paragraph (a) is in effect.

(III) Any person who, as part of a rehabilitation program of the social services department of any county or city and county, is placed with a private employer for the purpose of training or learning trades or occupations shall be deemed while so engaged to be an employee of such private employer. Any person who receives a work experience assignment to a position in any department or agency of any county or municipality, in any school district, in the office of any state agency or political subdivision thereof, or in any private for profit or any nonprofit agency pursuant to the provisions of part 7 of article 2 of title 26, C.R.S., shall be deemed while so assigned to be an employee of the respective department, agency, office, political subdivision, private for profit or nonprofit agency, or school district to which said person is assigned or, if so negotiated between the county and the entity to which the person is assigned, of the county arranging the work experience assignment. Any person who receives a work experience assignment to a position in any federal office or agency pursuant to part 7 of article 2 of title 26, C.R.S., shall be deemed while so assigned to be an employee of the county arranging the work experience assignment. The rate of compensation for such persons if accidentally injured or, if killed, for their dependents shall be based upon the wages normally paid in the community in which they reside for the type of work in which they are engaged at the time of such injury or death; except that, if any such person is a minor, compensation to such minor for permanent disability, if any, or death benefits to such minor's dependents shall be paid at the maximum rate of compensation payable under articles 40 to 47 of this title at the time of the determination of such disability or of such death.

(IV) Except as provided in section 8-40-301 (3) and section 8-40-302 (7) (a), any person who may at any time be receiving training under any work or job training or rehabilitation program sponsored by any department, board, commission, or institution of the state of Colorado or of any county, city and county, city, town, school district, or private or parochial school or college and who, as part of any such work or job training or rehabilitation program of any department, board, commission, or institution of the state of Colorado or of any county, city and county, city, town, school district, or private or parochial school or college, is placed with any employer for the purpose of training or learning trades or occupations shall be deemed while so engaged to be an employee of the respective department, board, commission, or institution of the state of Colorado or of the county, city and county, city, town, school district, or private or parochial school or college sponsoring such training or rehabilitation program unless the following conditions are met, in which case the placed person shall be deemed an employee of the employer with whom he or she is placed:

(A) The sponsoring entity and the employer agree that the employer shall cover the placed person under the employer's workers' compensation insurance;

(B) The employer does in fact insure and keep insured its liability for workers' compensation as provided in articles 40 to 47 of this title and does in fact cover the placed person under such insurance; and

(C) With respect to agreements between sponsoring entities and employers entered into after April 1, 1991, the employer has been provided with notice of the provisions of this subparagraph (IV) and of subparagraphs (V) and (VI) of this paragraph (a).

(V) In the event a person placed with an employer is deemed an employee of the employer pursuant to subparagraph (IV) of this paragraph (a), the sponsoring entity shall not be subject to any liability for or on account of the death of or personal injury to the person so placed. In the event such person is deemed an employee of the sponsoring entity pursuant to the said subparagraph (IV), the employer shall not be subject to any liability for or on account of the death of or personal injury to the person and shall not be required to carry workers' compensation insurance or to pay premiums for workers' compensation insurance with respect to the person.

(VI) The rate of compensation for a person placed pursuant to subparagraph (IV) of this paragraph (a) if accidentally injured or, if killed, for dependents of such person shall be based upon the wages normally paid in the community in which such person resides or in the community where said work or job training or rehabilitation program is being conducted

for the type of work in which the person is engaged at the time of such injury or death, as determined by the director; except that, if any such person is a minor, compensation for such minor for permanent disability, if any, or death benefits to such minor's dependents shall be paid at the maximum rate of compensation payable under articles 40 to 47 of this title at the time of the determination of such disability or death.

(b) Every person in the service of any person, association of persons, firm, or private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed, who for the purpose of articles 40 to 47 of this title are considered the same and have the same power of contracting with respect to their employment as adult employees, but not including any persons who are expressly excluded from articles 40 to 47 of this title or whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of the employer. The following persons shall also be deemed employees and entitled to benefits at the maximum rate provided by said articles, and, in the event of injury or death, their dependents shall likewise be entitled to such maximum benefits, if and when the association, team, group, or organization to which they belong has elected to become subject to articles 40 to 47 of this title and has insured its liability under said articles: All members of privately organized volunteer fire departments, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations while performing their respective duties as members of such privately organized volunteer fire departments, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations and while engaged in organized drills, practice, or training necessary or proper for the performance of their respective duties.

(2) (a) Notwithstanding any other provision of this section, any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists, unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service shall not be considered if such control is exercised pursuant to the requirements of any state or federal statute or regulation.

(b) (1) To prove that an individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service, the individual and the person for whom services are performed may show by a preponderance of the evidence that the conditions set forth in paragraph (a) of this subsection (2) have been satisfied. The parties may also prove independence through a written document.

(II) To prove independence it must be shown that the person for whom services are performed does not:

(A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;

(B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

(C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;

(D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(E) Provide more than minimal training for the individual;

(F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;



(G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

(H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

(III) A document may satisfy the requirements of this paragraph (b) if such document demonstrates by a preponderance of the evidence the existence of the factors listed in subparagraph (II) of this paragraph (b) as are appropriate to the parties' situation. The existence of any one of these factors is not conclusive evidence that the individual is an employee.

(IV) If the parties use a written document pursuant to this paragraph (b), such document must be signed by both parties and may be the contract for performance of service or a separate document. Such document shall create a rebuttable presumption of an independent contractor relationship between the parties where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. All signatures on any such document must be duly notarized.

(V) If the parties use a written document pursuant to this paragraph (b) and one of the parties is a professional whose license to practice a particular occupation under the laws of the state of Colorado requires such professional to exercise a supervisory function with regard to an entire project such supervisory role shall not affect such professional's status as part of the independent contractor relationship.

(c) Nothing in this section shall be construed to conflict with section 8-40-301 or to relieve any obligations imposed pursuant thereto.

(d) Nothing in this section shall be construed to remove the claimant's burden of proving the existence of an employer-employee relationship for purposes of receiving benefits pursuant to articles 40 to 47 of this title.

(e) (I) Notwithstanding any other provision of this section, a written agreement between a nonprofit youth sports organization and a coach, specifying that the coach is an independent contractor and not an employee of the nonprofit youth sports organization and otherwise satisfying the requirements of this paragraph (e), shall be conclusive evidence that the relationship between the nonprofit youth sports organization and the coach is an independent contractor relationship rather than an employment relationship and that the nonprofit youth sports organization is not obligated to secure compensation for the coach in accordance with the "Workers' Compensation Act of Colorado".

(II) The written agreement shall contain a disclosure, in bold-faced, underlined, or large type, in a conspicuous location, and acknowledged by the parties by signature, initials, or other means demonstrating that the parties have read and understand the disclosure, indicating that the coach:

(A) Is an independent contractor and not an employee of the nonprofit youth sports organization;

(B) Is not entitled to workers' compensation benefits in connection with his or her contract with the nonprofit youth sports organization; and

(C) Is obligated to pay federal and state income tax on any moneys paid pursuant to the contract for coaching services and that the nonprofit youth sports organization will not withhold any amounts from the coach for purposes of satisfying the coach's income tax liability.

(III) A written agreement between a nonprofit youth sports organization and a coach in accordance with this paragraph (e) shall not be conclusive evidence of an independent contractor relationship for purposes of any civil action instituted by a third party.

(IV) As used in this paragraph (e), "nonprofit youth sports organization" means an organization that is exempt from federal taxation under section 501 (c) (3) of the federal

“Internal Revenue Code of 1986”, as amended, and is primarily engaged in conducting organized sports programs for persons under twenty-one years of age.

(3) Notwithstanding any other provision of this section, “employee” includes a person who participates in a property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

**Source:** **L. 90:** Entire article R&RE, p. 470, § 1, effective July 1. **L. 91:** (1)(a)(IV) amended, p. 1364, § 1, effective April 20; (1)(a)(III) amended, p. 1870, § 23, effective July 1. **L. 93:** (2) added, p. 356, § 2, effective April 12. **L. 94:** (1)(a)(III) amended, p. 452, § 2, effective March 29. **L. 95:** IP(2)(b)(II), (2)(b)(III), and (2)(b)(IV) amended, pp. 343, 344, § 2, effective July 1. **L. 97:** (1)(a)(I)(A) amended, p. 170, § 3, effective March 28; (1)(a)(III) amended, p. 1239, § 35, effective July 1; (1)(a)(I)(A) and (1)(a)(II) amended, p. 1005, § 2, effective August 6. **L. 2010:** (2)(e) added, (HB 10-1108), ch. 119, p. 400, § 2, effective April 15; (3) added, (HB 10-1076), ch. 162, p. 566, § 1, effective August 11.

**Editor’s note:** (1) This section is similar to former § 8-41-106 as it existed prior to 1990.

(2) Amendments to subsection (1)(a)(I)(A) by House Bill 97-1220 and Senate Bill 97-166 were harmonized.

**Cross references:** (1) For the scope of the term “employee”, see § 8-40-301.

(2) For the legislative declaration in the 2010 act adding subsection (2)(e), see section 1 of chapter 119, Session Laws of Colorado 2010.

## ANNOTATION

- I. General Consideration.
- II. Employee or Independent Contractor.
- III. Contract for Hire.
- IV. Public Employees.
- V. Private Employees.
  - A. In General.
  - B. Casual Employment.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, “Independent Contractors and the Colorado Workers’ Compensation Act — Parts I and II”, see 22 Colo. Law. 545 and 1281 (1993). For article, “Independent Contractors in Colorado”, see 34 Colo. Law. 53 (Dec. 2005).

**Annotator’s note.** (1) Since § 8-40-202 is similar to § 8-41-106 as it existed prior to the 1990 repeal and reenactment of the “Workers’ Compensation Act of Colorado”, articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section. For additional cases, see the annotations under former § 8-41-106 in the 1986 replacement volume.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under the act to the industrial claim appeals office.

**A governing body of the county or municipality must provide worker’s compensation to a voluntary peace officer.** The statutory language granting a county or municipality the

option to not provide such coverage was repealed by implication by § 16-2.5-110, which requires the reserve peace officers to be provided with worker’s compensation benefits. *City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006).

**Proper characterization of the employer-employee relationship depends on the facts** of each case and is for the commission to determine. *Melnick v. Indus. Comm’n*, 656 P.2d 1318 (Colo. App. 1982).

**To reap the benefits under the workmen’s compensation act, a person must in fact first be an employee** under the statutory definition. *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957).

**The definition of employee is broad** and obviously was so intended by the general assembly. *Indus. Comm’n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972 (1956); *Doyle v. Missouri Valley Constructors, Inc.*, 288 F. Supp. 121 (D. Colo. 1968).

The compensation act emphasizes the objective of protection of employees and in carrying out this objective gives a broad interpretation to the term “employee”. *Finnerman v. McCormick*, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed.2d 644 (1974).

**And even though the purpose of the workmen’s compensation act is to protect all workmen**, save those specifically excluded. *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953).

**The definition of an employee** entitled to coverage under this act includes “aliens” with-



out distinguishing between legal and illegal aliens and therefore does not preclude, as a matter of law, an illegal alien from proving an entitlement to benefits. *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997).

**General contractor remains statutory employer of subcontractor's employee** and is entitled to a corresponding immunity from suit, despite the fact that the subcontractor is an independent contractor of the general contractor. *Frank M. Hall & Co. v. Newsom*, 125 P.3d 444 (Colo. 2005).

**One cannot be his own employee.** *Indus. Comm'n v. Bracken*, 83 Colo. 72, 262 P. 521 (1927).

**"Employee" does not include one injured during pre-employment testing.** Applicant who was not under contract as an employee at the time of the accident is not an employee. *Younger v. City and County of Denver*, 796 P.2d 38 (Colo. App. 1990); *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991).

**"Appointment", as used in the definition of employee set forth in subsection (1) (a) requires that the person making the designation be vested with authority and the designation be for the purpose of discharging the duty of some office or trust.** A volunteer pitching coach permitted by a head baseball coach to work with the high school baseball team is not an employee subjecting the school district to workers' compensation liability since school district, and not head coach, is authorized to create additional coaching positions and a volunteer pitching coach position is not an office. *Mesa County Valley Sch. D. 51 v. Goletz*, 821 P.2d 785 (Colo. 1991).

**Three requirements are set forth, any two of which when met can qualify an employee, as the term is used in the statutes, as coming under the workmen's compensation act.** They are: (1) A contract of employment created in the state; (2) employment in the state under a contract created outside the state; and (3) substantial employment in the state. If any two of these conditions are met it makes no difference that the employee is not a resident of the state or is killed outside the state provided other statutory time limits on out-of-state employment are met. *Platt v. Reynolds*, 86 Colo. 397, 282 P. 264 (1929); *Tripp v. Indus. Comm'n*, 89 Colo. 512, 4 P.2d 917 (1931); *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957).

**"Employee" entitled to workers' compensation benefits** is a worker who performs a substantial portion of his work in this state and who is either injured in an accident in this state or has a contract in this state. *Loffland Bros. Co. v. Indus. Comm'n*, 714 P.2d 509 (Colo. App. 1985).

**In determining whether or not a claimant is an employee, the measure of his compen-**

sation is not a controlling factor. *De Beque Producers' Ass'n v. Indus. Comm'n*, 83 Colo. 158, 262 P. 1019 (1928).

**For in the statutory definition of employee there is no requirement that a salary be paid for the service rendered.** *Lyttle v. State Comp. Ins. Fund*, 137 Colo. 212, 322 P.2d 1049 (1958).

**An unpaid student intern must be deemed a "person placed pursuant to" subparagraph (1)(a)(IV) and is thus entitled to an imputed wage under subparagraph (1)(a)(VI) for purposes of calculating medical impairment benefits, notwithstanding the exception in subparagraph (1)(A)(IV), which exception relates only to who shall be deemed the employer, not whether an employee is entitled to an imputed wage.** *Kinder v. Indus. Claim Appeals Office*, 976 P.2d 295 (Colo. App. 1998).

**Whether an injured workman is an employee is a question of fact.** *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929); *Sch. Dist. No. 60 v. Indus. Comm'n*, 43 Colo. App. 38, 601 P.2d 651 (1979).

**Determination of type of employee deemed question of law.** Where the facts are undisputed, the question of whether an individual is an employee as defined by this section, or a constructive employee to whom work has been contracted out as defined by § 8-48-101 (1), is a question of law, not a question of fact. *Univ. of Colo. Med. Center v. Indus. Comm'n*, 622 P.2d 596 (Colo. App. 1980).

**And the finding on conflicting evidence is conclusive on review.** *De Beque Producers' Ass'n v. Indus. Comm'n*, 83 Colo. 158, 262 P. 1019 (1928); *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929).

**Moreover, where various findings are made, the last finding is conclusive.** In a workmen's compensation case, although the commission and its referee made three different findings of fact, this did not nullify the rule that the last finding is conclusive. *Indus. Comm'n v. Aetna Life Ins. Co.*, 88 Colo. 82, 292 P. 229 (1930).

**So also fact findings sufficiently supported by the evidence will not be disturbed on review.** *State Comp. Ins. Fund v. Indus. Comm'n*, 95 Colo. 309, 35 P.2d 849 (1934); *London Guarantee & Accident Co. v. Indus. Comm'n*, 95 Colo. 306, 35 P.2d 1010 (1934).

**And a court exceeds its jurisdiction in a workmen's compensation case if it attempts to pass upon the weight of the evidence introduced before the director.** *Indus. Comm'n v. Aetna Life Ins. Co.*, 88 Colo. 82, 292 P. 229 (1930).

**One may be employee by virtue of the statute and not by common-law definition.** An obligation to pay workmen's compensation may, in proper cases, be imposed against an owner where the common-law relationship of employer and employee does not exist, in that one

may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition. *Finnerman v. McCormick*, 499 F.2d 212 (10th Cir.), cert. denied, 419 U.S. 1049, 95 S. Ct. 624, 42 L. Ed.2d 644 (1974).

**Award of benefits of regular employee controlled by section.** Where nurse claiming benefits was a regular employee of the University of Colorado Medical Center, subsection (1)(a)(I) controlled the award of benefits as opposed to § 8-48-101 (1). *Univ. of Colo. Medical Center v. Indus. Comm'n*, 622 P.2d 596 (Colo. App. 1980).

**Award based upon erroneous interpretation of law sustained if award proper absent misinterpretation.** Even though a court may determine that the industrial commission erroneously interpreted the law, if the commission's award would have been correct had the law been properly interpreted, that award will be sustained. *Univ. of Colo. Med. Center v. Indus. Comm'n*, 622 P.2d 596 (Colo. App. 1980).

**Applied in** *Kalmon v. Indus. Comm'n*, 41 Colo. App. 259, 583 P.2d 946 (1978); *Ellis v. Rocky Mt. Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979); *Peterson v. Trailways, Inc.*, 555 F. Supp. 827 (D. Colo. 1983); *AGS Mach. Co. v. Indus. Comm'n*, 670 P.2d 816 (Colo. App. 1983).

## II. EMPLOYEE OR INDEPENDENT CONTRACTOR.

**Subsection (1)(b) contemplates contractual and quasi-contractual relationships created by estoppel**, and should be interpreted broadly to protect workers. *Olsen v. Indus. Claim Appeals Office*, 819 P.2d 544 (Colo. App. 1991).

**"Contractor" is not necessarily outside of the category of "employee".** The term "employee" has both a narrow, specific, and a wider generic meaning. *Indus. Comm'n v. Cont'l Inv. Co.*, 78 Colo. 399, 242 P. 49 (1925).

**But factors to be considered in determining whether one performing labor for another is a servant or a contractor are:** Does the workman give all or only a part of his time to the work; does the contract contemplate labor on the job, or completion; has the laborer or the employee control of the details; which may employ, control, and discharge assistants; which furnishes the necessary tools and equipment; may either terminate the employment without liability to the others; is compensation measured by time, by piece, or by lump sum? *Brush Hay & Milling Co. v. Small*, 154 Colo. 11, 388 P.2d 84 (1963).

**There are two tests for determining whether a worker is an actual employee or an independent contractor:** the "control" test and the "relative nature of the work" test, and if either test is satisfied the worker is an employee.

*Stampados v. Colo. D & S Enters.*, 833 P.2d 815 (Colo. App. 1992).

**The definition of an "independent contractor" in § 40-11.5-102 was intended to apply to the Workers' Compensation Act.** *Frank C. Klein & Co. v. Colo. Comp. Ins. Auth.*, 859 P.2d 323 (Colo. App. 1993).

**A servant is one whose employer has the order and control of work done by him** and who directs or may direct the means as well as the end. *Arnold v. Lawrence*, 72 Colo. 528, 213 P. 129 (1923); *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925); *Indus. Comm'n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972 (1956); *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**And it is the power of control, not the fact of control**, that is the principal factor in distinguishing a servant from a contractor. *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925); *Indus. Comm'n v. Moynihan*, 94 Colo. 438, 32 P.2d 802 (1934); *Indus. Comm'n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972 (1956); *Faith Realty & Dev. Co. v. Indus. Comm'n*, 170 Colo. 215, 460 P.2d 228 (1969).

**The right immediately to discharge involves the right of control.** *Indus. Comm'n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972 (1956).

**Thus the most important point in determining the question of contractor or employee is the right to terminate the relation without liability.** *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925); *Indus. Comm'n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972 (1956); *Brush Hay Milling Co. v. Small*, 154 Colo. 11, 388 P.2d 84 (1963); *Faith Realty & Dev. Co. v. Indus. Comm'n*, 170 Colo. 215, 460 P.2d 228 (1969).

**For the absolute right to terminate the relationship without liability is inconsistent with the concept of independent contractor.** *Indus. Comm'n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972 (1956).

**Where compensation is based upon time or piece the workman is usually a servant** and where it is based upon a lump sum for the task he is usually a contractor. *Brush Hay & Milling Co. v. Small*, 154 Colo. 11, 388 P.2d 84 (1963).

**A person may be determined to be an independent contractor even if all nine criteria outlined in subsection (2)(b)(II) are not established.** *Nelson v. Indus. Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998).

**Presumption of independent contractor status recognized in subsection (5) may be overcome** by clear and convincing evidence of control over the means and methods of performance that are wholly unrelated to the achievement of the end contracted for. *Frank C. Klein &*



Co. v. Colo. Comp. Ins. Auth., 859 P.2d 323 (Colo. App. 1993).

**Ski patrol worker who negotiated for a ski pass in lieu of salary in exchange for services** was not a "volunteer" for purpose of exclusion from coverage under this article. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994).

**If the facts are undisputed as to whether a workman is an employee or a contractor, the question is one of law.** *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925).

**And may be reviewed by the supreme court.** *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925); *Brush Hay & Milling Co. v. Small*, 154 Colo. 11, 388 P.2d 84 (1963).

**But if the question of whether workman was employee or independent contractor is one of fact**, to be determined from conflicting evidence, it is for the commission. *Whitney v. Mountain States Motors Co.*, 106 Colo. 184, 102 P.2d 743 (1940); *Brush Hay & Milling Co. v. Small*, 154 Colo. 11, 388 P.2d 84 (1963).

**Claimant's relationship with newspaper publisher was an employment relationship** where the newspaper exercised control over claimant by directing the time and place of newspaper delivery and delivery of newspapers was not a separate enterprise from the business of the newspaper. Contract which characterized claimant as an independent contractor was not controlling. *Olsen v. Indus. Claim Appeals Office*, 819 P.2d 544 (Colo. App. 1991).

**Acceptance of premiums by insurance fund for employee made fund liable for claim.** Actions of the state compensation insurance fund, which accepted workmen's compensation premium payments from employer based on employee status of carpenter constructing employer's private residence and which did not give employer notice that premium payment was accepted subject to appeal of determination that carpenter was employer's employee for workmen's compensation purposes, constituted conduct which would convey impression that the fund intended to cover carpenter's workmen's compensation claim; therefore, the fund was liable for workmen's compensation benefits awarded carpenter. *Drake v. Ins. Co. of North Am.*, 736 P.2d 1244 (Colo. App. 1986).

**Instances of employees.** *Indus. Comm'n v. Globe Indem. Co.*, 77 Colo. 251, 235 P. 576 (1925); *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925); *De Beque Producers' Ass'n v. Indus. Comm'n*, 83 Colo. 158, 262 P. 1019 (1928); *State Comp. Ins. Fund v. Indus. Comm'n*, 95 Colo. 309, 35 P.2d 849 (1934); *Indus. Comm'n v. Sontarelli*, 109 Colo. 84, 122 P.2d 239 (1942); *Kampt v. Disney*, 110 Colo. 518, 135 P.2d 1019 (1943); *Neely-Towner Motor Co. v. Indus. Comm'n*, 123 Colo. 472, 230 P.2d 993 (1951); *Indus. Comm'n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972

(1956); *Faith Realty & Dev. Co. v. Indus. Comm'n*, 170 Colo. 215, 460 P.2d 228 (1969).

**Instances of independent contractor.** *Indus. Comm'n v. Cont'l Inv. Co.*, 78 Colo. 399, 242 P. 49 (1925); *London Guarantee & Accident Co. v. Indus. Comm'n*, 95 Colo. 306, 35 P.2d 1010 (1934); *Whitney v. Mountain States Motors Co.*, 106 Colo. 184, 102 P.2d 743 (1940); *Warner v. Messick*, 108 Colo. 342, 117 P.2d 482 (1941); *Wilkowski v. Indus. Comm'n*, 113 Colo. 46, 154 P.2d 615 (1944); *Brush Hay & Milling Co. v. Small*, 154 Colo. 11, 388 P.2d 84 (1963); *Sands v. Indus. Comm'n*, 160 Colo. 42, 413 P.2d 702 (1966).

**Subsection (2) cited in** *Frank C. Klein & Co. v. Colo. Comp. Ins. Auth.*, 859 P.2d 323 (Colo. App. 1993).

### III. CONTRACT FOR HIRE.

**The requirement of contract of hire was written into the workmen's compensation act for two reasons:** First, the necessity for a "contract" was felt to insure that an employee did not give up legal rights against an employer without receiving value in return; and second, the contract had to be one "of hire" because, absent the expectation of remuneration at some rate, there was no way to compute benefits. *Rocky Mt. Dairy Prods. v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966).

**And § 8-41-105 and this section speak of "any contract of hire, express or implied", indicating that several "contracts of hire" may exist in a given situation and recovery had upon "any".** *Rocky Mt. Dairy Prods. v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966).

**Thus, both an express and implied "contract of hire" could exist between the same parties but covering different employment or covering the same employment but with differing parties.** *Rocky Mt. Dairy Prods. v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966).

**When a claim is filed under the workmen's compensation act, the burden of proof is upon the claimant to prove that he was an employee by showing the existence of a contract of hire.** *Hall v. State Comp. Ins. Fund*, 154 Colo. 47, 387 P.2d 899 (1963).

**And where the evidence does not disclose any contractual obligation**, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the act. *State Comp. Ins. Fund v. Indus. Comm'n*, 135 Colo. 570, 314 P.2d 288 (1957); *Hall v. State Comp. Ins. Fund*, 154 Colo. 47, 387 P.2d 899 (1963).

**Claimant who received a ski pass for use by another person was an employee** since the pass is a benefit comprising compensation. The lack of any wages as defined in § 8-40-201 (19) does not mean that no "contract of hire" exists under subsection (1)(b). *Aspen Highlands Ski-*

ing Corp. v. Apostolou, 854 P.2d 1357 (Colo. App. 1992).

**A contract of hire may be formed as long as the fundamental elements of contract formation are present** even though not every formality attending commercial contractual arrangements is observed. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

**Contract of hire found to exist** where claimant was part-time ski patrol worker who agreed to work only in exchange for the benefit of daily ski pass in lieu of salary and who worked under the direction of the employer. Aspen Highlands Skiing Corp. v. Apostolou, 866 P.2d 1384 (Colo. 1994).

#### IV. PUBLIC EMPLOYEES.

**The statutory definition of "employees" includes employees of the state.** Myers v. State, 162 Colo. 435, 428 P.2d 83 (1967).

**And if working for a public employer must be a "public employee".** Under the statutory classification of employer and employee, before a claimant can fix liability on a public employer, under the workmen's compensation act, for compensation for accidental injuries, he must be within the designation of "public employee". Indus. Comm'n v. State Comp. Ins. Fund, 94 Colo. 194, 29 P.2d 372 (1934).

**All workers in service of the state are treated as state "employees",** not as employees of separate entities, for purposes of workers' compensation benefits. Rodriguez v. Bd. of Dirs., 917 P.2d 358 (Colo. App. 1996).

**Public employees.** No intent can be found in the general assembly through the pertinent provisions of the workmen's compensation law to make any distinction in the classification of public employees between those who are engaged in governmental functions and those who are engaged in the proprietary branch of a political subdivision. The basic distinction of the act is between public employees and private employees. State Comp. Ins. Fund v. Alishio, 125 Colo. 242, 250 P.2d 1015 (1952).

**A governmental entity cannot be a constructive employer** pursuant to § 8-48-101 (1). Antal v. Delta County Mosquito Control Dist. No. 1, 644 P.2d 87 (Colo. App. 1982).

**Inmates are not employees of state or county.** Orr v. Indus. Comm'n, 691 P.2d 1145 (Colo. App. 1984), *att'd*, 716 P.2d 1106 (Colo. 1986).

**City as employer.** State Comp. Ins. Fund v. Alishio, 125 Colo. 242, 250 P.2d 1015 (1952).

**An unsalaried member of a state board or commission is an employee** of the state, and within the coverage of the workmen's compensation law, and had the general assembly intended to exclude such persons from coverage, language other than the words actually used would have been employed. Lyttle v. State

Comp. Ins. Fund, 137 Colo. 212, 322 P.2d 1049 (1958).

**Furthermore, it is evident that the intent of the general assembly was to provide** that the employees and appointees of the county, as specified therein, together with all nonsalaried employees, should be paid at the maximum rate of compensation. State Comp. Ins. Fund v. Keane, 160 Colo. 292, 417 P.2d 8 (1966).

**The status of a juror is not that of an employee** serving under this section, by "appointment or contract of hire, express or implied". The legislative branch of the government has not said that a juror is an employee of the county, and it does not lie with the judicial branch to belittle the functions of his great office by so declaring. Bd. of Comm'rs v. Evans, 99 Colo. 83, 60 P.2d 225 (1936).

**Employer of student teachers.** Section 22-62-105 (2) deems a school district the employer of a student teacher whereas the general provision of subsection (1)(a)(IV) of this section designates the sponsoring institution as the employer of its job trainees. Section 22-62-105 (2) merely shifts workmen's compensation liability for injury to student teachers to a different institution; where applicable, it is a legally enforceable specific exception to the general rule prescribed by subsection (1)(a)(IV). Sch. Dist. No. 60 v. Indus. Comm'n, 43 Colo. App. 38, 601 P.2d 651 (1979).

**Claimant was participating as a volunteer fireman,** and not merely as a patriotic citizen, at the time of his injury, while participating in a public patriotic celebration. Northwest Conejos Fire Prot. Dist. v. Indus. Comm'n, 39 Colo. App. 367, 566 P.2d 717 (1977).

**The rate of compensation for persons accidentally injured while serving as volunteer firefighters** shall be at the maximum rate provided by the Workers' Compensation Act. Subsection (1)(a)(II) creates an exception to the usual measure of calculating disability benefits. To the extent that subsection (1)(a)(II) gives injured volunteer firefighters a windfall, such a result has been mandated by the general assembly. Parker Fire Prot. Dist. v. Poage, 843 P.2d 108 (Colo. App. 1992).

**Volunteer member of civil air patrol** traveling on duty to attend organized training when injured suffers an injury which arises out of and in the course of his employment. Colo. Civil Air Patrol v. Hagans, 662 P.2d 194 (Colo. App. 1983).

**National Guard training is not "active service" for purposes of the receipt of workers' compensation benefits.** A member of the National Guard may not be considered to be on "active service" and hence qualified for workers' compensation benefits unless he or she has been ordered by the governor to provide full-time service in response to an emergency con-



fronting the state. *Sullivan v. Indus. Claim Appeals Office*, 22 P.3d 535 (Colo. App. 2000).

## V. PRIVATE EMPLOYEES.

### A. In General.

**Attorney regularly employed by a corporation is an "employee".** An attorney at law who is employed by a corporation regularly, and whose time and services are subject to the call of the employer under the terms of the employment, is an "employee" as that word is used in this section. *Indus. Comm'n v. Moynihan*, 94 Colo. 438, 32 P.2d 802 (1934).

**For in none of the provisions of the act is there language which expressly excludes members of the professions, attorney or other, if otherwise within the statute, from the enjoyment of its protecting purpose.** *Indus. Comm'n v. Moynihan*, 94 Colo. 438, 32 P.2d 802 (1934).

**Workmen's compensation acts are being extended even to employees of charitable institutions.** *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953).

**Student paid by university for particular service is employee subject to act.** Where a stipulated monthly amount is paid by a university for a particular service rendered by one who is also a student, it cannot be said that the university is merely "assisting" the student to obtain an education, and that the student, if injured in the course of his employment, cannot have the benefits of the compensation law. *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953).

**Student employee status in job training program.** To be an "employee" of the school district one must, at the time of injury, be receiving training under a work or job training program sponsored by the school district and one must have been placed by the school district with an employer for the purpose of training or learning trades or occupations. Further, the trainee is deemed an "employee" only "while so engaged" in such programs. *Denver Pub. Sch. v. De Avila*, 190 Colo. 184, 544 P.2d 627 (1976).

A critical requirement of the statute is that in order for the claimant to become an "employee" it was necessary that she be "placed" with the hospital for the purpose of training. The evidence discloses that at the time of her injury the claimant was not so "placed" where it is explicit that at the time of her injury the claimant was attending classes conducted exclusively by instructors employed by the school district. Under such circumstances, claimant does not come within the definition of "employee" and the school district is not liable for the injury sustained as the result of her mishap. *Denver Pub. Sch. v. De Avila*, 190 Colo. 184, 544 P.2d 627 (1976).

**Discharged employee is thereafter a mere volunteer not subject to the act.** The employee having been discharged, he was a mere volunteer, wrongfully engaged in driving the car of his former employer at the time of the accident; neither the doctrine of ratification nor estoppel had the slightest application to the case, even though the employer subsequently received the regular fare for the trip from the claimants, and upon no possible theory could the claimants recover compensation at the hands of the employer. *Burke v. Indus. Comm'n*, 70 Colo. 394, 201 P. 891 (1921).

### B. Casual Employment.

**Law reviews.** For comment on *Heckman v. Warren* appearing below, see 24 *Rocky Mt. L. Rev.* 396 (1952).

**For subsection (1)(b) exclusion to apply, casualness and course of business must exist.** *Brogger v. Kezer*, 626 P.2d 700 (Colo. App. 1980).

**Exclusion inapplicable where home deemed necessary facet of business.** The maintenance of a home which serves as a company office and is used for entertaining customers is a necessary facet of the employer's business, and, thus, the exclusion of subsection (1)(b) is not applicable. *Brogger v. Kezer*, 626 P.2d 700 (Colo. App. 1980).

**Casual is an antonym of regular.** *Lackey v. Indus. Comm'n*, 80 Colo. 112, 249 P. 662 (1926); *Heckman v. Warren*, 124 Colo. 497, 238 P.2d 854 (1951).

**Casual employment is that which is occasional, incidental, temporary, emergent or haphazard.** An employment, therefore, is casual within the meaning and intent of the workmen's compensation act when it is not regular, periodic or certain in nature. *Heckman v. Warren*, 124 Colo. 497, 238 P.2d 854 (1951).

**But the fact that the employment is casual is not enough to exclude an employee from the count in determining whether employer had four employees.** *Lackey v. Indus. Comm'n*, 80 Colo. 112, 249 P. 662 (1926); *Hoshiko v. Indus. Comm'n*, 83 Colo. 556, 226 P. 1114 (1928); *Comerford v. Carr*, 86 Colo. 590, 284 P. 121 (1930); *Kamp v. Disney*, 110 Colo. 518, 135 P.2d 1019 (1943); *Heckman v. Warren*, 124 Colo. 497, 238 P.2d 854 (1951); *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957).

**For the employment must also not be in the usual course of trade, business, or occupation of employer.** *Lackey v. Indus. Comm'n*, 80 Colo. 112, 249 P. 662 (1926); *Hoshiko v. Indus. Comm'n*, 83 Colo. 556, 266 P. 1114 (1928); *Comerford v. Carr*, 86 Colo. 590, 284 P. 121 (1930); *Kamp v. Disney*, 110 Colo. 518 135 P.2d 1019 (1943); *Heckman v. Warren*, 124 Colo. 497, 238 P.2d 854 (1951); *Denver Truck Exch.*

v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957).

**And one is employed in the usual course of trade, business, profession or occupation of his employer** when he is engaged in work of the kind required in the business of the employer, and such work is in conformity with the established scheme or system of the business. If it is work of the kind required in the employer's business and in conformity with his established scheme or system of doing business, then it is in the usual course thereof. The term "usual course of business" has reference to the normal operations constituting the regular business of the employer. Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

**Thus the workmen's compensation act is inapplicable** if, at the time of an employee's injuries, his employment was casual "and not in the usual course of trade, business, profession or occupation of his employer". Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

**But the fact that the servant is not employed for any specified time** does not render his employment casual. Indus. Comm'n v. Funk, 68 Colo. 467, 191 P. 125 (1920).

**So that casual employment in usual course of employer's business is sufficient.** Even

where the employment is casual, if at the time of the accident the employee was engaged in the usual course of the employer's business, he still is an employee within the terms of this title. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926); Hoshiko v. Indus. Comm'n, 83 Colo. 556, 226 P. 1114 (1928); Royal Indem. Co. v. Indus. Comm'n, 105 Colo. 25, 94 P.2d 697 (1927).

**Employment not casual.** Claimant who was employed on an hourly basis to perform part of the work of constructing a small office building on a used car lot was not a casual employee of the operator of the lot, and his employment was in the usual course of the operator's business. Neely-Towner Motor Co. v. Indus. Comm'n, 123 Colo. 472, 230 P.2d 993 (1951).

**"Usual course of trade or business" does not apply** to a single act of building by a farmer in a neighboring town. Lackey v. Indus. Comm'n, 80 Colo. 112, 249 P. 662 (1926).

**Emergency employee not active in usual course of business.** Heckman v. Warren, 124 Colo. 497, 238 P.2d 854 (1951).

**An attorney at law regularly employed by a corporation is not a casual employee** and his employment is in the usual course of a company's business. Indus. Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934).

### 8-40-203. Employer. (1) "Employer" means:

(a) The state, and every county, city, town, and irrigation, drainage, and school district and all other taxing districts therein, and all public institutions and administrative boards thereof without regard to the number of persons in the service of any such public employer. All such public employers shall be at all times subject to the compensation provisions of articles 40 to 47 of this title.

(b) Every person, association of persons, firm, and private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, who has one or more persons engaged in the same business or employment, except as otherwise expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied.

(c) Repealed.

**Source: L. 90:** Entire article R&RE, p. 473, § 1, effective July 1. **L. 91:** (1)(c) repealed, p. 1294, § 5, effective July 1.

**Editor's note:** This section is similar to former § 8-41-105 as it existed prior to 1990.

**Cross references:** For the scope of the term "employer", see § 8-40-302.

## ANNOTATION

- I. General Consideration.
- II. Public Employers.
- III. Private Employers.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "One Year Review of Corporations, Partnership and Agency", see 37 Dicta 11 (1960). For note, "Rural Poverty

and the Law in Southern Colorado", see 47 Den. L. J. 82 (1970).

**Annotator's note.** Since § 8-40-203 is similar to § 8-41-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.



**The definition of "employer" in this section should be broadly or liberally construed,** in order to effectuate the purpose of the legislation. *Conover v. Indus. Comm'n*, 125 Colo. 388, 244 P.2d 875 (1952).

**Consequently, the workmen's compensation act extends the concept of "employer"** far beyond the meaning of that term at common law. *Doyle v. Missouri Valley Constructors, Inc.*, 288 F. Supp. 121 (D. Colo. 1968).

**But the rule of liberal construction cannot be extended to a case that is removed by the statute itself.** *Smith v. Indus. Comm'n*, 134 Colo. 454, 306 P.2d 254 (1957).

**Proper characterization of the employer-employee relationship depends on the facts of each case and is for the commission to determine.** *Melnick v. Indus. Comm'n*, 656 P.2d 1318 (Colo. App. 1982).

**An employment contract need not provide for the payment of "wages" in order for one employed under such a contract to qualify as an "employee" under this article.** *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994).

**Applied in** *Hefley v. Morales*, 197 Colo. 523, 595 P.2d 233 (1979); *Ellis v. Rocky Mt. Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979); *Stampados v. Colo. D & S Enters.*, 833 P.2d 815 (Colo. App. 1992).

## II. PUBLIC EMPLOYERS.

**All state agencies are considered a single "employer"** and all persons in the service of the state are its employees. *Rodriguez v. Bd. of Dirs.*, 917 P.2d 358 (Colo. App. 1996).

**A city becomes an employer** of those persons defined as employees in § 8-41-106. *State Comp. Ins. Fund v. Alishio*, 125 Colo. 242, 250 P.2d 1015 (1952).

## III. PRIVATE EMPLOYERS.

**Where two or more companies form a joint venture, the joint venture itself is an "association of persons" and an "employer"** within the meaning of the workmen's compensation act. Being of that status, a joint venture and its insurance carrier could be made to respond to claims asserted under the act. *D. E. Jones Constr. Co. v. Heirs of Jones*, 29 Colo. App. 482, 487 P.2d 822 (1971).

**And the joint venture and each of its participants are jointly and severally liable** for claims asserted by or on behalf of an employee engaged in work being prosecuted by the joint venture. As to a claimant for benefits, there is nothing which makes the liability of any one of such parties primary to, or exclusive of, the liabilities of the others. The insurance coverage of one liable as a participant in the joint venture extends to and follows that participant within

the joint venture operations. Consequently, an employee, may assert his claim against the joint venture itself, or any or all members thereof and their respective insurer or insurers must discharge the claim. *Indus. Comm'n v. Lopez*, 150 Colo. 87, 371 P.2d 269 (1962); *D. E. Jones Constr. Co. v. Heirs of Jones*, 29 Colo. App. 482, 487 P.2d 822 (1971).

**Thus, employer status not divested by engaging in joint venture.** Where a joint venture is in furtherance of business in which two cement contractors are engaged, and each is an employer with respect to his own operation, they cannot divest themselves of such status by engaging in a joint venture in the same business in which each is individually engaged, notwithstanding they employ less than four employees on particular job. *Indus. Comm'n v. Lopez*, 150 Colo. 87, 371 P.2d 269 (1962).

**An "association of persons" need not measure up to the requirements of a partnership** in order to come within the meaning of "employer" as used in this section. *Conover v. Indus. Comm'n*, 125 Colo. 388, P.2d 875 (1952).

**Employment of employee need not be same as his employer.** There is no discernible legislative intent in this section which would require that the employment of the employee be the same as that of the employer. *Schultz v. Indus. Comm'n*, 34 Colo. App. 122, 523 P.2d 164 (1974).

**Parent corporation, sued by employee of its wholly-owned subsidiary, is not an "employer" entitled to immunity from tort liability under the workmen's compensation act.** *Peterson v. Trailways, Inc.*, 555 F. Supp. 827 (D. Colo. 1983).

**Unincorporated self-employed repairman not "employer".** Self-employed sheet metal and heating repairman, using the name "M. Kunz and Sons, Inc.", although he had not completed incorporation, is not an "employer" and not required to carry workmen's compensation insurance for himself. *Canda v. Indus. Comm'n*, 44 Colo. App. 70, 607 P.2d 403 (1980).

**The requirement of contract of hire was written into the workmen's compensation act for two reasons:** First, the necessity for a "contract" was felt to insure that an employee did not give up legal rights against an employer without receiving value in return; and second, the contract had to be one "of hire" because, absent the expectation of remuneration at some rate, there was no way to compute benefits. *Rocky Mt. Dairy Prods. v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966).

**And this section and § 8-41-107 speak of "any contract of hire, express or implied", indicating that several "contracts of hire" may exist in a given situation and recovery had upon**

"any". *Rocky Mt. Dairy Prods. v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966).

**So that both an express and implied "contract of hire" could exist** between the same parties but covering different employment or covering the same employment but with differing parties. *Rocky Mt. Dairy Prods. v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966).

**Usual master-servant relationship.** If the relationship between the parties is that of the usual master-servant variety, then workmen's compensation liability is determined by analyzing the factual situation in terms of the statutory inclusions and exclusions stated in this section. *Schultz v. Indus. Comm'n*, 34 Colo. App. 122, 523 P.2d 164 (1974).

**A general servant of one party may be loaned by his master for some special purpose** so as to become for that service the servant of the party to whom he is loaned and to impose on him the usual liabilities of a master. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**Thus, there may exist at one time the relationship of general employer and a special employer** as to one employee. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**Liability of employer determined by "control" or "whose business" test.** The liability of a general or special employer is sometimes determined by ascertaining who has control of the borrowed employee and equipment used in rendering the service, and sometimes it is determined by ascertaining in whose business the special employee was engaged. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**The control test is that the relation of master and servant exists whenever one person stands in such a relation to another that he may control the work of the other and direct the manner in which it shall be performed.** *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**The whose business test** holds the owner of the business liable if a servant or employee at the time of a negligent act resulting in damages to others is actually engaged in performing work or labor for the special, rather than the general, employer. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**But each case must be determined in the light of the existing facts and circumstances,** and frequently it is necessary that both the control test and whose business test be considered in determining upon whom the liability shall rest where there is a general, as well as a special, employer, and damages are claimed because of the negligence of an employee. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**A real estate brokerage concern which manages properties for others** as a part of its business, collecting rent and making improvements and repairs, and which employs men to wash the walls of a building it has in charge, is an employer within the definition of this section. *Alson Inv. Co. v. Youngquist*, 107 Colo. 1, 108 P.2d 228 (1940).

**But the act does not apply to nonresident employers.** *Hall v. Indus. Comm'n*, 77 Colo. 338, 235 P. 1073 (1925).

## PART 3

### SCOPE AND APPLICABILITY

**8-40-301. Scope of term "employee".** (1) "Employee" excludes any person employed by a passenger tramway area operator, as defined in section 25-5-702 (1), C.R.S., or other employer, while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment, regardless of whether such person is utilizing, by discount or otherwise, a pass, ticket, license, permit, or other device as an emolument of employment.

(2) "Employee" excludes any person who is a licensed real estate sales agent or a licensed real estate broker associated with another real estate broker if:

(a) Substantially all of the sales agent's or associated broker's remuneration from real estate brokerage is derived from real estate commissions; and

(b) The services of the sales agent or associated broker are performed under a written contract specifying that the sales agent or associated broker is an independent contractor; and

(c) Such contract provides that the sales agent or associated broker shall not be treated as an employee for federal income tax purposes.

(3) (a) Notwithstanding the provisions of section 8-40-202 (1) (a) (IV), "employee" excludes any person who is confined to a city or county jail or any department of corrections facility as an inmate and who, as a part of such confinement, is working, performing services, or participating in a training or rehabilitation or work release program; except that "employee" includes an inmate of a department of corrections facility or a city, county, or



city and county jail who is working, performing services, or participating in a training, rehabilitation, or work release program that has been certified by the federal prison industry enhancement certification program pursuant to the federal "Justice System Improvement Act of 1979", 18 U.S.C. sec. 1761 (c). For the purposes of articles 40 to 47 of this title, an inmate participating in a program certified by the federal prison industry enhancement certification program is an employee of that certified program, which certified program shall carry workers' compensation insurance pursuant to articles 40 to 47 of this title. No inmate participating in a certified program shall be deemed to be an employee of the state, city, county, or city and county that owns, operates, or contracts for the operation of the facility or jail in which the inmate is incarcerated.

(b) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate who is working for a private employer under a contract of hire wherein the private employer is required to maintain workers' compensation insurance for its employees pursuant to articles 40 to 47 of this title. Such inmate shall be an employee of such private employer for purposes of articles 40 to 47 of this title.

(c) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate working for a joint venture established pursuant to the provisions of section 17-24-119 or 17-24-121, C.R.S. Such inmate shall be an employee of such joint venture for purposes of articles 40 to 47 of this title.

(d) The provisions of paragraph (a) of this subsection (3) do not apply to an inmate working for a private person or entity pursuant to the provisions of section 17-24-122, C.R.S. Such inmate shall be an employee of such private person or entity for purposes of articles 40 to 47 of this title.

(4) "Employee" excludes any person who volunteers time or services for a ski area operator, as defined in section 33-44-103 (7), C.R.S., or for a ski area sponsored program or activity, notwithstanding the fact that such person may receive noncash remuneration for such person or such person's designee in conjunction with such person's status as a volunteer. No contract of hire, express or implied, is created between any volunteer pursuant to this section and a ski area operator. Notice shall be given to such volunteer in writing that the volunteering of time or services under this subsection (4) does not constitute employment for purposes of the "Workers' Compensation Act of Colorado" and that such person is not entitled to benefits pursuant to said act.

(5) "Employee" excludes any person who is working as a driver under a lease agreement pursuant to section 40-11.5-102, C.R.S., with a common carrier or contract carrier.

(6) Any person working as a driver with a common carrier or contract carrier as described in this section shall be eligible for and shall be offered workers' compensation insurance coverage by Pinnacle Assurance or similar coverage consistent with the requirements set forth in section 40-11.5-102 (5), C.R.S.

(7) Persons who provide host home services as part of residential services and supports, as described in section 27-10.5-104 (1) (f), C.R.S., for an eligible person, as defined in section 25.5-6-403 (2) (a), C.R.S., pursuant to the "Home- and Community-based Services for Persons with Developmental Disabilities Act", part 4 of article 6 of title 25.5, C.R.S., and pursuant to a contract with a community centered board designated pursuant to section 27-10.5-105, C.R.S., or a contract with a service agency as defined in section 27-10.5-102 (28), C.R.S., shall not be considered employees of the community centered board or the service agency.

(8) For the purposes of articles 40 to 47 of this title, "employee" excludes any person who performs services for more than one employer at a race meet as defined by section 12-60-102 (22), C.R.S., or at a horse track as defined by section 12-60-102 (11), C.R.S.

(9) Notwithstanding any other provision of this section, "employee" includes a person who participates in a property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

**Source:** L. 90: Entire article R&RE, p. 473, § 1, effective July 1. L. 92: (5) and (6) added, p. 1798, § 1, effective June 6. L. 93: (3) amended, p. 2129, § 3, effective September 1. L. 94: (4) amended, p. 1288, § 1, effective July 1. L. 95: (1) and (3)(c)

amended, p. 1091, § 1, effective May 31. **L. 97:** (3)(c) amended, p. 1031, § 66, effective August 6. **L. 2000:** (7) added, p. 1497, § 1, effective August 2. **L. 2002:** (6) amended, p. 1882, § 28, effective July 1. **L. 2003:** (8) added, p. 728, § 1, effective March 20. **L. 2006:** (7) amended, p. 1998, § 30, effective July 1. **L. 2010:** (3)(a) amended, (HB 10-1109), ch. 171, p. 606, § 1, effective August 11; (9) added, (HB 10-1076), ch. 162, p. 566, § 2, effective August 11.

**Editor's note:** This section is similar to former § 8-41-106 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-40-301 is similar to § 8-41-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Inmates are not employees of state or county.** *Orr v. Indus. Comm'n*, 691 P.2d 1145 (Colo. App. 1984), *att'd*, 716 P.2d 1106 (Colo. 1986).

**Subsection (5) is not ambiguous** and includes a driver who is working for an independent contractor under a conforming lease with a contract carrier. *FFE Trans. Servs. v. Indus. Claim Appeals Office*, 93 P.3d 630 (Colo. App. 2004).

The word "under" in subsection (5) is not ambiguous. *FFE Trans. Servs. v. Indus. Claim Appeals Office*, 93 P.3d 630 (Colo. App. 2004).

The legislative intent appears clear to exclude independent contractors and their drivers from the class of statutory employees. *FFE Trans. Servs. v. Indus. Claim Appeals Office*, 93 P.3d 630 (Colo. App. 2004).

Had the general assembly intended to exclude only independent contractors from the provisions of this section, it would not have allowed independent contractors to use assistants pursuant to § 40-11.5-102 (1)(f). *FFE Trans. Servs. v. Indus. Claim Appeals Office*, 93 P.3d 630 (Colo. App. 2004).

The traditional test set forth in *City and County of Denver v. Lee*, 450 P.2d 352 (Colo. 1969), for determining when recreational activities fall within the course and scope of employment remain valid under subsection (1) as amended in 1989 in determining whether an employee engaged in a recreational activity is within the coverage of the workers' compensation act. *Karlin v. Conrad*, 876 P.2d 64 (Colo. App. 1993).

**Exclusion provided by subsection (5) is conditional not absolute.** It takes effect only when the lease agreement required by § 40-11.5-102 includes complying coverage. *USF Distribution Servs., Inc. v. Indus. Claim Appeals Office*, 111 P.3d 529 (Colo. App. 2004).

**Ski instructor injured while skiing recreationally was not entitled to workers'**

**compensation benefits** as injury did not occur in course and scope of employment. *Dunavin v. Monarch Recreation Corp.*, 812 P.2d 719 (Colo. App. 1991).

**Evidence that claimant agreed to act as a member of the ski patrol only after negotiating with the supervisor to receive a special benefit is sufficient** to support the administrative law judge's finding that, without such consideration, claimant would have refused to render any services as a patrol member and therefore claimant was not a volunteer under the statute. *Aspen Highlands Skiing Corp. v. Apostolou*, 854 P.2d 1357 (Colo. App. 1992).

**Ski patrol worker who negotiated for a ski pass in lieu of salary in exchange for services** was not a "volunteer" for purpose of exclusion from coverage under this article. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994).

**Under this section, any employee who participates in employer-sponsored recreation** due to pressure exerted by employer rather than at employee's own initiative is entitled to benefits for injuries sustained during activity. However, any employee who is injured while voluntarily engaging, upon his own initiative, in recreational activity which does not benefit the employer or fulfill any job duties is not entitled to compensation. *Dunavin v. Monarch Recreation Corp.*, 812 P.2d 719 (Colo. App. 1991).

**A leased driver was not limited to workers' compensation benefits** for injuries received while performing duties within the lease agreement. The leased driver was not an employee for purposes of workers' compensation because section (5)(b) is an exception to the more general workers' compensation statutes. *Scott v. Matlack, Inc.*, 1 P.3d 185 (Colo. App. 1999), *rev'd* on other grounds, 39 P.3d 1160 (Colo. 2002).

**Leased driver was entitled to benefits at least equivalent to workers' compensation benefits** under subsection (6). *USF Distribution Servs., Inc. v. Indus. Claim Appeals Office*, 111 P.3d 529 (Colo. App. 2004).

**The definition of an employee** entitled to coverage under this act includes "aliens" without distinguishing between legal and illegal aliens and therefore does not preclude, as a



matter of law, an illegal alien from proving an entitlement to benefits. *Champion Auto Body v.*

*Indus. Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997).

**8-40-302. Scope of term “employer”.**

(1) Repealed.

(2) Articles 40 to 47 of this title are not intended to apply to employees of eleemosynary, charitable, fraternal, religious, or social employers who are elected or appointed to serve in an advisory capacity and receive an annual salary or an amount not in excess of seven hundred fifty dollars and are not otherwise subject to the “Workers’ Compensation Act of Colorado”.

(3) Articles 40 to 47 of this title are not intended to apply to employers of casual farm and ranch labor or employers of persons who do casual maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer if such employers have no other employees subject to said articles 40 to 47, if such employments are casual and are not within the course of the trade, business, or profession of said employers, if the amounts expended for wages paid by the employers to casual persons employed to do maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer do not exceed the sum of two thousand dollars for any calendar year, and if the amounts expended for wages by the employer of casual farm and ranch labor do not exceed the sum of two thousand dollars for any calendar year.

(4) Articles 40 to 47 of this title are not intended to apply to employers of persons who do domestic work or maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the private home of the employer if such employers have no other employees subject to said articles 40 to 47 and if such employments are not within the course of the trade, business, or profession of said employers. This exemption shall not apply to such employers if the persons who perform the work are regularly employed by such employers on a full-time basis. For purposes of this subsection (4), “full-time” means work performed for forty hours or more a week or on five days or more a week.

(5) (a) Any employer excluded under this section may elect to accept the provisions of articles 40 to 47 of this title by purchasing and keeping in force a policy of workers’ compensation insurance covering said employees.

(b) Notwithstanding any other provision of articles 40 to 47 of this title, any working general partner or sole proprietor actively engaged in the business may elect to be included by endorsement as an employee of the insured and shall be entitled to elect coverage regardless of whether such working general partner or sole proprietor employs any other person under any contract of hire.

(6) Articles 40 to 47 of this title are intended to apply to officers of agricultural corporations; but effective July 1, 1977, any such agricultural corporation may elect to reject the provisions of articles 40 to 47 of this title for any or all of said officers.

(7) (a) Any employer, as defined in section 8-40-203, who enters into a bona fide cooperative education or student internship program sponsored by an educational institution for the purpose of providing on-the-job training for students shall be deemed an employer of such students for the purposes of workers’ compensation and liability insurance pursuant to articles 40 to 47 of this title.

(b) If the student placed in an on-the-job training program does not receive any pay or remuneration from the employer, the educational institution sponsoring the student in the cooperative education or student internship program shall insure the student through the institution’s workers’ compensation and liability insurance or enter into negotiations with the employer for the purpose of arriving at a reasonable level of compensation to the employer for the employer’s expense of providing workers’ compensation and liability insurance while such student is participating in on-the-job training with said employer. This paragraph (b) shall not apply to a student teacher participating in a program authorized pursuant to article 62 of title 22, C.R.S.

(c) As used in this subsection (7), “cooperative education or student internship program” means a program sponsored by an educational institution in which a student is taught through a coordinated combination of specialized in-the-school instruction provided

through an educational institution by qualified teachers and on-the-job training provided through a local business, agency, or organization or any governmental agency in cooperation with the educational institution.

**Source:** **L. 90:** Entire article R&RE, p. 474, § 1, effective July 1. **L. 91:** (1) repealed, p. 1294, § 6, effective July 1. **L. 93:** (5) amended, p. 455, § 1, effective April 19.

**Editor's note:** This section is similar to former § 8-41-105 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Exempt Employers.
  - A. Casual Labor.
  - B. Farm and Ranch Labor.
  - C. Contracts for Hire.
  - D. Domestic Workers.

### I. GENERAL CONSIDERATION.

**Annotator's note.** Since § 8-40-302 is similar to § 8-41-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

### II. EXEMPT EMPLOYERS.

#### A. Casual Labor.

**Even if employee was a casual laborer, the exemption under subsection (4) (now subsection (3)) does not apply** because the employee's duty of maintaining the racetrack and its equipment were within the course of the employer's business of operating a racetrack. *Butland v. Indus. Claim Appeals Office*, 754 P.2d 422 (Colo. App. 1988).

#### B. Farm and Ranch Labor.

**Exclusion of farm and ranch labor in this section does not constitute a violation of equal protection.** *Anaya v. Indus. Comm'n*, 182 Colo. 244, 512 P.2d 625 (1973).

**Farm and ranch labor** falls within the field of agriculture which in general refers to any activity incident to the cultivation of land for the growing of crops, the harvesting thereof, and the care and feeding of livestock. It includes tillage, seeding, husbandry, and all things incident to farming in the widest sense of that term. *Great W. Mushroom Co. v. Indus. Comm'n*, 103 Colo. 39, 82 P.2d 751 (1938); *Billings Ditch Co. v. Indus. Comm'n*, 127 Colo. 69, 253 P.2d 1058 (1953); *Smith v. Indus. Comm'n*, 134 Colo. 454, 306 P.2d 254 (1957).

**The whole character of the employment must be looked to in order to determine whether one is a farm laborer.** Neither the

pending task nor the place where it is being performed is the test. *Billings Ditch Co. v. Indus. Comm'n*, 127 Colo. 69, 253 P.2d 1058 (1953).

**Construction of exemption clause.** The workmen's compensation law is to be construed liberally and in every reasonable manner to accomplish the evident intent and purpose of the act; but in applying this rule, the court must not forget the exemption clause which frees those who employ farm and ranch labor from the provisions of the act, unless they voluntarily elect to come under it. The court must, therefore, be equally cautious to see to it that this exemption be not so restricted, limited and constricted in the interpretation of its terms and provisions as to destroy its effect. *Billings Ditch Co. v. Indus. Comm'n*, 127 Colo. 69, 253 P.2d 1058 (1953).

**Not modified by § 8-48-101.** The contracting-out provision of § 8-48-101 does not modify the exemption for farm and ranch labor of this section. *Hefley v. Morales*, 197 Colo. 523, 595 P.2d 233 (1979).

**While the employer of farm or ranch labor may elect to accept coverage under the workmen's compensation act** by filing a written statement to the effect that he accepts the provisions of the act, the filing of an unsigned printed card by someone other than the employer; and without his knowledge or direction, is not sufficient to charge such employer with liability under the act. *Smith v. Indus. Comm'n*, 134 Colo. 454, 306 P.2d 254 (1957).

**The burden of proof is on a claimant to establish** by competent evidence that the employer himself, or some person by him duly authorized, filed a written statement accepting the provisions of the act. *Smith v. Indus. Comm'n*, 134 Colo. 454, 306 P.2d 254 (1957).

**Worker on threshing machine may not be "farm labor."** Where a farmer traveled about the country with his machine doing threshing for others, for compensation, it is held under the facts disclosed, that one who was employed by him in such work was not a farm laborer within the meaning of this section, and was entitled to compensation for an accidental injury. *Hoshiko v. Indus. Comm'n*, 83 Colo. 556, 266 P. 1114 (1928).



**Employee sorting potatoes for potato grower engaged in farm labor.** Employee, who was injured while sorting potatoes for potato grower in cellars maintained by grower where only his potatoes were sorted and stored, was engaged in farm labor and, thus, not entitled to workmen's compensation. *Anaya v. Indus. Comm'n*, 182 Colo. 244, 512 P.2d 625 (1973).

**Employee held to be engaged in farm labor.** Where employee left a hoist job at his own request, and a man was employed to succeed him on that job, and employee anticipated early enlistment in the Army, it was held that this was not a case of conflicting evidence, that the employee was engaged in farm labor, and that he had not been just temporarily transferred from his regular employment to work on the farm, so that he was a farm laborer within the meaning of the statute. *Maley v. Martin*, 111 Colo. 545, 144 P.2d 558 (1943).

C. Contracts for Hire.

**A contract for hire may be formed as long as the fundamental elements of contract formation are present** even though not every formality attending commercial contractual arrangements is observed. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994).

**Contract of hire found to exist** where claimant was part-time ski patrol worker who agreed to work only in exchange for the benefit of daily ski pass in lieu of salary and who worked under the direction of the employer. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994).

D. Domestic Workers.

**Subsection (4) is not violative of equal protection.** In requiring that employers of domestic workers who work 40 or more hours per week or five or more days per week provide workers' compensation and exempting employers of domestic workers who work fewer than such hours or days, the general assembly had a rational basis for treating employers of casual labor differently than employers who hire regular, full-time employees. *Naiden v. Epps*, 867 P.2d 215 (Colo. App. 1993).

**The Workers' Compensation Act was intended to apply to claimant who was hired to perform domestic services** on a full-time basis, when employer compensated dual employer for claimant's services, and dual employer maintained workers' compensation coverage on claimant's behalf. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**The exceptions under this section and § 8-41-402 are not intended to abrogate the borrowed servant doctrine** in the case of work performed at a private home, except in the limited situations in which the domestic employment is not on a full-time basis. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Domestic work, as used in subsection (4), includes child care.** This is consistent with the intent of this section to exempt from the workers' compensation requirements private employers who employ persons to perform domestic work within their homes because such employers cannot pass the cost of workers' compensation coverage to consumers. *Connor v. Zelaski*, 839 P.2d 501 (Colo. App. 1992).

ARTICLE 41

Coverage and Liability

**Editor's note:** This article was numbered as article 2 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Cross references:** For damages for death by negligence, see part 2 of article 21 of title 13.

PART 1		8-41-104.	Acceptance as surrender of other remedies.
ABROGATION OF DEFENSE		PART 2	
8-41-101.	Assumption of risk - negligence of employee or fellow servant.	COVERAGE	
8-41-102.	Liability of employer complying.	8-41-201.	Not applicable to common carriers.
8-41-103.	Availability of common-law defenses.	8-41-202.	Rejection of coverage by corporate officers and others.

8-41-203. Negligence of stranger - remedies - subrogation - actions - compromise.

## PART 4

8-41-204. Injury outside of state - benefits in accordance with state law.

## CONTRACTORS AND LESSEES

8-41-205. Waiver of compensation by employee - approval required - exception.

8-41-401. Lessor contractor-out deemed employer - liability - recovery.

8-41-206. Disability beginning five years after injury.

8-41-402. Repairs to real property - exception for liability of occupant of residential real property.

8-41-207. Death after two years.

8-41-208. Coverage for job-related exposure to or contraction of hepatitis C.

8-41-403. Exemption of certain lessors of real property.

8-41-209. Coverage for occupational diseases contracted by firefighters.

8-41-404. Construction work - proof of coverage required - violation - penalty - definitions.

8-41-210. Coverage for property tax work-off program participants.

## PART 5

## PART 3

## DEPENDENCY

## LIABILITY

8-41-301. Conditions of recovery.

8-41-501. Persons presumed wholly dependent.

8-41-302. Scope of terms - "accident" - "injury" - "occupational disease".

8-41-502. Other dependents - temporary dependency.

8-41-303. Loaning employer liable for compensation.

8-41-503. Dependency and extent determined - how.

8-41-304. Last employer liable - exception.

8-41-504. Action by injured employee - dependents not parties in interest.

8-41-505. Illegitimate minor children.

## PART 1

## ABROGATION OF DEFENSE

**8-41-101. Assumption of risk - negligence of employee or fellow servant.** (1) In an action to recover damages for a personal injury sustained by an employee while engaged in the line of duty, or for death resulting from personal injuries so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent, or servant of the employer, it shall not be a defense:

(a) That the employee, either expressly or impliedly, assumed the risk of the hazard complained of as due to the employer's negligence;

(b) That the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant;

(c) That the injury or death was caused, in whole or in part, by the want of ordinary care of the injured employee where such want of care was not willful.

**Source: L. 90:** Entire article R&RE, p. 476, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-42-101 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For article, "Derogation of the Common Law Rule of Contributory Negligence", see 7 Rocky Mt. L. Rev. 161 (1935). For article, "The Enterprise Liability Theory of

Torts", see 47 U. Colo. L. Rev. 153 (1976). For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "The Po-



sitional Risk Doctrine — Compensability of 'Neutral Force' Injuries", see 17 Colo. Law. 2375 (1988).

**Annotator's note.** Since § 8-41-101 is similar to § 8-42-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Constitutionality.** This section's abrogation of a claimant's common-law rights does not violate constitutional protections of due process and equal protection and the right of access to the courts. *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982).

**This section has abolished the defense of contributory negligence** where the workman's want of care is not wilful. *Clayton Coal Co. v. DeSantis*, 95 Colo. 332, 35 P.2d 492 (1934).

**And although doctrine of assumption of risk has been abolished, the workman still assumes risks.** While since the adoption of the workmen's compensation act the doctrine of

assumption of risk created by the master's negligence has disappeared, the workman still assumes, so far as a suit for damages is concerned, the risks not created by the master's negligence. *Colo. Milling & Elevator Co. v. Bright*, 76 Colo. 338, 231 P. 1111 (1924).

**Claim of intentional tort does not avoid applicability of act.** *Eason v. Frontier Air Lines*, 636 F.2d 293 (10th Cir. 1981).

**This section is applicable only in action against employer for negligence resulting in personal injury or death and relates to the abrogation of enumerated common law defenses,** and none of these circumstances is relevant to case in which claimant is attempting to pierce the corporate veil in a workers' compensation proceeding. *Matter of Death of Smithour*, 778 P.2d 302 (Colo. App. 1989).

**Proper instruction.** In personal injury case, an instruction that, if the defendant was negligent and its negligence was the proximate cause of the injury, there was no assumption of risk, is proper. *Colo. Milling & Elevator Co. v. Bright*, 76 Colo. 338, 231 P. 1111 (1924).

**8-41-102. Liability of employer complying.** An employer who has complied with the provisions of articles 40 to 47 of this title, including the provisions relating to insurance, shall not be subject to the provisions of section 8-41-101; nor shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability for the death of or personal injury to any employee, except as provided in said articles; and all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any person are abolished except as provided in said articles.

**Source: L. 90:** Entire article R&RE, p. 476, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-42-102 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For article, "Employer's Liability for Occupational Disease", see 16 Rocky Mt. L. Rev. 60 (1943). For comment on *Ward v. Denver & R. G. W. R.*, 119 F. Supp. 112 (D. Colo. 1954)), see 27 Rocky Mt. L. Rev. 106 (1954). For comment on *Finn v. Indus. Bd.* (165 Colo. 106, 437 P.2d 542 (1968)), see 45 Denver. L. J. 780 (1968). For article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with exclusive remedy, see 64 Den. U. L. Rev. 271 (1987). For article, "Bad Faith Claims and the PIP Statute: View of Plaintiff's Counsel", see 17 Colo. Law. 2163 (1988). For article, "The Positional Risk Doctrine — Compensability of 'Neutral Force' Injuries", see 17 Colo. Law. 2375 (1988). For article, "Work-Related Stress Claims", see 18 Colo. Law. 1529 (1989).

**Annotator's note.** Since § 8-41-102 is similar to § 8-42-102 as it existed prior to the 1990

repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**This section abolishes all common law rights and remedies in an employee action against employer** for injury except as provided in the act. *Ward v. Denver & R. G. W. R.*, 119 F. Supp. 112 (D. Colo. 1954); *Thomas v. Farnsworth Chambers Co.*, 286 F.2d 270 (10th Cir. 1960), rev'g 183 F. Supp. 764 (D. Colo. 1960); *Finn v. Indus. Comm'n*, 165 Colo. 106 437 P.2d 542 (1968); *Continental Sales Corp. v. Stookesbury*, 170 Colo. 16, 459 P.2d 566 (1969); *Rodriguez v. Nurseries, Inc.*, 815 P.2d 1006 (Colo. App. 1991).

When an employer has brought itself within the ambit of the workmen's compensation act, it is not subject to a common law action for dam-

ages, and the employee is limited to the remedies specified in the act. *Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed.2d 706 (1969); *Hilzer v. MacDonald*, 169 Colo. 230, 454 P.2d 928 (1969).

**The common law rule that a worker can simultaneously be the employee of two persons applies to cases arising under the workers' compensation act.** The rule allows an employee to be simultaneously in the general employment of one employer and in the special employment of another, provided the employee understands that he or she is submitting to the control of the special employer. In the dual employment situation, the employee's only remedy for an injury sustained while in the course of employment with the borrowing employer is through worker's compensation. A separate tort action against the special employer is barred. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Hence, this section applies only to employers and employees covered by the workmen's compensation act,** an employee being any person under any contract of hire, express or implied. *Continental Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**The Workers' Compensation Act of Colorado provides exclusive remedies for compensation of an employee by an employer for work-related injury.** *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Bailey v. C.P. Const., Inc.*, 837 P.2d 277 (Colo. App. 1992).

Therefore, an employer who has complied with the insurance provisions of the Act is immune from any common law liability for work-related injuries. *Bailey v. C.P. Const., Inc.*, 837 P.2d 277 (Colo. App. 1992).

**Officer who rejected workers' compensation coverage may pursue remedies in common law,** but recovery is limited to the cap found in § 8-41-401 of the Act. *Kelly v. Mile Hi Single Ply, Inc.*, 890 P.2d 1161 (Colo. 1995).

**Comparison to Montana statutes.** Sections 92-203 and 92-204, R.C.M. 1947, of the Montana workmen's compensation act are nearly identical in thrust and seemingly as all-encompassing as this section. *Pust v. Union Supply Co.*, 38 Colo. App. 435, 561 P.2d 355 (1976), rev'd sub nom. *Holly Sugar Corp. v. Union Supply Co.*, 194 Colo. 316, 572 P.2d 148 (1977) (third-party indemnification issue), and aff'd, 196 Colo. 162, 583 P.2d 276 (1978).

**Intentional wrongs are covered.** Intentional wrongs arising out of the course of employment are covered under Colorado's compensation scheme. *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982).

**An employer may be held liable to an employee for common law damage claims for intentional torts committed by the employer or**

the employer's alter ego if the employer deliberately intended to cause the injury and acted directly rather than constructively through an agent. *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003).

**Exclusivity provisions of the Workers' Compensation Act bar claim against employer for gross negligence but not intentional torts.** *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003).

**Cause of action based on a contractual right of indemnity is independent of the exclusive jurisdiction provisions of the act.** *Borroel v. Lakeshore, Inc.*, 618 F. Supp. 354 (D. Colo. 1985).

**Recovery under the act is meant to be exclusive remedy for workers covered by its provisions.** *Kelly v. Mile Hi Single Ply, Inc.*, 890 P.2d 1161 (Colo. 1995).

**Exclusivity provisions of Workers' Compensation Act do not bar action for mental suffering resulting from a breach of employment contract.** *Allabashi v. Lincoln Nat'l Sales Corp.*, 824 P.2d 1 (Colo. App. 1991).

**Workers' Compensation Act constitutes the exclusive remedy available to employee if employee asserts claim of intentional tort committed by employer's agent.** *Digliani v. City of Fort Collins*, 873 P.2d 4 (Colo. App. 1993).

Employees may not circumvent exclusive remedy provisions by framing their claims as breach of contract, breach of implied contract, or promissory estoppel. *Digliani v. City of Fort Collins*, 873 P.2d 4 (Colo. App. 1993); *McKelvy v. Liberty Mut. Ins. Co.*, 983 P.2d 42 (Colo. App. 1998).

**"Personal injury" in this section and "personal injuries" in § 8-41-104 refer to the job-related physical or mental injuries of an employee,** and, consequently, the Workers' Compensation Act's exclusivity provision bars action for or on account of such injuries of an employee. *Serna v. Kingston Enters.*, 72 P.3d 376 (Colo. App. 2002).

**Exclusive remedy provisions of Workers' Compensation Act barred city employees' common law claims against city for exposure to toxic chemicals at city facility.** Employer who complied with the provisions of the act was not subject to liability under common law rights and remedies for death of or personal injury to any employee. *Digliani v. City of Fort Collins*, 873 P.2d 4 (Colo. App. 1993).

**Economic liability does not qualify as a compensable "personal injury" under the Workers' Compensation Act of Colorado,** therefore, indemnity action is not barred under the act's exclusivity provision. *Serna v. Kingston Enters.*, 72 P.3d 376 (Colo. App. 2002).

**An employee's wife's rights are strictly derivative under the act** and are controlled by the all-inclusive election of the section. *Alexander*



v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed.2d 706 (1969).

**An employer who is subject to the provisions of the act cannot be made a third-party defendant** in an action wherein one of its employees is suing a stranger to the employer-employee relationship for injuries sustained while engaged in the course of his employment. *Ward v. Denver & R. G. W. R. R.*, 119 F. Supp. 112 (D. Colo. 1954); *Hilzer v. MacDonald*, 169 Colo. 230, 454 P.2d 928 (1969); *Pub. Serv. Co. v. District Court*, 638 P.2d 772 (Colo. 1981).

**Therefore, this section amounts to a legislative grant of immunity from common law liability in return for vicarious statutory liability** and the extent of the legislative intent is of course to be discerned from the particular language used in the enactments. *Thomas v. Farnsworth Chambers Co.*, 286 F.2d 270 (10th Cir.), rev'g 183 F. Supp. 764 (D. Colo. 1960).

**Workers' compensation carrier is granted the same immunity from suit by the injured employee as the employer has.** Therefore, no third-party action could be brought against a carrier for negligently conducting safety inspections undertaken pursuant to its capacity as carrier. *McHarque v. Stokes Div. of Pennwalt Corp.*, 649 F. Supp. 1388 (D. Colo. 1986).

**Employer not liable for contribution.** Because the workmen's compensation act immunizes an employer from tort liability to a covered employee, the employer is not "jointly liable in tort" and therefore contribution is barred. *Hammond v. Kolberg Mfg. Corp.*, 542 F. Supp. 662 (D. Colo. 1982).

**Section bars only actions founded on compensable injuries.** The bar of workmen's compensation extends only to actions founded upon injuries compensable under the act. *Bennett v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982).

An employer who is immune from common-law liability for an injury cannot become "jointly or severally liable in tort" so as to trigger a right of contribution under § 13-50.5-102. *Greer v. Intercole Automation, Inc.*, 553 F. Supp. 275 (D. Colo. 1982).

Act does not apply to injuries sustained when claimant has ceased his employment relationship. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

Factual question existed as to whether sexual assault on female employee by employer "arose out of" employment, making injury compensable and employer accordingly immune from suit. *Stamper v. Hiteshew*, 797 P.2d 784 (Colo. App. 1990).

As a matter of policy, sexual harassment is not a risk inherently connected to the employment relationship. Except in the most unusual cases, acts of harassment are highly personal and fall into the category of inherently private

assaults that do not arise from employment. Therefore, sexual harassment claims are not barred by the exclusive remedy provisions of the Workers' Compensation Act. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001).

**For employer to be absolved of liability for third-party indemnification claim,** the employee's right to compensation under this act must first exist. *Garrett v. Miller*, 44 Colo. App. 440, 619 P.2d 780 (1980).

**Indirect subsection under rules of indemnity.** The workers' compensation exclusive remedy provision does not permit an employer to be indirectly subjected under rules of indemnity to liability to which it could not be directly subjected. *Tex-Ark Joist Co. v. Derr and Gruenewald Const.*, 719 P.2d 384 (Colo. App. 1986), aff'd, 749 P.2d 431 (Colo. 1988).

**The fact that an award may deprive a claimant of a common law action does not make such a statute unconstitutional** because a different remedy has been provided the employee by the general assembly which is within its power. *Finn v. Indus. Comm'n*, 165 Colo. 106, 437 P.2d 542 (1968), *O'Quinn v. Walt Disney Prods., Inc.*, 177 Colo. 190, 493 P.2d 344 (1972).

**When an employee accepts the terms of the act his common-law action against his employer does not constitute an election of remedies;** for his remedy against his employer is under the act, and therefore he cannot make the choice which the doctrine of election of remedies contemplates. *State Comp. Ins. Fund v. Foulds*, 167 Colo. 123, 445 P.2d 716 (1968).

**And although a workman will be required to forego a negligence action** against a general contractor or real property owner, he will be assured that regardless of fault, the more solvent general contractor or real property owner stands behind and secures the workmen's compensation liability of the workman's immediate employer. *O'Quinn v. Walt Disney Prods., Inc.* 177 Colo. 190, 493 P.2d 344 (1972).

**An exculpatory clause like this section shall be construed to destroy the common-law right of action** of an injured and compensated employee of a subcontractor against a negligent general contractor. *Thomas v. Farnsworth Chambers Co.*, 286 F.2d 270 (10th Cir.), rev'g 183 F. Supp. 764 (D. Colo. 1960); *Whiting v. Farnsworth Chambers Co.*, 293 F.2d 45 (10th Cir. 1961).

**For where the subcontractor has secured compensation for his employees,** a general contractor is under no statutory liability, and is subject to common-law liability. *Thomas v. Farnsworth Chambers Co.*, 286 F. 2d 270 (10th Cir.), rev'g 183 F. Supp. 764 (D. Colo. 1960).

**A general contractor may be liable as a third party tortfeasor** to these injured and compensated employees of a subcontractor. *Thomas v. Farnsworth Chambers Co.*, 286 F.2d

270 (10th Cir.), rev'g 183 F. Supp. 764 (D. Colo. 1960).

**Furthermore, under this section and § 8-48-102, a landowner is not immune from common-law liability** where an employee of a contractor working on its land is injured by the negligence of a servant of the landowner and where the contractor is himself an employer, as defined in the workmen's compensation act, and carries compensation insurance covering such employee. *Great W. Sugar Co. v. Erbes*, 148 Colo. 566, 367 P.2d 329 (1961).

**There are nine criteria relevant to determining whether a special employment relationship exists.** They are: (1) Whether the borrowing employer has the right to control the employee's conduct; (2) whether the employee is performing the borrowing employer's work; (3) whether there was an agreement between the original and borrowing employer; (4) whether the employee has acquiesced in the arrangement; (5) whether the borrowing employer had the right to terminate the employee; (6) whether the borrowing employer furnished the tools and place for performance; (7) whether the new employment was to be for a considerable length of time; (8) whether the borrowing employer had the obligation to pay the employee; and (9) whether the original employer terminated its relationship with the employee. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991); *Morphew v. Ridge Crane Serv., Inc.*, 902 P.2d 848 (Colo. App. 1995).

Of the nine criteria, three are decisive: Whether the employee has acquiesced in the arrangement; whether the borrowing employer has the right to control the employee's conduct; and whether the borrowing employer had the right to terminate the employee. *Evans v. Webster*, 932 P.2d 951 (Colo. App. 1991).

**There are additional criteria in the context of leased heavy equipment:** (1) Whether the general employer could properly have substituted another servant at any time; (2) whether the duration of the work was short; (3) whether the machine operator had the skill of a specialist; (4) whether the general employer had rented a valuable machine and the employee to operate it; and (5) whether the general employer furnished fuel and maintenance. *Morphew v. Ridge Crane Serv., Inc.*, 902 P.2d 848 (Colo. App. 1995).

**A tort suit against a special employer is barred by the Workers' Compensation Act** when an employee consents to work for the special employer pursuant to a contract of hire within the Workers' Compensation Act and the employee is an employee of both the general and special employer. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**A separate tort action against a special employer is barred in dual employment situation** and the employee's only remedy for an

injury sustained while in the course of employment with the borrowing employer is through workers' compensation. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**"Loaned employee" may maintain negligence action.** A "loaned employee" and an "employee" under workmen's compensation are not the same, and no provision prohibits or limits a "loaned employee" from maintaining a negligence action against the borrowing employer. *Continental Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**An employer is not liable for his supervisor's act** which has no real connection with his employer's business and is purely personal. *Packaging Corp. of Am. v. Roberts*, 169 Colo. 316, 455 P.2d 652 (1969).

**Unavailable remedy.** An employee cannot rely upon the provisions of §§ 8-2-201 through 8-2-205 as providing an available remedy excepted from abolition by the workmen's compensation act in this section, even though those sections were mistakenly placed within the scope of this section by the 1973 revisor. *Ryan v. Centennial Race Track, Inc.*, 196 Colo. 30, 580 P.2d 794 (1978). (See Editor's note preceding § 8-2-201.)

**Parent corporation, sued by employee of its wholly-owned subsidiary, is not an "employer" entitled to immunity** from tort liability under the workmen's compensation act. *Peterson v. Trailways, Inc.*, 555 F. Supp. 827 (D. Colo. 1983); *Gaber v. Franchise Servs., Inc.*, 680 P.2d 1345 (Colo. App. 1984).

**"Dual capacity" doctrine.** Even if doctrine were applied, a city is not liable to its employee under such doctrine where the city, although the partial manufacturer of the truck that injured the employee, is not principally engaged in the manufacture of such trucks. *Shaw v. City of Colo. Springs*, 683 P.2d 385 (Colo. App. 1984).

**Claimant's tort suit against the employer was barred by the Workers' Compensation Act as a matter of law** where claimant had consented to work for the employer pursuant to a contract of hire within the meaning of the Act and claimant was an employee of both dual employer and employer. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Plaintiffs alleged at most a claim for gross negligence, and the exclusivity provisions of the Workers' Compensation Act, therefore, bar their action.** Although plaintiffs alleged that employer acted in willful, wanton, and reckless disregard for the health and safety of employee and others, they did not allege that employer intended to cause the injury. *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003).

**A claim against an employer's workmen's compensation insurer for tortious conduct in connection with the handling of a claim for compensation is not precluded by the Work-**



**men's Compensation Act**, where the conduct complained of occurred after the compensable injury, and the damages claimed were not sustained within the scope of the employment relationship. *Savio v. Travelers Ins. Co.*, 678 P.2d 549 (Colo. App. 1983).

**Against a tort claim of bad faith**, the standard for measuring the conduct of an insurer includes two elements: Unreasonable conduct, and knowledge that the conduct is unreasonable, or a reckless disregard for the fact the conduct is unreasonable. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**Tort suit against borrowed employee barred** where special employer had the exclusive right to control the work of the borrowed employee operator pursuant to the lease agreement, at the time of the accident the borrowed employee operator was performing work for the special employer, the special employer was controlling the work, and the borrowed employee operator acquiesced to this special employment relationship. *Morphew v. Ridge Crane Serv., Inc.*, 902 P.2d 848 (Colo. App. 1995).

**Trial court erred in dismissing plaintiff's summary judgment claims** alleging violations of the anti-discrimination act and outrageous conduct on grounds that this act provides exclusive remedy against employer where genuine factual controversy existed regarding job-relatedness of sexual harassment claims. *Ferris v. Local 26*, 867 P.2d 38 (Colo. App. 1993).

**Summary judgment was properly entered based on exclusivity provision** where state employee who suffered a workplace injury received workers' compensation benefits, and thereafter filed personal injury action against the state agency. *Rodriguez v. Bd. of Dirs.*, 917 P.2d 358 (Colo. App. 1996).

**Summary judgment precluded.** ALJ erred in granting summary judgment where there existed an unresolved conflict between the medical report issued by the employer's physician advisor and the IME reports obtained by the injured employee. *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007).

**Employee suffered workplace injury for which workers' compensation is the exclusive remedy** and since employee had received workers' compensation benefits from the state, he was statutorily barred by this section from subjecting the state to further potential liability arising from that injury. *Rodriguez v. Bd. of Dirs.*, 917 P.2d 358 (Colo. App. 1996).

**A provision of the High Voltage Power Lines Safety Act (§ 9-2.5-101 et seq.) providing that a person or entity which violates the Act "may be liable for all damages"** does not permit an employee covered by workers' compensation to seek additional remedies against the covered employer under the Act. *Rodriguez v. Nurseries, Inc.*, 815 P.2d 1006 (Colo. App. 1991).

**The rights of the spouse of an employee under the Workers' Compensation Act are strictly derivative from those of the employee** and thus a wife may not maintain a tort action against her husband's employer for loss of consortium. *Rodriguez v. Nurseries, Inc.*, 815 P.2d 1006 (Colo. App. 1991).

**Employee's claim for wrongful death of her child was not derivative of an injury to the employee and could be brought against the employer.** Where employee's child was born prematurely and died because the employer coerced the employee into working too many hours during her pregnancy, the claim was derived from an injury to a third party, the employee's child. *Keefe v. Pizza Hut of Am., Inc.*, 868 P.2d 1092 (Colo. App. 1993), *aff'd*, 900 P.2d 97 (Colo. 1995).

**Wrongful death action brought by employee's nondependent parents, based on the death of the employee which occurred in the course of the scope of the employee's employment, is strictly derivative and barred by the exclusivity provisions of this section, even though the parents suffer their own distinct injuries.** Thus, summary judgment was appropriate and parents could not maintain an action under either the federal Fair Labor Standards Act or the Colorado Youth Employment Opportunity Act. *Henderson v. Bear*, 968 P.2d 144 (Colo. App. 1998).

**Co-employees are immune** from common law actions brought by an officer who has rejected coverage under the Act. *Kelly v. Mile Hi Single Ply, Inc.*, 890 P.2d 1161 (Colo. 1995).

**If the employer has entered into an express indemnity agreement with a third party, the employer waives immunity under the Workers' Compensation Act and may be required to indemnify the third party for damages paid to the injured worker by the third party.** *Pub. Serv. Co. v. United Cable Television of Jeffco, Inc.*, 816 P.2d 289 (Colo. App. 1991).

Courts will enforce express indemnity agreements against an employer who would otherwise be immune under the Workers' Compensation Act based on the employer's freedom of contract rights and the employer's right to waive statutory protections. *Pub. Serv. Co. v. United Cable Television of Jeffco, Inc.*, 816 P.2d 289 (Colo. App. 1991).

**Claims for medical monitoring fall under the "personal injury" umbrella for purposes of the Workers' Compensation Act.** Employee's claims for exposure to unsafe levels of radioactive and other hazardous substances were barred by exclusivity provisions of this Act. *Bldg. and Const. Dept. v. Rockwell Intern.*, 7 F.3d 1487 (10th Cir. 1993).

**A motion to dismiss based on the exclusivity provisions of the Workers' Compensation Act does not go to the subject matter jurisdiction of the court, therefore, an evidentiary**

hearing is neither required nor appropriate. The trial court did not err in ruling on employer's motion without such a hearing. *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003).

**Engaging in an act that violates the federal pay statutes** does not require the withdrawal of the immunity provided by this section. *Bailey v. C.P. Const., Inc.*, 837 P.2d 277 (Colo. App. 1992).

**8-41-103. Availability of common-law defenses.** If an employer has complied with the provisions of articles 40 to 47 of this title, including the provisions thereof relating to insurance, and an action is brought against such employer or such employer's insurance carrier to recover damages for personal injuries or death sustained by an employee who has elected not to come under said articles, such employer and such employer's insurance carrier shall have all the defenses to the action which they would have had if said articles and part 2 of article 2 of this title had not been enacted.

**Source:** L. 90: Entire article R&RE, p. 476, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-42-103 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Derogation of the Common Law Rule of Contributory Negligence", see 7 Rocky Mt. L. Rev. 161 (1935). For article, "One Year Review of Torts", see 35 Dicta 53 (1958).

**Annotator's note.** Since § 8-41-103 is similar to § 8-42-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Workmen's compensation act does not bar** a claimant from bringing a tort action in state court for damages arising from bad faith in the processing of his request for rehabilitation. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139 (Colo. 2007).

In a case involving a claim by an employee against a compensation insurance carrier for the tort of bad faith, conduct constituting bad faith can occur in the unreasonable refusal to investigate a claim and to gather facts. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

The duty of good faith derives from the relationship, arising from the underlying insurance or compensation obligation between an insured claimant and the provider of benefits, and precedes official intervention and permeates all of the dealings between the parties. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

The duty of an insurer under the act to provide benefits and compensation is factually and analytically distinct from its duty to deal in good faith with claimants, even though such duties

**Applied** in *Ogden v. McChesney*, 41 Colo. App. 191, 584 P.2d 636 (1978); *Ellis v. Rocky Mt. Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979); *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982); *Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379 (Colo. App. 1983); *Savio v. Travelers Ins. Co.*, 678 P.2d 549 (Colo. App. 1983); *Williams v. White Mountain Const. Co.*, 749 P.2d 423 (Colo. 1988).

necessarily involve a common underlying physical injury. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

An employee covered by compensation insurance required by the act stands in the same position as an insured in a private insurance contract. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**An order by an official body securing benefits** for a claimant does not and cannot remedy separate injuries caused by prior bad faith acts by the provider of benefits resulting in delay or denial of benefits. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**There is no overlap of jurisdiction** between rulings of workers compensation agencies on statutory issues committed to them and rulings of courts of law on the tort of bad faith. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**Co-employee cannot be held liable for injury to co-worker who has elected to reject workers' compensation coverage.** The availability of common law defenses to employers does not extend to employees and thereby make them subject to suit. *Kelly v. Mile Hi Single Ply, Inc.*, 873 P.2d 13 (Colo. App. 1993).

**In reconciling § 8-41-401 (3) and this section, court upheld trial court's reasoning that corporate officer who has elected to reject coverage may bring tort action only against employer.** Whether or not a corporate officer has elected to reject such coverage, employees covered by Workers' Compensation Act are still limited to their rights and remedies under the Act. *Kelly v. Mile Hi Single Ply, Inc.*, 873 P.2d 13 (Colo. App. 1993).



**8-41-104. Acceptance as surrender of other remedies.** An election under the provisions of section 8-40-302 (5) and in compliance with the provisions of articles 40 to 47 of this title, including the provisions for insurance, shall be construed to be a surrender by the employer, such employer's insurance carrier, and the employee of their rights to any method, form, or amount of compensation or determination thereof or to any cause of action, action at law, suit in equity, or statutory or common-law right, remedy, or proceeding for or on account of such personal injuries or death of such employee other than as provided in said articles, and shall be an acceptance of all the provisions of said articles, and shall bind the employee personally, and, for compensation for such employee's death, the employee's personal representatives, surviving spouse, and next of kin, as well as the employer, such employer's insurance carrier, and those conducting their business during bankruptcy or insolvency.

**Source:** L. 90: Entire article R&RE, p. 476, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-43-104 as it existed prior to 1990.

### ANNOTATION

**Law reviews.** For article, "Employer's Liability for Occupational Diseases", see 16 Rocky Mt. L. Rev. 60 (1943). For article, "One Year Review of Torts", see 38 Dicta 93 (1961). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 34 Colo. Law. 95 (April 2005).

**Annotator's note.** Since § 8-41-104 is similar to § 8-43-104 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**This section applies only to remedies against the immediate employer.** *Chartier v. Winslow Crane Serv. Co.*, 142 Colo. 294, 350 P.2d 1044 (1960).

**So that this section does not operate to relieve a third person.** *Chartier v. Winslow Crane Serv. Co.*, 142 Colo. 294, 350 P.2d 1044 (1960).

**Under this section a covered employee simply has no option to sue his employer at common law for damages in the absence of specific acts of noncompliance with the act or misconduct on the part of his employer.** *Varsity Amusement Co. v. Butters*, 155 Colo. 330, 394 P.2d 603 (1964).

**Thus, a covered employee is not precluded under the theory of election of remedies from pursuing his claim under the act after a pre-trial agreement on liability because an election of remedies implies that a party has a choice of remedies at the time he files his suit, a choice which a covered employee does not have.** *Varsity Amusement Co. v. Butters*, 155 Colo. 330, 394 P.2d 603 (1964).

**However, where employer fails to comply with act, employee may proceed under the act or at law.** Where an employer fails to comply with the insurance features of the workmen's

compensation act, an injured employee has the right, at his option, to proceed under the provisions of the act or by a common-law action for negligence. *Indus. Comm'n v. Schaefer Realty Co.*, 98 Colo. 445, 56 P.2d 51 (1936); *Sharmar Nursing Home v. Indus. Comm'n*, 160 Colo. 197, 416 P.2d 161 (1966).

**But by electing to pursue his remedy at law for damages, an injured employee forfeits his right thereafter to resort to the remedy offered by the workmen's compensation act.** *Indus. Comm'n v. Schaefer Realty Co.*, 98 Colo. 445, 56 P.2d 51 (1936).

**When an employer-employee relationship exists under the act, the immunity from common-law suits should be broadly construed.** *Colo. Comp. Ins. Auth. v. Baker*, 955 P.2d 86 (Colo. App. 1998).

**"Personal injury" limited.** Because "personal injury" is not defined by the workmen's compensation act, it does not include damages which are based mainly on mental suffering and humiliation, and only peripherally on physical suffering and pain. *Luna v. City & County of Denver*, 537 F. Supp. 798 (D. Colo. 1982).

**"Personal injury" in § 8-41-102 and "personal injuries" in this section refer to the job-related physical or mental injuries of an employee, and, consequently, the Workers' Compensation Act's exclusivity provision bars action for or on account of such injuries of an employee.** *Serna v. Kingston Enters.*, 72 P.3d 376 (Colo. App. 2002).

**Economic liability does not qualify as a compensable "personal injury" under the Workers' Compensation Act of Colorado, therefore, indemnity action is not barred under the act's exclusivity provision.** *Serna v. Kingston Enters.*, 72 P.3d 376 (Colo. App. 2002).

**Intentional torts are covered under this act, and compensation awards may be made for injuries suffered from intentional acts of**

coemployees. *Ellis v. Rocky Mt. Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979).

Intentional wrongs arising out of the course of employment are covered under Colorado's compensation scheme. *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982).

**Intentional infliction of emotional distress.** A claim for intentional infliction of emotional distress is not barred by the workmen's compensation act. *Luna v. City & County of Denver*, 537 F. Supp. 798 (D. Colo. 1982); *Spulak v. K Mart Corp.*, 664 F. Supp. 1395 (D. Colo. 1985); *Kirk v. Smith*, 674 F. Supp. 803 (D. Colo. 1987).

Where the entire complaint is based on infliction of emotional distress, the plaintiff may be ineligible to receive compensation for the present claim under the workmen's compensation act, and therefore may properly bring an action in tort. *Vigil v. Safeway Stores, Inc.*, 555 F. Supp. 1049 (D. Colo. 1983); *Kirk v. Smith*, 674 F. Supp. 803 (D. Colo. 1987).

**If an injury comes within the coverage of the act, an action for damages is barred even though a particular element of damages is not compensated for.** *Colo. Comp. Ins. Auth. v. Baker*, 955 P.2d 86 (Colo. App. 1998); *McKelvy v. Liberty Mut. Ins. Co.*, 983 P.2d 42 (Colo. App. 1998).

**A subsequent civil action to pursue equitable claims for unjust enrichment, money had and received, restitution, and money paid by mistake, is prohibited** where the claims, in effect, reopen an administrative proceeding that has previously been closed and where there was no separate injury or tort for which a civil recovery could be sought. *Colo. Comp. Ins. Auth. v. Baker*, 955 P.2d 86 (Colo. App. 1998).

**Exclusive remedy for negligence and intentional torts.** An employee's exclusive remedy for his negligence and intentional tort claims is

as provided for under the workmen's compensation act. *Ellis v. Rocky Mt. Empire Sports, Inc.*, 43 Colo. App. 166, 602 P.2d 895 (1979).

**Exclusivity provisions of Workers' Compensation Act bar discharged employee's claim against former employer for outrageous conduct** in termination process. *Weissman v. Crawford Rehab. Servs.*, 914 P.2d 380 (Colo. App. 1995).

**Wrongful death action brought by employee's nondependent parents, based on the death of the employee which occurred in the course of the scope of the employee's employment, is strictly derivative and barred by the exclusivity provisions of this section, even though the parents suffer their own distinct injuries.** Thus, summary judgement was appropriate and parents could not maintain an action under either the federal Fair Labor Standards Act or the Colorado Youth Employment Opportunity Act. *Henderson v. Bear*, 968 P.2d 144 (Colo. App. 1998).

**Doctor hired by a company to treat its employees is not a co-employee** exempted from suit by this section for injuries caused in treatment, but may be sued in a malpractice action under § 8-52-108. *Wright v. District Court*, 661 P.2d 1167 (Colo. 1983).

**A plaintiff's co-employee is not immune from a tort claim for damages** by virtue of this section if the co-employee's tortious conduct did not arise "out of" and "in the course of" the tortfeasor's employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

A co-employee who causes injury to a worker is not immune from a plaintiff's tort claim for damages when the co-employee's conduct derives from matters personal to the employee or from a neutral source unrelated to the employee's employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

## PART 2

### COVERAGE

**8-41-201. Not applicable to common carriers.** The provisions of articles 40 to 47 of this title shall not apply to common carriers by railroad but shall apply to all other employers as defined in said articles engaged in intrastate or interstate commerce, or both, except those employers, other than the Colorado division of civil air patrol, for whom a rule of liability is established by the laws of the United States.

**Source:** L. 90: Entire article R&RE, p. 477, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-41-107 as it existed prior to 1990.

### ANNOTATION

**Law reviews.** For article, "A Reappraisal of the Employment Status in Social Legislation", see 23 Rocky Mt. L. Rev. 392 (1951).

**Annotator's note.** Since § 8-41-201 is similar to § 8-41-107 as it existed prior to the 1990 repeal and reenactment of the "Workers' Com-



pensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Article not applicable to common carriers in interstate commerce.** *Freeman v. Grove*, 75 Colo. 566, 227 P. 550 (1924); *Denver Union*

*Term. Ry. v. Indus. Comm'n*, 97 Colo. 129, 47 P.2d 392 (1935); *Zelle v. Indus. Comm'n*, 100 Colo. 116, 65 P.2d 1429 (1937); *Consolidated Fast Freight v. Walker*, 103 Colo. 347, 85 P.2d 720 (1938); *Cohen v. Schaezel*, 106 Colo. 266, 103 P.2d 1060 (1940).

**8-41-202. Rejection of coverage by corporate officers and others.** (1) Notwithstanding any provisions of articles 40 to 47 of this title to the contrary, a corporate officer of a corporation or a member of a limited liability company may elect to reject the provisions of articles 40 to 47 of this title. If so elected, said corporate officer or member shall provide written notice on a form approved by the division through a rule promulgated by the director of such election to the worker's compensation insurer of the employing corporation or company, if any, by certified mail. If there is no workers' compensation insurance company, the notice shall be provided to the division by certified mail. Such notice shall become effective the day following receipt of said notice by the insurer or the division.

(2) A corporate officer's or member's election to reject the provisions of articles 40 to 47 of this title shall continue in effect so long as the corporation's or company's insurance policy is in effect or until said officer or member, by written notice to the insurer, revokes the election to reject said provisions.

(3) Nothing in this section shall be construed to limit the responsibility of corporations or limited liability companies to provide coverage for their employees as required under articles 40 to 47 of this title. An election to reject coverage pursuant to this section may not be made a condition of employment.

(4) For the purposes of this section:

(a) "Corporate officer" means the chairperson of the board, president, vice-president, secretary, or treasurer who is an owner of at least ten percent of the stock of the corporation and who controls, supervises, or manages the business affairs of the corporation, as attested to by the secretary of the corporation at the time of the election.

(b) "Member" means an owner of at least ten percent of the membership interest of the limited liability company at all times and who controls, supervises, or manages the business affairs of the limited liability company.

**Source:** **L. 90:** Entire article R&RE, p. 477, § 1, effective July 1. **L. 93:** Entire section amended, p. 386, § 1, effective April 19. **L. 96:** (1) and (4) amended, p. 646, § 1, effective May 1.

**Editor's note:** This section is similar to former § 8-41-106.5 as it existed prior to 1990.

**8-41-203. Negligence of stranger - remedies - subrogation - actions - compromise.** (1) (a) If any employee entitled to compensation under articles 40 to 47 of this title is injured or killed by the negligence or wrong of another not in the same employ, such injured employee or, in case of death, such employee's dependents, may take compensation under said articles and may also pursue a remedy against the other person to recover any damages in excess of the compensation available under said articles.

(b) The payment of compensation pursuant to articles 40 to 47 of this title shall operate as and be an assignment of the cause of action against such other person to Pinnacol Assurance, the medical disaster insurance fund, the major medical insurance fund, or the subsequent injury fund, if compensation is payable from said funds, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. Said insurance carrier shall not be entitled to recover any sum in excess of the amount of compensation for which said carrier is liable under said articles to the injured employee, but to that extent said carrier shall be subrogated to the rights of the injured employee against said third party causing the injury. If the injured employee proceeds against such other person, then Pinnacol Assurance, the medical disaster insurance fund, the

major medical insurance fund, the subsequent injury fund, or such other person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the compensation provided by said articles in such case.

(c) The right of subrogation provided by this section shall apply to and include all compensation and all medical, hospital, dental, funeral, and other benefits and expenses to which the employee or, if the employee is deceased, the employee's dependents are entitled under the provisions of said articles, including parts 2 and 3 of article 46 of this title, or for which the employee's employer or insurance carrier is liable or has assumed liability.

(d) The assigned and subrogated cause of action provided by this section, together with the right to recover future benefits:

(I) Shall extend to all moneys collected from the third party causing the injury for all:

(A) Economic damages; and

(B) Physical impairment and disfigurement damages; except that, to the extent the trier of fact makes a separate award for disfigurement damages, the right of the beneficiary of the assigned interest to recover from such disfigurement damages shall be limited to the amount the beneficiary of the assigned interest paid, or is obligated to pay, in disfigurement damages pursuant to articles 40 to 47 of this title; and

(II) Shall not extend to moneys collected for noneconomic damages awarded for pain and suffering, inconvenience, emotional stress, or impairment of quality of life.

(e) (I) Except as otherwise provided in subparagraph (II) of this paragraph (e), the amount of the assigned and subrogated cause of action shall be reduced by an amount equal to the reasonable attorney fees and costs paid by the injured employee or, if the employee is deceased, the employee's dependents, in pursuing the recovery of the assigned and subrogated cause of action and the collection of such recovery.

(II) If the beneficiary of the assigned and subrogated cause of action elects to independently pursue such assigned cause of action, any recovery by such beneficiary shall not be reduced by any attorney fees and costs incurred by the employee. If the beneficiary of the assigned and subrogated cause of action elects to intervene within ninety days after receiving the notice required by paragraph (c) of subsection (4) of this section, any recovery by such beneficiary shall not be reduced by any attorney fees and costs incurred by the employee. If such beneficiary elects to intervene after the expiration of such ninety-day period, the court may reduce the beneficiary's recovery by a reasonable amount for any attorney fees and costs incurred by the employee after the end of such ninety-day period and before receiving notice that the beneficiary intends to intervene.

(f) Nothing in this section shall be construed as limiting in any way the right of the injured employee to take compensation under articles 40 to 47 of this title and also proceed against the third party causing the injury to recover any damages in excess of the subrogation rights described in this section.

(2) Such a cause of action assigned to Pinnacol Assurance may be prosecuted or compromised by it. A compromise of any such cause of action by the employee or, if the employee is deceased, the employee's dependents at an amount less than the compensation provided for by articles 40 to 47 of this title shall be made only with the written approval of the chief executive officer of Pinnacol Assurance, if the deficiency of compensation would be payable from the Pinnacol Assurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Such written approval shall not be unreasonably withheld. Failure to obtain such written approval shall entitle the party responsible for paying workers' compensation benefits to be reimbursed for all benefits paid from, and offset any future liability under articles 40 to 47 of this title against, the entire proceeds recovered without any credit for reasonable attorney fees and costs as provided in paragraph (e) of subsection (1) of this section. If such approval is not obtained, the employee or, if the employee is deceased, the employee's dependents shall not be liable for any plaintiff's attorney fees for the third-party recovery on that portion of any recovery equal to the assigned and subrogated interest and are not subject to any action for refusal to pay such plaintiff's attorney fees resulting from the third-party case.

(3) If an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee who are entitled to compensation under



articles 40 to 47 of this title are minors, the decision to pursue or compromise any claim against a third party shall be made by such minor or shall be made on the minor's behalf by a parent of such minor or by the minor's next friend or duly appointed guardian, as the director of the division of workers' compensation may determine by rule in each case. Once such decision is made, the person who made the decision shall also bear the responsibility to provide all notices required by this section.

(4) (a) (I) If the employee or, if the employee is deceased, the employee's dependents make a demand upon or a request of a person or entity not in the same employ as the employee to seek recovery for damages arising from actions of such other person or entity, the employee or dependents shall also give written notice, within ten days, to the division of workers' compensation and to all parties who may be responsible for paying benefits to the employee or dependents under articles 40 to 47 of this title.

(II) If the party responsible for paying workers' compensation benefits under articles 40 to 47 of this title to the employee or, if the employee is deceased, the employee's dependents, makes a demand upon or a request of a person or entity not in the same employ as the employee to seek recovery for damages arising from actions of the other person or entity, the party responsible for paying the workers' compensation benefits shall also give written notice, within ten days, to the division of workers' compensation and to the employee or, if the employee is deceased, to the employee's dependents.

(III) The notice requirements of this paragraph (a) shall not apply to demands or requests seeking the recovery of medical payments only, and not seeking the recovery of any other type of damage or loss.

(b) The notice required by this subsection (4) shall contain the following:

(I) A description of the claim;

(II) The names and addresses of any and all other persons believed to be negligent;

(III) The name and address of any attorney representing the employee or dependents;

(IV) The name and address of any attorney representing other persons believed to be negligent; and

(V) The name, address, and telephone number of the insurance company or third-party administrator.

(c) (I) Except as provided in subparagraph (II) of this paragraph (c), at least twenty days before commencing a lawsuit or arbitration proceeding to recover damages arising from actions of another person or entity, the party initiating such lawsuit or arbitration shall give written notice to all parties who may be responsible for paying benefits to the employee or dependents under articles 40 to 47 of this title and to the employee or, if the employee is deceased, the employee's dependents. Such notice shall contain all of the information set out in paragraph (b) of this subsection (4) and shall be accompanied by a draft copy of the complaint.

(II) If any applicable statutory limitation period would expire before such twenty days have passed, the party initiating such lawsuit or arbitration may file or serve the complaint, or otherwise act to toll the running of such limitation period, before such twenty days have passed. The party initiating the lawsuit or arbitration shall provide the notice required by subparagraph (I) of this paragraph (c) within twenty days after commencing such action.

(d) If the employee or dependents fail to provide the written notice required pursuant to subparagraph (I) of paragraph (a) of this subsection (4):

(I) The party responsible for paying workers' compensation benefits shall be entitled to reimbursement from all moneys collected from the third party for all economic damages and for all physical impairment and disfigurement damages, without any credit for reasonable attorney fees as provided in paragraph (e) of subsection (1) of this section. If the trier of fact makes a separate award for disfigurement damages, reimbursement from such disfigurement damage award shall be limited to the amount the party paying workers' compensation benefits paid, or is obligated to pay, in disfigurement damages pursuant to articles 40 to 47 of this title. Such rights shall not extend to moneys collected for noneconomic damages awarded for pain and suffering, inconvenience, emotional stress, or impairment of quality of life.

(II) The employee or dependents shall not be liable for any plaintiff's attorney fees for the third-party recovery on that portion of any recovery equal to the assigned and

subrogated interest and are not subject to any action for refusal to pay such plaintiff's attorney fees resulting from the third-party case.

(e). If the party responsible for paying workers' compensation benefits under articles 40 to 47 of this title fails to provide the written notice required pursuant to subparagraph (II) of paragraph (a) of this subsection (4), the amount of the claim shall be reduced by fifty dollars for each day such notice was not given to the employee or, if the employee is deceased, the employee's dependents, in an amount not to exceed twenty percent of the amount of the total assigned interest at the time such notice should have been given. The failure to provide such notice shall be a reassignment of a portion of the claim to the employee or, if the employee is deceased, the employee's dependents, in an amount equal to the penalty.

**Source:** L. 90: Entire article R&RE, p. 477, § 1, effective July 1; (1) amended, p. 1843, § 29, effective July 1. L. 2002: (1) and (2) amended, p. 1882, § 29, effective July 1. L. 2003: Entire section amended, p. 2613, § 1, effective July 1. L. 2004: (4) amended, p. 77, § 1, effective August 4.

**Editor's note:** This section is similar to former § 8-52-108 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Election.
- III. Assignment and Subrogation.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Colorado Practice in Workmen's Compensation", see 31 Rocky Mt. L. Rev. 500 (1959). For article, "The Enterprise Liability Theory of Torts", see 47 U. Colo. L. Rev. 153 (1976). For article, "A Primer on Workers' Compensation Subrogation", see 21 Colo. Law. 1931 (1992). For article, "Applying Tate and Kester: The Status of Subrogation and Set-Off Rights", see 21 Colo. Law. 2419 (1992). For article, "Judicial Apportionment of Personal Injury Claims", see 29 Colo. Law. 77 (May 2000). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 117 (November 2004). For article, "Workers' Compensation Subrogation Rights Against Worker Recoveries from Third-Party Tortfeasors", see 38 Colo. Law. 41 (January 2009).

**Annotator's note.** Since § 8-41-203 is similar to § 8-52-108 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**This section recognizes common-law rights against tortfeasors who cause compensable injuries.** *Indus. Comm'n v. Standard Ins. Co.*, 149 Colo. 587, 370 P.2d 156 (1962).

**If an employee fails to procure the insurer's consent** in accordance with subsection (2), the employee forfeits his right to receive future benefits. *Matter of Death of Peterkin*, 729 P.2d

977 (Colo. 1986); *Sullivan v. Indus. Claim Appeals Office*, 796 P.2d 31 (Colo. App. 1990); *Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855 (Colo. 1992).

**Purpose of notice** is to give insurance carrier an opportunity to assess its rights in a case which may result in an improvident settlement by an injured employee. Thus, where no notice is given, there is no duty to act reasonably because the carrier is unaware that it should act at all. *Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855 (Colo. 1992).

**An insurance carrier which has been properly notified about a suit brought in good faith by an injured employee has an obligation to act reasonably** when the injured employee requests approval of a settlement in such a suit. *Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855 (Colo. 1992).

**Obligation to act reasonably** requires insurance carrier to make a good faith appraisal of the suit and any proposed settlement and act accordingly. *Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855 (Colo. 1992).

**An insurance carrier must fairly and reasonably evaluate the suit before refusing approval of a settlement.** Once it has been apprised that a good-faith suit by an injured employee has deteriorated, the carrier cannot simply seize that opportunity to avoid payment of future compensation by withholding consent to settlement. *Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855 (Colo. 1992).

**In determining whether an insurance carrier's refusal is reasonable**, the court will look to the insurance carrier's actions taken in light of all circumstances. *Eckhardt v. Vill. Inn (Vicorp)*, 826 P.2d 855 (Colo. 1992).

**Workers' compensation carrier is granted the same immunity from suit by the injured**



**employee as the employer has.** Therefore, no third-party action could be brought against a carrier for negligently conducting safety inspections undertaken pursuant to its capacity as carrier. *McHargue v. Stokes Div. of Pennwalt Corp.*, 649 F. Supp. 1388 (D. Colo. 1986).

**An insurer's general knowledge of, and consent to, third-party negotiations does not constitute participation in, or encouragement of, a specific settlement agreement.** *Sullivan v. Indus. Claim Appeals Office*, 796 P.2d 31 (Colo. App. 1990).

**But the workmen's compensation act is a bar to a suit by an employee against a co-employee for injuries sustained when both are acting within the course of their employment.** *Nelson v. Harding*, 29 Colo. App. 76, 480 P.2d 851 (1970); *Sieck v. Trueblood*, 29 Colo. App. 432, 485 P.2d 134 (1971).

**Co-employee immunity for intentional wrongs is strictly limited to injuries sustained where both the tortfeasor and the victim are acting in the course of their employment.** *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982).

**Section does not abridge remedy against third person.** The law does not attempt in any way to abridge the remedies which an employee of one person may have at law against a third person for a tort which such third person commits against him. *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

**And only limitation is that third person shall not be "in the same employ".** Under this section, the injured person may elect to proceed against a third person and the only limitation is that the third person shall not be "in the same employ". *Chartier v. Winslow Crane Serv. Co.*, 142 Colo. 294, 350 P.2d 1044 (1960).

**Otherwise, remedy is limited to workmen's compensation.** Where the employer is the primary, if not sole, beneficiary of the fellow employee's action, the fellow employee is acting within the scope of his employment at the time of the accident, and the provisions of this section, allowing an injured employee to elect whether to pursue a cause of action against a third-party tortfeasor, are not applicable. The employee's remedy is limited to recovery under the workmen's compensation act. *Sieck v. Trueblood*, 29 Colo. App. 432, 485 P.2d 134 (1971).

**Thus, where a fellow employee and an outsider are both at fault in causing injury to a worker who elects the benefits of workmen's compensation, such election in practical effect nullifies the fault as between the fellow employee and the injured worker but does not vitiate the fault as between the outsider and the injured worker.** *Hamblen v. Santa Fe Trail Transp. Co.*, 101 F. Supp. 799 (D. Colo. 1951).

**Employee cannot join fellow employee in action against third party.** An employee has no

cause of action against a fellow employee for injuries sustained in the course of employment as the result of the latter's negligence where such employees and their employer are subject to the workmen's compensation act. And a plaintiff is precluded from joining his fellow employee as a defendant, as well as from proceeding against him independently for any damages suffered by plaintiff as a result of an accident arising out of the employment. *Hamblen v. Santa Fe Trail Transp. Co.*, 101 F. Supp. 799 (D. Colo. 1951).

**The term "third person" applies to anyone not immune to suit under the compensation act and incurring a common-law liability for injury to a workman.** *Indus. Comm'n v. Standard Ins. Co.*, 149 Colo. 587, 370 P.2d 156 (1962); *Cont'l Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**Uninsured motorist carrier's liability to insured contractual.** Although it is based upon the contingency of a third party's tort liability, the uninsured motorist carrier's liability to an insured is contractual, and the state compensation insurance fund does not become a third-party beneficiary under the insurance contract. *State Comp. Ins. Fund v. Gulf Ins. Co.*, 628 P.2d 182 (Colo. App. 1981); *State Comp. Ins. Fund v. Commercial Union Ins. Co.*, 631 P.2d 1168 (Colo. App. 1981).

**Uninsured motorist carrier is not third-party tortfeasor within the purview of this section.** *State Comp. Ins. Fund v. Commercial Union Ins. Co.*, 631 P.2d 1168 (Colo. App. 1981).

**Subcontractor may be sued by an employee of a general contractor.** *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**Employee of subcontractor may maintain common-law action against general contractor.** An employee of a subcontractor who has elected to receive workmen's compensation benefits from his insured subcontractor may maintain a common-law negligence action against the general contractor for the injuries received in the course of his employment. *Thomas v. Farnsworth Chambers Co.*, 286 F.2d 270 (10th Cir.), rev'g 183 F. Supp. 764 (D. Colo. 1960); *Whiting v. Farnsworth & Chambers Co.*, 293 F.2d 45 (10th Cir. 1961).

**Because a general contractor may be liable as a third-party tortfeasor to these injured and compensated employees of a subcontractor.** *Thomas v. Farnsworth Chambers Co.*, 286 F.2d 270 (10th Cir.), rev'g 183 F. Supp. 764 (D. Colo. 1960); *Whiting v. Farnsworth & Chambers Co.*, 293 F.2d 45 (10th Cir. 1961).

**And "loaned employee" may maintain negligence action against borrowing employer.** A "loaned employee" and an "employee" under workmen's compensation are not the same, and no provision prohibits or limits a

"loaned employee" from maintaining a negligence action against the borrowing employer. *Cont'l Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**For workmen's compensation does not immunize borrowing employer.** The defendant, even though it might have had workmen's compensation insurance coverage, is a "third party" and therefore subject to this common law action for negligence. The workmen's compensation act does not immunize the borrowing employer because the loaning employer is solely responsible for workmen's compensation coverage, unless it is shown that the loaning constitutes a new contract of hire between the employee and the borrowing employer. *Cont'l Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**Also, a physician incurring liability to an employee for negligent treatment of an injury is a "third person"** under this section. *Indus. Comm'n v. Standard Ins. Co.*, 149 Colo. 587, 370 P.2d 156 (1962).

**So that a disability is compensable which results from the negligent treatment by a physician furnished as required by the employer.** *Indus. Comm'n v. Standard Ins. Co.*, 149 Colo. 587, 370 P.2d 156 (1962).

**Doctor hired by a company to treat its employees** is not a coemployee exempted from suit by § 8-43-104 for injuries caused in treatment, but may be sued in a malpractice action under this section. *Wright v. District Court*, 661 P.2d 1167 (Colo. 1983).

**Clearly this section is not designed to relieve a third party** from the consequences of injuries to another negligently inflicted. *Riss & Co. v. Anderson*, 108 Colo. 78, 114 P.2d 278 (1941); *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

Workmen's compensation act is not to shield third-party tortfeasors from liability for damages resulting from their negligence. *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**Termination of death benefits held proper.** The propriety of termination of death benefits where the dependents of deceased elect to take compensation under articles 40 to 54 but nevertheless pursue their remedy against a third-party tortfeasor is implicit in this section. *Berry Constr., Inc. v. Indus. Comm'n*, 39 Colo. App. 251, 567 P.2d 806 (1977).

**Substantial evidence of causation** is not restricted to credible medical testimony. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

**Person responsible for enforcing this section is director of division of labor.** General powers given to director of division of labor place him in a fiduciary role to funds such as the subsequent injury fund which are not legal entities, and therefore the director is the proper

party to represent the fund and to protect its interests in workmen's compensation proceedings. *Sears, Roebuck & Co. v. Baca*, 682 P.2d 11 (Colo. 1984).

**All workers in service of the state are treated as state "employees"**, not as employees of separate entities, for purposes of workers' compensation benefits. *Rodriguez v. Bd. of Dirs.*, 917 P.2d 358 (Colo. App. 1996).

**The clear and unambiguous language of subsection (1)** allows the workers' compensation carrier to seek reimbursement of its partial permanent disability payments from the third party tortfeasor. *Business Ins. Co. v. BFI Waste Sys.*, 23 P.3d 1261 (Colo. App. 2001).

**Applied** in *Ogden v. McChesney*, 41 Colo. App. 191, 584 P.2d 636 (1978); *State Comp. Ins. Fund v. City of Colo. Springs*, 43 Colo. App. 112, 602 P.2d 881 (1979).

## II. ELECTION.

**The provision of this section for election in advance of suit is for the benefit of the state** in the administration of the state compensation insurance fund, and not for the benefit of the third person. *King v. O.P. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937).

**Signing of wage history does not constitute an election.** The signing of a wage history by employee cannot be construed as constituting the filing of a claim for compensation nor be considered the written election contemplated by this section itself. *King v. O.P. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937).

**Neither does the mere acceptance of medical, surgical, or hospital aid** by the employee constitute an election to take compensation. *King v. O.P. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937).

**For right of election contemplates opportunity for deliberation followed by affirmative act.** The right of election insured to an injured employee who may have a cause of action in tort against a third party undoubtedly contemplates the opportunity for deliberation followed by some affirmative action on his part before he can be said to have elected to take compensation. *King v. O.P. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937).

**Filing of claim and consequent notice to employer constituted election** to seek compensation. *Lantern Inn v. Indus. Comm'n*, 624 P.2d 929 (Colo. App. 1981).

**No election of remedies.** Although decedent's wife had no legal cause of action against the subcontractor in whose employ the deceased was at the time of injury, the bringing of an action under such circumstances did not constitute an election of remedies, and claimant is not estopped by reason thereof from recovering compensation. *Hartford Accident & Indem. Co. v. Clifton*, 117 Colo. 547, 190 P.2d 909 (1948).



**Action by employee against third party is not precluded by receipt of payments.** Where no award of compensation has been made, an action by the injured employee against a third party is not precluded by the receipt of payments from the employer or the insurance carrier. *King v. O.P. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937); *Riss & Co. v. Anderson*, 108 Colo. 78, 114 P.2d 278 (1941); *Riss & Co. v. Galloway*, 108 Colo. 93, 114 P.2d 550 (1941); *Liberty Mut. Ins. Co. v. Indus. Comm'n*, 145 Colo. 369, 359 P.2d 4 (1961).

**Likewise, action against third person does not bar workmen's compensation claim.** In accepting compensation from his employer for injuries received in the course of his employment, and thereafter commencing an action against third persons alleged to be responsible for his injuries and settling his claim against such persons without consent of the compensation insurance carrier does not bar a claimant from pursuing his claim for workmen's compensation. *Liberty Mut. Ins. Co. v. Indus. Comm'n*, 145 Colo. 369, 359 P.2d 4 (1961); *State Comp. Ins. Fund v. Foulds*, 167 Colo. 123, 445 P.2d 716 (1968); *Central Elec. Supply Co. v. Indus. Comm'n*, 698 P.2d 830 (Colo. App. 1984).

An employee who suffers a compensable injury at the hands of a third party may pursue his remedies against the third person even though the employee has filed a claim under the workers' compensation act. *Matter of Death of Peterkin*, 729 P.2d 977 (Colo. 1986).

If the third-party suit is successful, the employer's insurance carrier may suspend all future benefits to the employee if the amount of the third-party recovery that is actually collected equals or exceeds the compensation award. *Matter of Death of Peterkin*, 729 P.2d 977 (Colo. 1986).

**An injured employee does not lose or waive his right of action against a third party by exercising his rights under a workmen's compensation act.** *Krueger v. Merriman Elec.*, 29 Colo. App. 492, 488 P.2d 228 (1971).

**For this section only limits an employee's right to retain so much of the recovery as may exceed the compensation paid to him or for which his employer or the employer's insurance carrier is liable.** Since the statute by its terms limits the carrier's recovery to the amount of compensation for which it is liable, if the carrier sues alone the recoverable damages are limited to that compensation. Thus, if the employee by electing to accept compensation has lost all rights in the cause of action, then the third-party tortfeasor would be relieved of liability beyond the amount of compensation paid; it is clear that this is not the purpose of the statute. *Riss & Co. v. Anderson*, 108 Colo. 78, 114 P.2d 278 (1941); *Wilson v. Smith*, 110 Colo. 68, 130 P.2d 1053 (1942); *Drake v. Hodges*, 114 Colo. 10, 161 P.2d 338 (1945); *Kirkham v. Hickerson Bros. Truck*

*Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971); *Krueger v. Merriman Elec.*, 29 Colo. App. 492, 488 P.2d 228 (1971).

**Where the provisions of the workmen's compensation act do not expressly limit the employee with respect to other remedies,** the supreme court is not disposed to read or interpret such limitations into the workmen's compensation statutes. *Cont'l Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**Employee may bring action for property damage, pain and suffering, and lost wages.** The compensation provided for by the statute does not include payment for property damage, for pain and suffering, nor for all loss of future wages and the like. The right to bring an action against a third-party tortfeasor who is not a co-employee for these damages remains in the employee. Pursuant to the statute, he must repay the carrier out of his recovery for the compensation paid by it, but all amounts in excess thereof belong to him. *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

**Filing of written election with director held not to bar action against defendant.** In an action for damages for personal injuries resulting from a collision of plaintiff's automobile with a railway train owned and operated by defendant company, it was held that where plaintiff filed a written election to avail himself of the benefits of the workmen's compensation act, plaintiff was not "forever barred from asserting his alleged cause of action against this defendant". *Donley v. Denver & Salt Lake R.R.*, 111 Colo. 358, 141 P.2d 899 (1943).

**No question of estoppel between employee and third party.** Whatever may be the situation as between the employee and his employer and the insurance carrier, no question of estoppel arises as between the employee and the third party defendant. *King v. O.P. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937).

**Amount received under benefit plan should not be considered in employee's action against third party.** The amount received by an employee under a so-called benefit plan, considered as self-insurance under this act, should not be considered in mitigation of damages in an action by employee against third party. *Riss & Co. v. Anderson*, 108 Colo. 78, 114 P.2d 278 (1941).

### III. ASSIGNMENT AND SUBROGATION.

**Law reviews.** For article, "A Primer on Workers' Compensation Subrogation", see 21 Colo. Law. 1931 (1992).

**The legislative intent underlying this section is to preclude double recoveries;** thus, if the claimant cannot enforce a judgment or set-

tlement agreement in his favor, there is no double recovery in the first instance. *Rocky Mountain Gen. v. Simon*, 827 P.2d 629 (Colo. App. 1992).

**Purpose of this provision is to adjust rights** between the insurer and the employee by requiring that the insurer be reimbursed out of the employee's recovery against the third-party tortfeasor for worker's compensation benefits paid by the insurer, leaving the employee with the excess. *Cont'l Cas. Co. v. Gate City Steel*, 650 P.2d 1336 (Colo. App. 1982); *Rocky Mountain Gen. v. Simon*, 827 P.2d 629 (Colo. App. 1992); *Jordan v. Fonken & Stevens, P.C.*, 914 P.2d 394 (Colo. App. 1995); *Andrews v. Indus. Claim Appeals Office*, 952 P.2d 853 (Colo. App. 1997).

**The subrogation provisions of this section have the effect of preventing an injured employee from receiving a duplicate recovery** since the governmental interest in preventing double recovery is significant and is generally held to override a literal or technical interpretation of statutes or insurance policies. *Rocky Mountain Gen. v. Simon*, 827 P.2d 629 (Colo. App. 1992).

**Interpreting this section to restrict an employer's or carrier's subrogation interest to proceeds paid to worker individually** would create an incentive for employees to circumvent this section by simply agreeing with tortfeasors that settlement proceeds would be paid to an individual or legal entity other than the employee, would defeat the public policy against double recoveries, and would render the subrogation provisions meaningless. *Rocky Mountain Gen. v. Simon*, 827 P.2d 629 (Colo. App. 1992).

**Being the more specific statute, the plain terms of this section control over § 5-12-102** and, therefore, insurer is limited under subrogation agreement for workers' compensation to recover only the amount which it paid to the injured employee and cannot collect any interest on amount. *Husson v. Meeker*, 812 P.2d 731 (Colo. App. 1991).

**The phrase "actually collected" under this section refers to monetary proceeds actually received**, and therefore, insurance carrier could not claim credit for future annuity payments from third-party tortfeasor not yet paid into claimant's trust. *Rocky Mountain Gen. v. Simon*, 827 P.2d 629 (Colo. App. 1992).

**"Assignment" of the "cause of action" under subsection (1) is only a partial one.** It extends only to that part of the claim for economic damages that the carrier has paid; the carrier has no interest in any part of the claim for non-economic damages, nor in that proportion of the claimant's economic damages that the carrier has not paid. *Sneath v. Express Messenger Serv.*, 931 P.2d 565 (Colo. App. 1996); *Chavez v. Kelley Trucking, Inc.*, \_\_ P.3d \_\_ (Colo. App. 2011).

**Insurance carrier's subrogation rights are limited to the amount of compensation benefits for which said carrier is liable**, rather than to the amount of the entire net recovery an employee collects when the employee elects to pursue a remedy against a third party. Thus, the insurer is only subrogated to the claimant's rights to recover economic damages. *Colo. Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156 (Colo. 2000).

**Claimant was not required to obtain workers' compensation insurer's approval before settling his claim against the employer for noneconomic damages.** *Chavez v. Kelley Trucking, Inc.*, \_\_ P.3d \_\_ (Colo. App. 2011).

**Subrogation would be meaningless if the limit of liability fluctuated with every recovery.** *Weaver-Beatty Motor Co. v. Billen*, 36 Colo. App. 442, 541 P.2d 120 (1975).

**Insurer's right to recovery limited to damages obtainable through subrogation.** Since insured's recovery was limited by insured's comparative negligence, insurer's recovery should also be limited and insurer is not therefore entitled to offset of its reduction through reimbursement by insured. *Martinez v. St. Joseph Hospital & Nursing Home*, 878 P.2d 13 (Colo. App. 1993).

**Subrogation has no effect on limits of liability.** The right of subrogation granted to the state fund under this section is a separate and distinct right which has no effect on the limits of liability under § 8-49-101 established by the general assembly. *Weaver-Beatty Motor Co. v. Billen*, 36 Colo. App. 442, 541 P.2d 120 (1975).

**This section does not create a new cause of action but merely permits the assignment of claimant's original claim.** Such claims are not original claims either for or against the state, but the private claims of individuals assigned to the compensation fund for subrogation purposes. *Jackson v. Bates*, 133 Colo. 248, 293 P.2d 962 (1956).

**Distinction between assignment and subrogation.** Assignment and subrogation are not one and the same. Assignment is distinguished from subrogation in that subrogation is an act of the law predicated on payment of the debt or claim, and operates only to secure contribution and indemnity, whereas assignment is an act of the parties depending generally on intention, and contemplates a continuation of and transfers the whole claim or debt. *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

**In the absence of specific statutory authorization, there is no right to subrogation.** *Pisicchio v. Dir. of Div. of Labor & Emp.*, 29 Colo. App. 538, 487 P.2d 382 (1971).

**This section creates no immediate and outright assignment of any part of an injured employee's cause of action against a negligent tortfeasor.** The statute instead creates several



interrelated alternatives from which an injured employee and the employer's workers' compensation insurer may choose. These include the insurer being subrogated to the employee's right to bring suit against the negligent tortfeasor, to the extent of workers' compensation benefits paid. *Harms v. Williamson*, 956 P. 2d 649 (Colo. App. 1998).

No matter which alternative is chosen, the insurer is not required to file a notice of claim separate from and in addition to a sufficient notice of claim filed by the injured employee. *Harms v. Williamson*, 956 P. 2d 649 (Colo. App. 1998).

**The event which operates as a matter of law to assign the claim against the tortfeasors is the awarding of compensation.** *Liberty Mut. Ins. Co. v. Indus. Comm'n*, 145 Colo. 369, 359 P.2d 4 (1961); *Central Elec. Supply Co. v. Indus. Comm'n*, 698 P.2d 830 (Colo. App. 1984).

**Act of statistician held not to be an "awarding of compensation."** The act of a statistician in approving the admission of liability, which was accompanied by the wage history signed by the plaintiff, held not to amount to an "awarding of compensation" as contemplated by this section. *King v. O.P. Baur Confectionery Co.*, 100 Colo. 528, 68 P.2d 909 (1937).

**This section expressly limits the rights of an insurance carrier to those of a subrogee and indemnifies it only to the extent of the compensation for which it is liable as defined in the act.** *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

**In order to protect subrogee, employee may not settle claim without consent of carrier.** The employee is prohibited by the statute from settling his claim against the third party for less than the compensation due without the consent of the carrier. No other limitations are imposed on the employee by the statute, and this being so, the courts cannot insert them. *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

**But where no award has been made, the "effective force" required to give rise to subrogation rights, and the right of the carrier to give its consent to a settlement, is absent.** Under these circumstances the carrier must be content with the provision of the statute which gives him full credit for the amount received by the claimant in the settlement of the civil action. *Liberty Mut. Ins. Co. v. Indus. Comm'n*, 145 Colo. 369, 359 P.2d 4 (1961).

**Carrier, however, may settle without consent of employee.** The insurance carrier's rights in the action are limited to its share of the recovery as set forth in the act. If it desires to settle as to its rights it may do so with or without the consent of the employee. *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P. 2d 513 (1971).

**But the insurance carrier may not compel the employee to abandon or compromise his cause of action.** *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

**For the only limitations on the employee's right of action are those imposed by the act itself.** By forcing him to accept an unsatisfactory settlement, he was subjected to an unwarranted limitation on his right to prosecute his action against the alleged tortfeasor. This would defeat the primary purpose of this section of the act which is to provide the mechanics that will achieve the result of the third party paying what he would normally pay if no compensation question were involved; the employer and carrier "coming out even" by being reimbursed for their compensation expenditure; and the employee getting any excess of the damage recovery over compensation. *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 485 P.2d 513 (1971).

**Rights acquired by subrogation are assignable.** The assignment of subrogation rights by an insurance company to the injured party is valid and simply avoids circuitous procedure. There is nothing in the statute which prohibits the director from following procedures available to private insurers in this regard. *Krueger v. Merriman Elec., Colo.*, 29 Colo. App. 429, 488 P.2d 228 (1971).

**Prior to 1959, insurer's right to subrogation did not extend to benefits such as hospital, medical, and surgical expenses.** *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957); *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702, 78 A.L.R.2d 198 (1959).

**But now the employer and insurer are entitled to be subrogated to the rights of the employee in his malpractice action against the negligent physician.** However, the employee can recover from the doctor only such damages as flow from the doctor's negligence. *Indus. Comm'n v. Standard Ins. Co.*, 149 Colo. 587, 370 P.2d 156 (1962).

**And accordingly, the insurer is subrogated only to the extent of the compensation he is required to pay for aggravation of an original injury by the doctor.** *Indus. Comm'n v. Standard Ins. Co.*, 149 Colo. 587, 370 P.2d 156 (1962).

**The general assembly, prior to the amendment of this section in 2003, did not intend to include physical impairment or disfigurement damages recovered by an employee within the general category of economic damages subject to the insurer's right of subrogation.** *Colo. Comp. Ins. Auth. v. Jones*, 131 P.3d 1074 (Colo. App. 2005).

**When insurer entitled to reimbursement from employee without proof of negligence.** Where an employee receives worker's compensation benefits and then recovers from a third-party tortfeasor pursuant to a settlement agree-

ment which resolves all claims between the two parties, the insurer is entitled to its reimbursement from the employee without proof of the third party's negligence. *Continental Cas. Co. v. Gate City Steel*, 650 P.2d 1336 (Colo. App. 1982).

**And when insurer entitled to reimbursement directly from tortfeasor.** Where the third-party tortfeasor pays the employee pursuant to a general settlement of all claims between them, with notice of the insurer's subrogation rights, and agrees to indemnify the employee for any amounts he is required to pay the insurer in satisfaction of the insurer's reimbursement and subrogation rights, the third-party tortfeasor, rather than the employee, may be held directly liable for reimbursement to the insurer without proof of negligence. *Continental Cas. Co. v. Gate City Steel*, 650 P.2d 1336 (Colo. App. 1982).

**If a claimant recovers from the tortfeasor, the claimant must reimburse the insurer for any benefits paid,** and then the insurer may also offset any portion of the recovery not used to reimburse the insurer for past benefit payments against any future benefits the insurer may have to pay. Thus, the claimant receives interim workers' compensation benefits, recovers from the tortfeasor, reimburses the insurer for the interim benefits, credits the insurer for potential future benefits, and keeps the remainder as excess. *Jorgensen v. Colo. Comp. Ins. Auth.*, 967 P.2d 172 (Colo. App. 1998), *aff'd* on other grounds, 992 P.2d 1156 (Colo. 2000).

**Limit on reimbursement of employer's insurance carrier after recovery from third party.** An injured employee who recovers damages from a third-party tortfeasor must reimburse his employer's workmen's compensation insurance carrier for benefits paid to him, but any damages recovered in excess of the compensation paid by the carrier belong to the employee. *State Comp. Ins. Fund v. Commercial Union Ins. Co.*, 631 P.2d 1168 (Colo. App. 1981).

**Amount of subrogation may not be reduced to pay attorney fees.** Where there is no written consent from the party liable for compensation payments, the successful claimant in the third-party suit may not reduce the amount of the subrogation required by subsection (1) by unilaterally entering into a compromise agreement the ultimate result of which is to pay a portion of the recovery to counsel as attorney fees incurred in the third-party action. *In re Peterkin*, 698 P.2d 1353 (Colo. App. 1985), *aff'd*, 729 P.2d 977 (Colo. 1986).

**Claimant permitted to reduce insurance carrier's subrogation credit by the amount of attorney fees and costs incurred in settling the third-party action where there was no deficiency between the settlement and the amount of compensation for which the insurer was liable.**

When there is no such deficiency the reduction cannot be disallowed based on insurer's argument that it did not give written approval for the settlement. Further, to disallow the reduction would result in the insurer's unjust enrichment. *Kennedy v. Indus. Comm'n*, 735 P.2d 891 (Colo. App. 1986).

Workers' compensation insurer was not entitled to take subrogation credit, against additional compensation benefits to be paid claimant for her permanent disability, for amount of gross settlement with tortfeasor which represented claimant's attorney fees and expenses. *Drake v. Ins. Co. of North Am.*, 736 P.2d 1244 (Colo. App. 1986).

Where an injured employee's tort claim against a third party is settled for an amount greater than the insurer's subrogation claim for workers' compensation benefits, and the insurer has not actively participated in the tort litigation, a court may order the insurer to pay a reasonable share of the attorney fees and court costs incurred by the employee in the tort litigation. *County Workers Comp. Pool v. Davis*, 817 P.2d 521 (Colo. 1991).

**Insurer may not be subrogated to liability arising from accident subsequent to industrial accident.** There is no authority to award subrogation to an insurance company where tortfeasor liability arises from an accident subsequent to and unconnected with the industrial accident for which workmen's compensation was sought and where the latter, nonindustrial accident aggravated the disability caused by the original industrial accident. *Pisicchio v. Dir. of Div. of Labor & Emp.*, 29 Colo. App. 538, 487 P.2d 382 (1971).

**Insurer may not credit claimant's settlement against worker's compensation claim for damages covered by personal injury protection (PIP) benefits.** *Tate v. Indus. Claim Appeals Office*, 815 P.2d 15 (Colo. 1991).

**No subrogation rights over a claimant's third-party settlement acquired by a worker's compensation insurer** where insurer had paid no benefits to claimant at the time of third-party settlement, and the insurer has no control over claimant's third-party settlement. *Brickell v. Business Machs., Inc.*, 817 P.2d 536 (Colo. App. 1990).

**Workers' compensation carrier is barred from asserting subrogation claim against tortfeasor** when injured employee is eligible for PIP benefits. *County Workers Comp. Pool v. Folk*, 895 P.2d 1083 (Colo. App. 1994).

**Employee may be joined in employer's action against third party.** In an action for damages by an employer or insurance carrier against a third party under this section, the employee may be joined as a proper, although not a necessary, party plaintiff. *Wilson v. Smith*, 110 Colo. 68, 130 P.2d 1053 (1942); *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303,



485 P.2d 513 (1971); *Moore v. Fischer*, 31 Colo. App. 425, 505, P.2d 383 (1972).

**In the event of a recovery from a third party defendant for a wrong alleged**, from the sum awarded the amount of compensation for which the state fund is liable under the act shall be returned to the fund and the balance, if any, goes to a statutory assignee. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**The employer or carrier is entitled to subrogation credit for the amount of the monetary recovery when a third-party action results in a monetary recovery for work-related injuries**, irrespective of whether the money is paid to the claimant directly or to an individual or legal entity designated to receive the proceeds. *Rocky Mountain Gen. v. Simon*, 827 P.2d 629 (Colo. App. 1992).

**Insurer can only settle an action against a third party in the amount of compensation already paid to the claimant.** Thus, by settling, the insurer does not waive its statutory right to offset claimant's third-party recovery against the insurer's payment of future compensation benefits. *Metcalfe v. Bruning Div. of AMI*, 868 P.2d 1145 (Colo. App. 1993); *Jordan v. Fonken & Stevens, P.C.*, 914 P.2d 394 (Colo. App. 1995); *Andrews v. Indus. Claim Appeals Office*, 952 P.2d 853 (Colo. App. 1997).

**This section specifically provides that the subsequent injury fund has subrogation rights with respect to third-party settlement proceeds.** *Metcalfe v. Bruning Div. of AMI*, 868 P.2d 1145 (Colo. App. 1993).

**An insurance carrier becomes subrogated to the rights of the injured employee against any third-party tortfeasor to the extent of benefits paid.** This right extends to the settlement proceeds of a compromised claim. However, if the settlement is to be paid to the spouse of the injured employee for lack of consortium, such subrogation claim depends on whether the settlement agreement was fair and entered not in good faith and not designed to defeat such subrogation claim. *Rains v. Kolberg Mfg. Corp.*, 897 P.2d 845 (Colo. App. 1994).

**Claimant cannot unilaterally characterize recovery as being only for pain and suffering** and thus defeat the insurance carrier's subrogation rights. Regardless of the label applied to the recovery, the carrier is entitled to exercise its

subrogation rights against the amount of recovery actually collected. *Kennedy v. Indus. Comm'n*, 735 P.2d 891 (Colo. App. 1986).

**Subrogee's statutory subrogation lien applies to and may be satisfied from the total settlement amount recovered, which was undifferentiated between two accidents**, even though the assignment agreement made no express reference to the second accident. *United Fire & Cas. Co. v. Armantrout*, 904 P.2d 1375 (Colo. App. 1995).

**District court has jurisdiction to apportion a settlement reached in a tort case when a worker's compensation case underlies the tort case**, because the court is only determining the portion of the settlement that represents the non-economic losses. While that apportionment will indirectly affect the workers' compensation case by limiting the amount of proceeds subject to the subrogation interest, it is a proper exercise of the court's authority. *Jorgensen v. Colo. Comp. Ins. Auth.*, 967 P.2d 172 (Colo. App. 1998), *aff'd*, 992 P.2d 1156 (Colo. 2000).

**Since the carrier's subrogation right attaches only to the claimant's economic loss, the court shall determine actual amount of claimant's economic and non-economic damages and apportion settlement proceeds accordingly.** Failure to apportion settlement proceeds is reversible error even when the settlement is substantially lower than the actual damages. *Reliance Ins. Co. v. Blackford*, 100 P.3d 578 (Colo. App. 2004); *Colo. Comp. Ins. Auth. v. Jones*, 131 P.3d 1074 (Colo. App. 2005).

**Uninsured/underinsured motorist (UM/UIM) insurer not a third-party tortfeasor within purview of section and does not step into shoes of tortfeasor**; therefore, a worker's compensation insurer does not have subrogation rights against UM/UIM insurance benefits paid to injured worker. *Colo. Ins. Guar. Ass'n v. Menor*, 166 P.3d 205 (Colo. App. 2007).

While Colorado insurance guaranty association (CIGA), acting as worker's compensation insurer, does not have subrogation rights against UM/UIM insurance benefits under this section, CIGA has claim for relief for nonduplication of recovery under its enabling statute. *Colo. Ins. Guar. Ass'n v. Menor*, 166 P.3d 205 (Colo. App. 2007).

**8-41-204. Injury outside of state - benefits in accordance with state law.** If an employee who has been hired or is regularly employed in this state receives personal injuries in an accident or an occupational disease arising out of and in the course of such employment outside of this state, the employee, or such employee's dependents in case of death, shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving this state, unless, prior to the expiration of such six-month period, the employer has filed with the division notice that the employer has elected to extend such coverage for a greater period of time.

**Source:** L. 90: Entire article R&RE, p. 478, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-204 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For note, "The Conflicts Problem as Applied to Workmen's Compensation in Colorado", see 22 Rocky Mt. L. Rev. 77 (1949).

**Annotator's note.** Since § 8-41-204 is similar to § 8-46-204 as it existed prior to the 1990 repeal and reenactment of the "Worker's Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**This section gives an employee outside of this state the right to remain protected by the Colorado insurance coverage,** subject, however, to the second condition in § 8-46-202, and if that condition does not exist, the whole act becomes inoperative. *Frankel Carbon & Ribbon Co. v. Aaron*, 113 Colo. 429, 158 P.2d 929 (1945).

**Section extends protection of compensation act.** The requirements of § 8-46-202 cannot be fulfilled in a short period of time and afford no protection to an employee who must be sent out of the state on little if any advance notice. This section was intended to bridge the gap between and extend the protection of the compensation act to employees injured while employed out of the state within the six-month period. *State Comp. Ins. Fund v. Howington*, 133 Colo. 583, 298 P.2d 963 (1956).

**And the six-month limitation period commences to run from the date of departure** following the most recent assignment to the state. *Employers' Liab. Assurance Corp. v. Indus. Comm'n*, 147 Colo. 309, 363 P.2d 646 (1961).

**An employee who is hired in Colorado and receives personal injuries outside of the state in an accident arising out of the employment is entitled to compensation only if the employee received the injuries within six months after leaving the state.** Where employee was

hired or employed in Colorado but was never physically present in Colorado, the employee is not entitled to compensation. *Hathaway Lighting, Inc. v. Indus. Claim Appeals Office*, 143 P.3d 1187 (Colo. App. 2006).

**There are three requirements, any two of which when met can qualify an employee or his dependents for compensation** under this section where the injury or death occurs outside of the state. The requirements are: A contract of employment created in the state, employment in the state under a contract created outside the state, and substantial employment in the state. If any two of these conditions are met, it makes no difference that the employee is not a resident of the state or is killed outside the state provided other statutory time limits on out-of-state employment are met. *RCS Lumber Co. v. Worthy*, 149 Colo. 537, 369 P.2d 985 (1962).

**And claimants have the burden of proving a Colorado employment contract.** *RCS Lumber Co. v. Worthy*, 149 Colo. 537, 369 P.2d 985 (1962).

**The place of employment under this section is not expressly limited to the state.** *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957).

**Panel did not err in concluding that Colorado had jurisdiction over workers' compensation claim where contract for hire took place in Colorado for a job in Wyoming** even though the claimant could reject the offer and the employer could reject the claimant when he arrived at the job site. By the time the claimant had agreed to report and departed from his home for the job site, the fundamental elements of the contract were present. *Moorhead Mach. & Boiler v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

**Applied in** *Gardner Motor Co. v. Feistel*, 160 Colo. 135, 414 P.2d 915 (1966); *Loffland Bros. v. Baca*, 651 P.2d 431 (Colo. App. 1982).

**8-41-205. Waiver of compensation by employee - approval required - exception.** No waiver of compensation or medical benefits by an employee for aggravation of any preexisting condition or disease shall be allowed under articles 40 to 47 of this title. This section, however, shall not invalidate any such waiver so filed and approved prior to March 1, 1977, under the provisions of the "Colorado Occupational Disease Disability Act", which was repealed effective September 1, 1975.

**Source:** L. 90: Entire article R&RE, p. 479, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-51-113 as it existed prior to 1990.



**Cross references:** For the historical record of the "Colorado Occupational Disease Disability Act", see article 60 of this title, as contained in the original Volume 3, Colorado Revised Statutes 1973, as amended through L. 75.

### ANNOTATION

**Annotator's note.** Since § 8-41-205 is similar to § 8-51-113 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**Employer's liability fixed on date of last injurious exposure.** When an employee is disabled as a result of an occupational disease and

so advises his employer, but continues in the same employment, the extent of the employer's liability under the workmen's compensation act or the occupational disease disability act (now repealed) is to be determined by reference to the statutory scheme in effect on the date of the last injurious exposure to the hazards of the disease. *Martinez v. Indus. Comm'n*, 40 Colo. App. 485, 580 P.2d 36 (1978).

**8-41-206. Disability beginning five years after injury.** Any disability beginning more than five years after the date of injury shall be conclusively presumed not to be due to the injury, except in cases of disability or death resulting from exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestosis, silicosis, or anthracosis.

**Source: L. 90:** Entire article R&RE, p. 479, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-52-106 as it existed prior to 1990.

### ANNOTATION

**Annotator's note.** Since § 8-41-206 is similar to § 8-52-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Compensation under this section predicated on proved accident, as cause, and proved disability, as result, within five years.** *London Guarantee & Accident Co. v. Sauer*, 92 Colo. 565, 22 P.2d 624 (1933).

**But once the causal connection is established, a disability may be shown, whether it is actually disclosed early or late.** *London Guarantee & Accident Co. v. Sauer*, 92 Colo. 565, 22 P.2d 624 (1933).

**Thus, this section is not one of limitations. It creates an arbitrary rule of evidence, which inhibits a finding of any causal connection between an injury and an accident when the disability has its beginning five years after date of the accident.** *Indus. Comm'n v. Weaver*, 81 Colo. 191, 254 P. 444 (1927); *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

**Which does not bar an action for a recurring disability more than five years after accident.** *Indus. Comm'n v. Weaver*, 81 Colo. 191, 254 P. 444 (1927).

**For a recurring disability is a different thing from a "disability beginning more than**

**five years from the date of the accident".** *Indus. Comm'n v. Weaver*, 81 Colo. 191, 254 P. 444 (1927).

**Furthermore, the earliest disability for which compensation awarded or paid arrests running of any statute of limitations.** *London Guarantee & Accident Co. v. Sauer*, 92 Colo. 565, 22 P. 2d 624 (1933).

**"Disability" as used in this section means disability to work.** *United States Fid. & Guar. Co. v. Indus. Comm'n*, 97 Colo. 102, 46 P.2d 752 (1935).

**And "beginning" signifies commencement; the entrance into existence; the initial state of anything.** *Indus. Comm'n v. Weaver*, 81 Colo. 191, 254 P. 444 (1927).

**Disability under this statute does not commence only when the injured worker is unable to work.** The commencement of disability may also be established by evidence which demonstrates that a claimant is able to return to work only in a restricted capacity. *Ricks v. Indust. Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991).

**Employee failing to make claim within prescribed period is guilty of laches.** Where an employee, without reasonable excuse, neglects to make claim for alleged disability resulting from accidental injuries within the time fixed by this section, he is guilty of laches, and judgment

awarding his compensation will be reversed. United States Fid. & Guar. Co. v Indus. Comm'n, 97 Colo. 102, 46 P.2d 752 (1935).

**When no onset of disability was established, this section does not apply;** thus, find-

ings of maximum medical improvement and lack of permanent impairment were premature, and the claimant was not precluded from seeking medical benefits. Leming v. Indus. Claim Appeals Office, 62 P.3d 1015 (Colo. App. 2002).

**8-41-207. Death after two years.** In case death occurs more than two years after the date of receiving any injury, such death shall be prima facie presumed not to be due to such injury; such presumption shall not apply in cases of silicosis, asbestosis, anthracosis, or disability or death resulting from exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds. In all other cases, such presumption may be rebutted by competent evidence.

**Source:** L. 90: Entire article R&RE, p. 479, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-110 as it existed prior to 1990.

### ANNOTATION

**Annotator's note.** Since § 8-41-207 is similar to § 8-50-110 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Death from an injury must occur within a period of two years** from the date of the injury

if dependents are to be entitled to receive benefits. Moffat Coal Co. v. McFall, 117 Colo. 191, 186 P.2d 1021 (1947).

**Statutory presumption overcome** where suicide was found to have been proximately caused by depression and anxiety suffered as a result of work-related injury. Jakco Painting Contractors v. Indus. Comm'n, 702 P.2d 755 (Colo. App. 1985).

**8-41-208. Coverage for job-related exposure to or contraction of hepatitis C.** (1) The exposure to or contraction of hepatitis C by a firefighter, emergency services provider, or peace officer, as described in section 16-2.5-101, C.R.S., shall be presumed to be within the course and scope of employment if the following conditions are satisfied:

(a) A baseline test shall be provided by the employer, or if insured, by the insurer, to be performed within five days after the employee reports the on-the-job exposure. The employee must report the exposure within two days after the employee knew or reasonably should have known of the exposure;

(b) The baseline test establishes that the employee was not infected with hepatitis C at the time of the on-the-job exposure;

(c) The employee complies with reasonable and necessary medical procedures set forth in section 8-42-101 (1) (c);

(d) The employee is determined to have hepatitis C within twenty-four months after the on-the-job exposure to the known or possible source.

(2) The exposure to or contraction of hepatitis C by a firefighter, emergency services provider, or peace officer, as described in section 16-2.5-101, C.R.S., shall not be deemed to be within the course and scope of employment if an employer or insurer shows by a preponderance of the evidence that such exposure or contraction did not occur on the job.

**Source:** L. 2002: Entire section added, p. 440, § 1, effective May 16. L. 2003: IP(1) and (2) amended, p. 1613, § 3, effective August 6.

**8-41-209. Coverage for occupational diseases contracted by firefighters.** (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.



(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

(3) Repealed.

**Source: L. 2007:** Entire section added, p. 962, § 1, effective May 17.

**Editor's note:** Subsection (3)(b) provided for the repeal of subsection (3), effective March 1, 2009. (See L. 2007, p. 962.)

**8-41-210. Coverage for property tax work-off program participants.** Notwithstanding any provision of law to the contrary, a governmental entity or private nonprofit or for-profit entity that has a contract with a governmental entity that is self-insured under articles 40 to 47 of this title may purchase workers' compensation insurance from any insurer authorized to transact the business of workers' compensation insurance in this state for the express purpose of covering participants in the property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

**Source: L. 2010:** Entire section added, (HB 10-1076), ch. 162, p. 566, § 3, effective August 11.

## PART 3

### LIABILITY

**8-41-301. Conditions of recovery.** (1) The right to the compensation provided for in articles 40 to 47 of this title, in lieu of any other liability to any person for any personal injury or death resulting therefrom, shall obtain in all cases where the following conditions occur:

(a) Where, at the time of the injury, both employer and employee are subject to the provisions of said articles and where the employer has complied with the provisions thereof regarding insurance;

(b) Where, at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment;

(c) Where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted.

(2) (a) A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim shall have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

(a.5) For purposes of this subsection (2), "mental impairment" also includes a disability arising from an accidental physical injury that leads to a recognized permanent psychological disability.

(b) Notwithstanding any other provision of articles 40 to 47 of this title, where a claim is by reason of mental impairment, the claimant shall be limited to twelve weeks of medical impairment benefits, which shall be in an amount not less than one hundred fifty dollars per week and not more than fifty percent of the state average weekly wage, inclusive of any temporary disability benefits; except that this limitation shall not apply to any victim of a crime of violence, without regard to the intent of the perpetrator of the crime, nor to the victim of a physical injury or occupational disease that causes neurological brain damage; and nothing in this section shall limit the determination of the percentage of impairment pursuant to section 8-42-107 (8) for the purposes of establishing the applicable cap on benefits pursuant to section 8-42-107.5.

(c) The claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment.

(d) The mental impairment which is the basis of the claim must be, in and of itself, either sufficient to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment.

**Source:** **L. 90:** Entire article R&RE, p. 479, § 1, effective July 1. **L. 91:** (2) amended, p. 1294, § 7, effective July 1. **L. 99:** (2)(a) and (2)(b) amended and (2)(a.5) added, p. 299, § 2, effective July 1. **L. 2006:** (2)(b) amended, p. 98, § 1, effective July 1. **L. 2009:** (2)(b) amended, (SB 09-243), ch. 269, p. 1222, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-52-102 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Course of Employment.
  - A. In General.
  - B. Employee Going to and from Work.
- III. Proximate Cause.
- IV. Evidence.
  - A. In General.
  - B. Sufficiency of Evidence.
  - C. Admissibility of Evidence.
  - D. Presumption against Suicide.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Employer's Liability for Occupational Diseases", see 16 Rocky Mt. L. Rev. 60 (1943). For article, "The Enterprise Liability Theory of Torts", see 47 U. Colo. L. Rev. 153 (1976). For article, "Erosion of the Exclusive Remedy in Workers' Compensation", see 31 Colo. Law. 83 (December 2002). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 97 (June 2003). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 113 (October 2003). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 83 (April 2004). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 34 Colo. Law. 95 (April 2005).

**Annotator's note.** (1) Since § 8-41-301 is similar to § 8-52-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to

47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to enforce the workmen's compensation laws or were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission.

**Subsection (2) does not violate equal protection** because requiring verification of the mental component of a stress claim by a physician or psychologist is rationally related to the purpose of this section, which is to establish the proof requirements for compensability of a stress-related claim in order to avoid frivolous and fraudulent claims. *Tomsha v. City of Colo. Springs*, 856 P.2d 13 (Colo. App. 1992).

There is a rational basis for requiring physical injury or occurrence of a crime of violence during the course of employment as an additional proof of work-related causation. *Colo. AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

**Purpose of the workmen's compensation act** is to provide monetary relief to employees who, while performing services for the employer, suffer disability or death as a result of an accident or injury arising out of and in the course of their employment. This is a legitimate state purpose. *Claimants In re Kohler v. Indus. Comm'n*, 671 P.2d 1002 (Colo. App. 1983).



**The legislative purpose in enacting subsection (2)(a) was to establish the requirements for compensability of a stress-related claim, and it was designed to prevent frivolous claims.** Loveland Police Dept. v. Indus. Claim Appeals Office, 141 P.3d 943 (Colo. App. 2006).

**Any relief for alleged breach of contract for employer's failure to pay disability and medical benefits on a timely basis and to provide adequate medical treatment must be obtained exclusively through the workers' compensation scheme.** Employee may not avoid the Workers' Compensation Act's exclusivity provisions merely by framing his claim as one for breach of contract. The damages employee sought are the very benefits provided by the act. McKelvy v. Liberty Mut. Ins. Co., 983 P.2d 42 (Colo. App. 1998).

**If an injury comes within the coverage of the act, a common law action is barred even though a particular element of damages may not be provided as compensation.** McKelvy v. Liberty Mut. Ins. Co., 983 P.2d 42 (Colo. App. 1998).

**Trial court correctly determined it lacked jurisdiction over breach of contract claim since the act provides a comprehensive and exclusive remedy for that claim.** McKelvy v. Liberty Mut. Ins. Co., 983 P.2d 42 (Colo. App. 1998).

**Statutes of this character are to be liberally construed to the end that their beneficent purpose may be accomplished.** Indus. Comm'n v. Aetna Life Ins. Co., 64 Colo. 480, 174 P. 589 (1918); Univ. of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953).

**The workmen's compensation statute must be liberally construed to effectuate its humanitarian purpose of assisting injured workers.** Deterts v. Times Publ'g Co., 38 Colo. App. 48, 552 P.2d 1033 (1976).

**The workmen's compensation act is to be broadly and liberally construed to achieve its salutary purposes.** Stewart v. United States, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984).

**However, rule of liberal construction does not lessen degree of proof.** A claimant in a worker's compensation case has the burden of proving entitlement to benefits by a preponderance of the evidence and the court of appeals' statement that "any reasonable doubt as to whether a compensable injury arises out of and in the course of employment must be resolved in favor of a claimant" is an incorrect statement of the burden of proof because it creates a virtual presumption of compensability. City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985).

**But the intent is to make the industry responsible for industrial accidents only, and not those resulting from hazards common to all.** Indus. Comm'n v. Anderson, 69 Colo. 147, 169

P. 135 (1917); Cason v. Am. Brake Shoe & Foundry Co., 32 F. Supp. 680 (D. Colo. 1940).

**Meaning of "accidents".** In workmen's compensation acts, injuries are designated "accidents" to distinguish them from intentional injuries and injuries caused by disease. To constitute an accidental injury, it is not necessary that there should be anything extraordinary occurring in or about the work itself, such as slipping, or falling, or being hit. Central Sur. & Ins. Corp. v. Indus. Comm'n, 84 Colo. 481, 271 P. 617 (1928); Keating v. Indus. Comm'n, 105 Colo. 155, 95 P.2d 821 (1939); Gates v. Central City Opera House Ass'n, 107 Colo. 93, 108 P.2d 880 (1940); Indus. Comm'n v. La Foret Camps, 125 Colo. 503, 245 P.2d 459 (1952); Indus. Comm'n v. Corwin Hosp., 126 Colo. 358, 250 P.2d 135 (1952); J. W. Metz Lumber Co. v. Taylor, 134 Colo. 249, 302 P.2d 521 (1956); Wesco Elec. Co. v. Shook, 143 Colo. 382, 353 P.2d 743 (1960).

**1975 amendment broadened scope of compensable injuries.** The 1975 amendment, replacing the word "accident" wherever it occurred with "injury" and explicitly including a reference to occupational diseases, had the effect of broadening the scope of compensable injuries under the workmen's compensation act. Kandt v. Evans, 645 P.2d 1300 (Colo. App. 1982); CF & I Steel Corp. v. Indus. Comm'n, 650 P.2d 1332 (Colo. App. 1982).

**Injury compensable whether "accident" or "occupational disease".** A claimant is entitled to compensation if he sustains an injury under the conditions set forth in this section, and it is immaterial whether the injury was an accident as defined in § 8-41-108 (1) or an occupational disease as defined in § 8-41-108 (3). CF & I Steel Corp. v. Indus. Comm'n, 650 P.2d 1332 (Colo. App. 1982).

**An accident found to occur at a "definite time", "unexpected" and "unintended", is an accidental injury under the compensation act.** Indus. Comm'n v. Corwin Hosp., 126 Colo. 358, 250 P.2d 135 (1952); J.W. Metz Lumber Co. v. Taylor, 134 Colo. 249, 302 P.2d 521 (1956); Martin Marietta Corp. v. Faulk, 158 Colo. 441, 407 P.2d 348 (1965).

**Under the workmen's compensation law by the term "injury" is meant, not only an injury the means or cause of which is an accident, but also an injury which is itself an accident.** Carroll v. Indus. Comm'n, 69 Colo. 473, 195 P. 1097 (1921); Indus. Comm'n v. La Foret Camps, 125 Colo. 503, 245 P.2d 459 (1952); J.W. Metz Lumber Co. v. Taylor, 134 Colo. 249, 302 P.2d 521 (1956); Wesco Elec. Co. v. Shook, 143 Colo. 382, 353 P.2d 743 (1960).

**Injuries held accidents.** Indus. Comm'n v. Swanson, 93 Colo. 354, 26 P.2d 107 (1933); Indus. Comm'n v. Ule, 97 Colo. 253, 48 P.2d 803 (1935); Gates v. Central City Opera House Ass'n, 107 Colo. 93, 108 P.2d 880 (1940);

Indus. Comm'n v. Hayden Coal Co., 113 Colo. 62, 155 P.2d 158 (1944); Indus. Comm'n v. La Foret Camps, 125 Colo. 503, 245 P.2d 459 (1952); Indus. Comm'n v. Corwin Hosp., 126 Colo. 358, 250 P.2d 135 (1952); J. W. Metz Lumber Co. v. Taylor, 134 Colo. 249, 302 P.2d 521 (1956); City & County of Denver v. Pollard, 160 Colo. 306, 417 P.2d 231 (1966).

**But the loss of voice of an employee resulting from emotional stress and strain because of differences with his supervisor is not an accident** arising out of and in the course of employment within the meaning of the workmen's compensation act. *Classen v. Mountain States Tel. & Tel. Co.*, 153 Colo. 570, 387 P.2d 264 (1963).

**Subsection (2) applies not only to a single traumatic event**, but also to multiple traumatic events. Therefore, it applies to a series of stressful incidents. *McCallum v. Dana's Housekeeping*, 940 P.2d 1022 (Colo. App. 1996).

**Accident must be traceable to a definite time, place, and cause.** An accident under the various workmen's compensation acts, must be traceable to a definite time, place, and cause; the occurrence constituting an accident must be unexpected. *Prouse v. Indus. Comm'n*, 69 Colo. 382, 194 P. 625 (1920); *Peer v. Indus. Comm'n*, 94 Colo. 227, 29 P.2d 636 (1934); *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

**Lack of causal connection may be asserted at any time.** In a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

**However, the time of the accident is only required to be reasonably definite** to support an award. *Gates v. Central City Opera House Ass'n*, 107 Colo. 93, 108 P.2d 880 (1940); *Great Am. Indem. Co. v. State Comp. Ins. Fund*, 108 Colo. 323, 116 P.2d 919 (1941).

**On the other hand, an "occupational disease" is acquired in the usual and ordinary course of employment** and is recognized from common experience to be incidental thereto. *City & County of Denver v. Moore*, 31 Colo. App. 310, 504 P.2d 367 (1972).

**Evidence not bringing injury within definition of "occupational disease".** *Great Am. Indem. Co. v. State Comp. Ins. Fund*, 108 Colo. 323, 116 P.2d 919 (1941); *City & County of Denver v. Moore*, 31 Colo. App. 310, 504 P.2d 367 (1972).

Written testimony from a physician or psychologist is sufficient, subject to the ability of any party on request to cross-examine at a hearing or a deposition the professional who au-

thored the written material that the claimant presents. *Colo. Dept. of Labor & Employment v. Esser*, 30 P.3d 189 (Colo. 2001).

**The second clause of the "mental impairment" definition in subsection (2)(a) requires the injury to consist of a "psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances".** Expert testimony is necessary to prove that the event was psychologically traumatic. Whether the event was generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances may be proved by lay evidence, expert evidence, or both. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004); *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

**Expert is not required to use the term "psychologically traumatic event";** rather there must be a presentation of sufficient facts such that the ALJ can find there existed a psychologically traumatic event or events. *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

**Sufficient evidence must show that the "psychologically traumatic event" was unique and outside of a worker's usual experience.** Claimants, however, need not show the psychologically traumatic event would cause identical significant symptoms of distress in similarly situated workers. *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

**"Medical impairment benefits" in subsection (2)(b) means awards for medical impairment benefits, which by definition in § 8-42-107 (1)(a) and (8)(a), are payable for permanent disability.** *City of Thornton v. Replogle*, 873 P.2d 30 (Colo. App. 1993).

**Subsection (2)(b) was construed to mean that award for medical impairment benefits is limited but that award for temporary disability benefits is not**, and judge may reduce potential award of medical impairment benefits by amounts that claimant may have received as temporary disability benefits. *City of Thornton v. Replogle*, 873 P.2d 30 (Colo. App. 1993).

However, combined amount of temporary disability benefits and permanent partial disability benefits is limited by § 8-42-107.5. *City of Thornton v. Replogle*, 873 P.2d 30 (Colo. App. 1993).

**Twelve-week limitation on receipt of medical impairment workers' compensation benefits for mental impairment claim does not apply to temporary disability benefits.** *Rendon v. United Airlines*, 881 P.2d 482 (Colo. App. 1994).

**Twelve-week limitation on medical impairment benefits in subsection (2)(b) does not**



**apply to death benefits.** Death benefits are distinct from wage loss and disability benefits, and the limitation on medical impairment disability benefits applies to those cases in which disability benefits are payable to an eligible claimant, not to cases in which a claimant seeks death benefits. *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

**Twelve-week limitation on mental impairment benefits is not reduced by TTD benefits for physical injury.** Subsection (2)(b), with its offset requirement, is clearly limited in scope to benefits paid as the result of mental impairment only. *Sears Distribution Ctr. v. Indus. Claim Appeals Office*, 104 P.3d 313 (Colo. App. 2004).

**A crime of violence did not occur** when a police officer was bitten while trying to restrain a man suffering from a seizure disorder, since the seizure prevented the man from acting with conscious awareness of what he was doing. Thus, police officer was barred from receiving medical impairment benefits in excess of the limitation of 12 weeks under the exception for victims of crimes of violence in subsection (2)(c). *Bralish v. Indus. Claim Appeals Office*, 81 P.3d 1091 (Colo. App. 2003).

**Compensation can be awarded for personal injuries only.** *London Guarantee & Accident Co. v. Indus. Comm'n*, 80 Colo. 162, 249 P. 642 (1926).

**A wooden leg is not a part of a man's person.** A wooden leg is a man's property, not part of his person, and no compensation can be awarded for its injury. *London Guarantee & Accident Co. v. Indus. Comm'n*, 80 Colo. 162, 249 P. 642 (1926).

**There are separate and distinct limitations placed on temporary and permanent disability benefits for mental impairment.** Permanent disability benefits are limited to 12 weeks while temporary disability benefits are limited by maximum medical improvement. *City of Thornton v. Replogle*, 888 P.2d 782 (Colo. 1995).

**Fear and anxiety not compensable.** Fear and anxiety caused by the prospect of an operation to correct a compensable injury are not compensable. *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 116 Colo. 98, 179 P.2d 973 (1947).

**And negligence of employee contributing to the injury does not bar him from relief.** *Ocean Accident & Guar. Corp. v. Pallaro*, 66 Colo. 190, 180 P. 95 (1919).

**In addition, a preexisting disease will not render noncompensable an injury received under conditions which would otherwise make it compensable.** *Allen v. Gettler*, 94 Colo. 528, 30 P.2d 1117 (1934); *Indus. Comm'n v. Pacific Employers Ins. Co.*, 128 Colo. 411, 262 P.2d 926 (1953); *J.W. Metz Lumber Co. v. Taylor*, 134 Colo. 249, 302 P.2d 521 (1956); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Indus. Comm'n v. Colo. Fuel*

*& Iron Corp.*, 135 Colo. 307, 310 P.2d 717 (1957); *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594, 314 P.2d 297 (1957); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 152 Colo. 25, 380 P.2d 28 (1963); *State v. Richards*, 158 Colo. 155, 405 P.2d 675 (1965); *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965); *Gen. Cable Co. v. Indus. Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994).

**For compensation is not dependent on the state of an employee's health** or his freedom from constitutional weakness or latent tendency. *Peter Kiewit Sons' Co. v. Indus. Comm'n*, 124 Colo. 217, 236 P.2d 296 (1951); *State v. Richards*, 158 Colo. 155, 405 P.2d 675 (1965).

**The right to compensation for an injury springs into being where the necessary employer-employee relationship exists,** and both the service being performed and the injury sustained arise out of and in the course of employment. *Johnson v. Indus. Comm'n*, 137 Colo. 591, 328 P.2d 384 (1958).

**For the liability of an employer under the workmen's compensation act is predicated on relationship.** *Froid v. Knowles*, 95 Colo. 223, 36 P.2d 156 (1934).

**Thus, one not an employer or employee does not share in its burdens or benefits.** *Froid v. Knowles*, 95 Colo. 223, 36 P.2d 156 (1934).

**But ignorance of employee as to who was his employer will not of itself prevent compensation.** *Bukowich v. Ford Motor Co.*, 99 Colo. 56, 59 P.2d 470 (1936).

**But where state compensation insurance fund insurance policy does not afford coverage** to law firm for employee performing construction work at the direction of employer, state fund is properly dismissed as a party in the case. *State Comp. Ins. Fund v. Dean*, 689 P.2d 1146 (Colo. App. 1984).

**To justify recovery under the workmen's compensation law the one essential element is that a substantial portion of the work must be done in this state,** but with this must be combined either an accident in Colorado or a contract in Colorado. *United States Fid. & Guar. Co. v. Indus. Comm'n*, 99 Colo. 280, 61 P.2d 1033 (1936).

**The clause "inclusive of any temporary disability benefits" in subsection (2)(b) does not limit temporary disability benefits for mental impairment to twelve weeks.** *City of Thornton v. Replogle*, 888 P.2d 782 (Colo. 1995).

**The law of the place of contract controls the rights and liabilities both of the employer and employee.** *Indus. Comm'n v. Aetna Life Ins. Co.*, 64 Colo. 480, 174 P. 589 (1918).

**Thus, when contract is made in this state recovery may be had under this act for accidental death in another state.** *Indus. Comm'n v. Aetna Life Ins. Co.*, 64 Colo. 480, 174 P. 589 (1918); *Hall v. Indus. Comm'n*, 77 Colo. 338,

235 P. 1073 (1925); *Home Ins. Co. v. Hepp*, 91 Colo. 495, 15 P. 2d 1082 (1932).

**For the workmen's compensation act has extraterritorial effect.** *Hall v. Indus. Comm'n*, 77 Colo. 338, 235 P. 1073 (1925).

**And there is no reason for distinction as to the place of performance of the principal portion of the services.** *Home Ins. Co. v. Hepp*, 91 Colo. 495, 15 P.2d 1082 (1932).

**So that employee who is unsuccessful in claim for compensation in other state may proceed under this act.** Where an injured employee claims, and was awarded compensation by the industrial commission and thereafter elected to make claim for compensation for his injuries under the industrial act of another state and asked that payments under the Colorado award be discontinued, which request was granted, the commission did not thereby lose jurisdiction, and the employee, having been unsuccessful in his application for compensation in the other state, may proceed under the Colorado act. *United States Fid. & Guar. Co. v. Indus. Comm'n*, 99 Colo. 280, 61 P.2d 1033 (1936).

**Where employee is paid for injury he has no independent action against employer for alleged malpractice of its physician.** *Hennig v. Crested Butte Anthracite Mining Co.*, 92 Colo. 459, 21 P.2d 1115 (1933).

**Statement of director not a finding of disability caused by accident.** *Di Gregorio v. Monroe Coal Co.*, 98 Colo. 267, 55 P.2d 715 (1936).

**A sexual assault involving pinching is a physical injury within the meaning of this section,** and therefore claim did not fall within the mental impairment provision's requirement of testimony by a licensed physician or psychologist. *Oberle v. Indus. Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996).

**Applied** in *Greer v. Intercole Automation, Inc.*, 553 F. Supp. 275 (D. Colo. 1982).

## II. COURSE OF EMPLOYMENT.

### A. In General.

**Law reviews.** For note, "'Horseplay Cases' Under Workmen's Compensation Acts", see 10 *Rocky Mt. L. Rev.* 272 (1938). For comment on *Indus. Comm'n v. Havens* (136 Colo. 111, 314 P.2d 698 (1957)), see 30 *Rocky Mt. L. Rev.* 239 (1958). For comment on *Divelbiss v. Indus. Comm'n* (140 Colo. 452, 344 P.2d 1084 (1959)), see 32 *Rocky Mt. L. Rev.* 257 (1959). For comment on *Game & Fish Dept. v. Pardoe* (147 Colo. 363, 363 P.2d 1067 (1961)), see 34 *Rocky Mt. L. Rev.* 273 (1962). For article, "A Significant Change in the Colorado Workmen's Compensation Act: 'Accident', 'Injuries', and 'Heart Attack'", see 41 *Den. L. Ctr. J.* 189 (1964). For article, "Compensability of Heart Disease Under the Colorado Workmen's Compensation

Act", see 37 *U. Colo. L. Rev.* 205 (1965). For article, "The Positional Risk Doctrine — Compensability of 'Neutral Force' Injuries", see 17 *Colo. Law.* 2375 (1988). For article, "Work-Related Stress Claims", see 18 *Colo. Law.* 1529 (1989). For article, "Sexual Harassment: Issues of Compensability and Exclusivity", see 24 *Colo. Law.* 825 (1995).

**The purpose of the workmen's compensation act is to afford protection to employees injured from causes arising out of and during the course of their employment.** *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 228 (Colo. 2004).

**And whether employee is acting within scope of employment is determined from surrounding circumstances.** *Taylor v. Saunders*, 71 Colo. 160, 204 P. 608 (1922); *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929); *Chaney v. Indus. Comm'n*, 120 Colo. 111, 207 P.2d 816 (1949); *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 228 (Colo. 2004).

Colorado courts have repeatedly emphasized that the determination of whether the injuries arose out of and in the course of an employment relationship is largely dependent upon the facts surrounding the injury in question. *Bennett v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982).

**For this section requires an employee to be doing the duty which he is employed to perform.** *Indus. Comm'n v. Nissen*, 84 Colo. 19, 267 P. 791 (1928).

**However, activity not required to be strict obligation of employment or confer specific benefit on the employer.** An activity arises out of and in the course of employment when it is sufficiently interrelated to the conditions and circumstances under which the employee usually performs his job functions that the activity may reasonably be characterized as an incident of employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Matter of Death of McLaughlin*, 728 P.2d 337 (Colo. App. 1986); *Banks v. Indus. Claim Appeals Office*, 794 P.2d 1062 (Colo. App. 1990); *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

**So that the right to compensation for an injury exists when both the service being performed and the injury sustained shall arise out of and in the course of the employment.** *Indus. Comm'n v. Anderson*, 69 Colo. 147, 169 P. 135 (1917); *Indus. Comm'n v. Rocky Mt. Fuel Co.*, 107 Colo. 226, 110 P.2d 654 (1941); *Alexander Film Co. v. Indus. Comm'n*, 136 Colo. 486, 319 P.2d 1074 (1957); *Johnson v. Indus. Comm'n*, 137 Colo. 591, 328 P.2d 384 (1958); *Divelbiss v. Indus. Comm'n*, 140 Colo. 452, 344 P.2d 1084



(1959); State Comp. Ins. Fund v. Walter, 143 Colo. 549, 354 P.2d 591 (1960); Silver Eng'r Works, Inc. v. Simmons, 180 Colo. 309, 505 P.2d 966 (1973).

**Totality of the circumstances must be examined** in each case to see whether there is a sufficient nexus between the employment and the injury so that it may be said that the accident occurred within the scope of employment. City & County of Denver Sch. Dist. No. 1 v. Indus. Comm'n, 196 Colo. 131, 581 P.2d 1162 (1978); Stewart v. United States, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984); Perry v. Crawford & Co., 677 P.2d 416 (Colo. App. 1983); Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991); Loveland Police Dept. v. Indus. Claim Appeals Office, 141 P.3d 943 (Colo. App. 2006).

Totality of circumstances in each case must be considered in determining whether injury arose out of and in the course of employment. Younger v. City & County of Denver, 810 P.2d 647 (Colo. 1991).

**A claim for compensation for mental impairment resulting from harassment by a co-worker may be compensable, even if the dispute does not center upon work-related issues**, if the work brought the employees together and created the relation and conditions resulting in the dispute. Moorhead Mach. & Boiler v. Del Valle, 934 P.2d 861 (Colo. App. 1996).

**In order to be compensable under the Workers' Compensation Act, an injury incurred by an employee must arise out of and in the course of the employee's employment.** Price v. Indus. Claim Appeals Office, 919 P.2d 207 (Colo. 1996).

**In workers' compensation law, the terms "in the course of" and "arising out of" are not synonymous.** Popovich v. Irlando, 811 P.2d 379 (Colo. 1991); Panera Bread, LLC v. Indus. Claim Appeals Office, 141 P.3d 970 (Colo. App. 2006).

**An activity arises out of and in the course of employment** when it is sufficiently interrelated to the conditions and circumstances under which the employee generally performs his job functions that the activity may reasonably be characterized as an incident of employment, although the activity itself is not a strict employment requirement and does not confer an express benefit on the employer. Price v. Indus. Claim Appeals Office, 919 P.2d 207 (Colo. 1996).

**Meaning of term "arise out of".** To "arise out of" the employment, unmistakably means that the cause of the accident was at all times "in" the employment. It could not come out of it, unless it was first in it. Rocky Mt. Fuel Co. v. Kruzic, 94 Colo. 398, 30 P.2d 868 (1934).

The expression "arising out of" refers to the origin or cause of the injury. Deterts v. Times

Publ'g Co., 38 Colo. App. 48, 552 P.2d 1033 (1976); Kirk v. Smith, 674 F. Supp. 803 (D. Colo. 1987); Price v. Indus. Claim Appeals Office, 908 P.2d 136 (Colo. App. 1995), aff'd, 919 P.2d 207 (Colo. 1996); City of Northglenn v. Eltrich, 908 P.2d 139 (Colo. App. 1995), aff'd sub. nom. Price v. Indus. Claim Appeals Office, 919 P.2d 207 (Colo. 1996).

"Positional-risk" or "but for" test applies to determine whether injury "arises out of" employment when injury does not have inherent connection with employment. Stamper v. Hiteshew, 797 P.2d 784 (Colo. App. 1990).

Factual question existed as to whether sexual assault on female employee by employer "arose out of" employment, making injury compensable and employer accordingly immune from suit. Stamper v. Hiteshew, 797 P.2d 784 (Colo. App. 1990).

Except in the most unusual cases, acts of harassment are highly personal and fall into the category of inherently private assaults that do not arise from employment. As a matter of policy, sexual harassment is not a risk inherently connected to the employment relationship. Therefore, sexual harassment claims are not barred by the exclusive remedy provisions of the Workers' Compensation Act. Horodyskyj v. Karanian, 32 P.3d 470 (Colo. 2001).

**"Arises out of and in the course of an employee's employment"** means that there must be a nexus between a claimant's injury and his conditions of employment. There is no requirement that the conditions of employment be the direct cause of the event that caused the injury. Ramsdell v. Horn, 781 P.2d 150 (Colo. App. 1989).

An injury may be connected with the employment and therefore may arise out of that employment if the employee's work places him in a position in which he ultimately sustains that injury, even though the direct cause of that injury is not employment-related. To be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. There is general agreement that an employee who works at a height above ground is subjected to a special hazard. Ramsdell v. Horn, 781 P.2d 150 (Colo. App. 1989).

**Test is whether acts of employee at time of injury were solely for his own benefit**, not whether the benefits to the employer are incidental or primary; if the acts were for his sole benefit, then his injury does not arise out of his employment. Brogger v. Kezer, 626 P.2d 700 (Colo. App. 1980); Kater v. Indus. Comm'n, 728 P.2d 746 (Colo. App. 1986).

**Thus, accident "arises out of" employment where there is a causal connection between work conditions and injury.** Gates Rubber Co. v. Indus. Comm'n, 112 Colo. 480, 150 P.2d 301 (1944); J. W. Metz Lumber Co. v. Taylor, 134

Colo. 249, 302 P.2d 521 (1956); Indus. Comm'n v. London & Lancashire Indem. Co., 135 Colo. 372, 311 P.2d 705 (1957); Indus. Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957); Claimants in re Death of Bennett v. Durango Furn. Mart, 136 Colo. 529, 319 P.2d 494 (1957); Miller v. Denver Post, Inc., 137 Colo. 61, 322 P.2d 661 (1958); Indus. Comm'n v. Johnson Pontiac, Inc., 140 Colo. 160, 344 P.2d 186 (1959); Wesco Elec. Co. v. Shook, 143 Colo. 382, 353 P.2d 743 (1960); State Comp. Ins. Fund v. Walter, 143 Colo. 549, 354 P.2d 591 (1960); Martin Marietta Corp. v. Faulk, 158 Colo. 441, 407 P.2d 348 (1965); Younger v. City & County of Denver, 810 P.2d 647 (Colo. 1991); Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991).

**An injury arises out of employment when it** has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment. Popovich v. Irlando, 811 P.2d 379 (Colo. 1991); Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991); Madden v. Mountain West Fabricators, 977 P.2d 861 (Colo. 1999); Panera Bread, LLC v. Indus. Claim Appeals Office, 141 P.3d 970 (Colo. App. 2006).

Incident leading to claimant's injury arose out of claimant's employment as a matter of law where the entire incident occurred on the employer's premises, the parties were brought into contact through their employment, and the only alleged source of the animosity giving rise to the incident was events occurring as a result of the claimant's employment. Ventura v. Albertson's, Inc., 856 P.2d 35 (Colo. App. 1992).

**If travel is a substantial part of the employee's service to the employer,** then it is sufficient by itself to demonstrate a causal connection between the employee's scope of employment and the injury. Staff Adm'rs, Inc. v. Reynolds, 977 P.2d 866 (Colo. 1999).

**Driving to work does not generally qualify as service "arising out of and in the course of" employment.** Whether travel qualifies as such service depends upon the context of the employment. The court should consider the following variables when determining whether travel qualifies as such service: (1) Whether the travel occurred during working hours; (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contact; and (4) whether the obligations of conditions of employment created a "zone of special danger" out of which the injury arose. Madden v. Mountain West Fabricators, 977 P.2d 861 (Colo. 1999).

**Injuries sustained in car accident which resulted from claimant's epileptic seizure are compensable** because claimant's employment subjected her to the additional risk of vehicular

travel and she was driving with the knowledge and permission of both her doctor and employer. Nat'l Health Labs. v. Indus. Claim Appeals Office, 844 P.2d 1259 (Colo. App. 1992).

**Injuries which result from discharge do not arise until after the employment relationship is terminated.** Thus, they do not arise out of or in the course of employment and therefore are not barred by the act. Smith v. Colo. Interstate Gas Co., 777 F. Supp. 854 (D. Colo. 1991); Golightly - Howell v. OCAW Intern. Union, 806 F. Supp. 921 (D. Colo. 1992) (decided under former § 8-52-102 prior to the 1990 repeal and reenactment of the Workers' Compensation Act).

**On the other hand, the term "in the course of" relates more particularly to the time, place, and circumstances under which the injury occurred.** Indus. Comm'n v. London & Lancashire Indem. Co., 135 Colo. 372, 311 P.2d 705 (1957); Deterts v. Times Publ'g Co., 38 Colo. App. 48, 552 P.2d 1033 (1976); Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991).

**The term "in the course of" refers to the time, place, and activity at the time of the injury.** Kirk v. Smith, 674 F. Supp. 803 (D. Colo. 1987).

For an injury to be found as occurring within the "course of employment", it must be established that the injury occurred both within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions. Popovich v. Irlando, 811 P.2d 379 (Colo. 1991); Panera Bread, LLC v. Indus. Claim Appeals Office, 141 P.3d 970 (Colo. App. 2006).

**The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions.** An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment. Popovich v. Irlando, 811 P.2d 379 (Colo. 1991); Wild West Radio, Inc. v. Indus. Claim Appeals Office, 905 P.2d 6 (Colo. 1995).

**The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions.** Popovich v. Irlando, 811 P.2d 379 (Colo. 1991); Triad Painting Co. v. Blair, 812 P.2d 638 (Colo. 1991).

**Although employer was aware of employee's propensity to seizures,** that does not per se establish that the injuries he suffered as a result of a seizure occurring at work arose from the



employment. *Gates Rubber Co. v. Indus. Comm'n*, 705 P.2d 6 (Colo. App. 1985).

**A regulation cannot make that which is clearly not incident to employment fall within the course of employment.** *Rogers v. Indus. Comm'n*, 40 Colo. App. 313, 574 P.2d 116 (1978).

Consequently, "arising out of" and "in the course of" are not synonymous, so that a claimant must meet both requirements where, as under the workmen's compensation act, the conditions are conjunctive. *Indus. Comm'n v. London & Lancashire Indem. Co.*, 135 Colo. 372, 311 P.2d 705 (1957); *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991).

The terms "arising out of" and "in the course of" are not interchangeable. An injury "arises out of" employment when it both has its origin in an employee's work-related functions and is sufficiently related to those functions such that it can be said to be part of the employee's service to the employer in connection with the contract of employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

Employer's personal delivery of paycheck and termination notice to employee at home, while employee was on sick leave and not performing services, "arose out of" but was not "in the course of" employment. *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 228 (Colo. 2004).

**The term "course of employment"** refers to the time, place, and circumstances under which the injury occurred while an injury "arises out of employment" when the injury has its origin in work-related functions. *L.E.L. Const. v. Goode*, 849 P.2d 876 (Colo. App. 1992).

**To come within the classification of "course of conduct", it must be shown that such conduct is such a continuous practice as to constitute a regular course of conduct.** An occasional instance does not establish such a custom, because the proof of such a custom must be clear and convincing as to duration. *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 127 Colo. 225, 255 P.2d 961 (1953).

**Whether horseplay is a deviation from employment is determined by a four-part test:** (1) The extent and seriousness of the deviation; (2) the completeness of the deviation; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. *Lori's Fam. Din., Inc. v. Indus. Claims Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

It is unnecessary to prove all four parts of the test to determine deviation; rather the four-part test serves merely as an objective method of analysis. The third and fourth parts of the test may be viewed merely as specific methods of proving that a claimant's actions became part of

the employment. *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

**Compensability is not precluded for an isolated incident of horseplay** if the incident does not constitute a substantial deviation from the general course of employment. *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

**If at the time of the injury the employee was doing what he expressly or impliedly was directed by his superiors to do**, and the latter were vested with the authority to give him directions, then he was acting within the course of his employment. *Walsh v. Indus. Comm'n*, 34 Colo. App. 371, 527 P.2d 1180 (1974).

**Application of positional-risk test proper** to determine whether employee, in course of employment, was reasonably required to be at a particular place at a particular time and met with a neutral force which is neither personal to the injured employee nor distinctly associated with the employment. *Younger v. City & County of Denver*, 810 P.2d 647 (Colo. 1991).

**Employer directions to employees for purposes of determining compensability.** Such directions fall into one of two categories: (1) Those which limit the sphere of the employment relationship; or (2) those which simply regulate the employee's conduct while he is engaged in such employment. A general directive disclosing no intent to cause employment cessation for violation of the directive, without any other evidence of the purpose or effect of the direction upon claimant's general employment responsibilities, is insufficient to allow the conclusion that the direction limited the sphere of claimant's employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

**Injury while performing acts for mutual benefit of employer and employee.** An injury suffered by an employee while performing acts for the mutual benefit of the employer and the employee is usually compensable. *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976).

When some advantage to an employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to employment. *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976).

Emergency or rescue activity is within course of employment if the employer has an interest in the rescue. *Tri-State Commodities, Inc. v. Stewart*, 689 P.2d 712 (Colo. App. 1984).

**But the employee need not necessarily be engaged in the actual performance of work** at the moment of injury in order to be entitled to compensation. It is enough if he is upon his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment. *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257

P.2d 423 (1953); *Divelbiss v. Indus. Comm'n*, 140 Colo. 452, 344 P.2d 1084 (1959); *Packaging Corp. of Am. v. Roberts*, 169 Colo. 316, 455 P.2d 652 (1969).

The mere fact that the injury befell the claimant at the moment when he was not performing labor for his employer does not necessarily prove that the accident did not arise out of or in the course of the employment. *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976).

**Injuries which occur off the work premises while employee is on a paid break** raise the issues whether the employer retained control during the break period and whether the activity giving rise to the injuries constituted a deviation from employment so substantial as to remove it from the employment relationship. *Roache v. Indus. Comm'n*, 729 P.2d 991 (Colo. 1986).

Factors to be considered are duration of break, whether employment contract provides for break, whether break is a paid interval, whether off-premises location is close to employment site, whether employer permits off-premises breaks, and whether there are limitations on where employees go during break. *Roache v. Indus. Comm'n*, 729 P.2d 991 (Colo. 1986).

Where employee injured at convenience store, one block from work site, during a paid break, injuries arose out of and in the course of employment where employees were expressly permitted to go to such store because there were no vending machines or cafeteria on the employment premises. *Roache v. Indus. Comm'n*, 729 P.2d 991 (Colo. 1986).

Mere presence of company vehicle in driveway of employee's relative's home did not bring injury within the "course of employment" for purposes of this section. *Archer v. Farmer Bros. Co.*, 70 P.3d 495 (Colo. App. 2002), *aff'd* on other grounds, 90 P.3d 228 (Colo. 2004).

**In order to determine whether an injury suffered by an employee while engaging in an exercise program is compensable under the Workers' Compensation Act**, a court should look at the following factors: (1) Whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise program; (4) whether the employer exerted any control or direction over the employee's exercise program; and (5) whether the employer stood to benefit from the employee's exercise program. *Price v. Indus. Claim Appeals Office*, 919 P.2d 207 (Colo. 1996).

**A second injury sustained by a claimant during a trip to obtain medical care or rehabilitation for a compensable injury is compensable.** Because an employer is required to provide medical treatment and an injured employee is required to submit to it, a trip to the

doctor's office becomes an implied part of the employment contract. *Excel v. Indus. Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993); *Turner v. Indus. Claim Appeals Office*, 111 P.3d 534 (Colo. App. 2004).

The "quasi-course of employment doctrine" has been utilized to extend liability to subsequent injuries incurred in certain activities that take place outside the time and space limits of normal employment and would not be considered employment activities for usual purposes. Liability is extended because these activities would not have been undertaken but for the compensable injury and are an implied part of the employment contract. *Schrieber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993).

**There was no error in the panel's conclusion that as a matter of law claimant was not entitled to benefits under the "quasi-course of employment doctrine"** for injuries sustained during a trip to an unauthorized treatment provider since, although the trip may have been reasonable, it was not an implied condition or expectation of the claimant's employment. *Schrieber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993).

**If the injury arises from something incident to the employment.** *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953); *State Comp. Ins. Fund v. Coleman*, 155 Colo. 82, 392 P.2d 598 (1964).

**Thus, injury comes within course of employment where, but for hazard of occupation, injury would not have happened.** *Indus. Comm'n v. Irvine*, 72 Colo. 573, 212 P. 829 (1923); *Ellerman v. Indus. Comm'n*, 73 Colo. 20, 213 P. 120 (1923); *Indus. Comm'n v. Colo. Fuel & Iron Corp.*, 135 Colo. 307, 310 P.2d 717 (1957); *Alexander Film Co. v. Indus. Comm'n*, 136 Colo. 486, 319 P.2d 1074 (1957).

**Even if risk or hazard is external to the employment.** *Indus. Comm'n v. London & Lancashire Indem. Co.*, 135 Colo. 372, 311 P.2d 705 (1957).

**But where an employee is injured during a period of departure from his employment activities**, he is not within the coverage and protection of the act. *Gen. Plant Prot. Corp. v. Indus. Comm'n*, 146 Colo. 191, 361 P.2d 138 (1961); *Employers' Liab. Assurance Corp. v. Indus. Comm'n*, 147 Colo. 309, 363 P.2d 646 (1961).

**And where workman disobeys a rule or order limiting the sphere of employment, he cannot recover compensation.** *Indus. Comm'n v. Funk*, 68 Colo. 467, 191 P. 125 (1920); *Fouquet v. State Comp. Ins. Fund*, 144 Colo. 240, 355 P.2d 943 (1960).

**But may recover if the rule deals only with his conduct within the sphere of his employment.** *Indus. Comm'n v. Funk*, 68 Colo. 467, 191 P. 125 (1920); *Pacific Employers' Ins. Co.*



v. Kirkpatrick, 111 Colo. 470, 143 P.2d 267 (1943).

**And an employee does not step from the course of his employment when he allows one not an employee** to drive a truck on a mission for the employer but is at the time in the course of his employment. *Western Cas. & Sur. Co. v. Swort*, 134 Colo. 421, 306 P.2d 661 (1957).

**Furthermore, an employee is not entitled to compensation for a later accident due to an efficient intervening cause not arising out of and in course of employment.** *Post Printing & Publ'g Co. v. Erickson*, 94 Colo. 382, 30 P.2d 327 (1934).

**But if subsequent accident is attributed to the prior accident, it is compensable.** Any subsequent natural development of an industrial injury, uninfluenced by an independent intervening cause, resulting in additional disability of an employee, should be attributed to the original accident and compensation awarded therefor. *Post Printing & Publ'g Co. v. Erickson*, 94 Colo. 382, 30 P.2d 327 (1934); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

**Injuries incurred in act of discharge.** The act of discharging an employee is an integral part of the employment relationship, making injuries arising out of discharge casually connected to that employment. *Alpine Roofing Co. v. Dalton*, 36 Colo. App. 315, 539 P.2d 487 (1975).

**Injuries within reasonable time of termination.** Injuries incurred by an employee while leaving the premises, collecting pay, or getting his clothes or tools within a reasonable time after termination of the employment are within the course of employment, since they are normal incidents of the employment relation. *Alpine Roofing Co. v. Dalton*, 36 Colo. App. 315, 539 P.2d 487 (1975).

**Claimant's injuries arose in the course of his employment where he had been discharged several minutes prior to an assault.** *Alpine Roofing Co. v. Dalton*, 36 Colo. App. 315, 539 P.2d 487 (1975).

**Acts of self-ministration held within scope of employment.** Acts of self ministration, such as eating, obtaining lodging, and going to and from those places have been held incidental to and within the scope of employment of an employee required to be away from home on behalf of his employer. *Archer Freight Lines v. Horn Transp., Inc.*, 32 Colo. App. 412, 514 P.2d 330 (1973).

**Acts reasonably necessary for the employee's health are within the course of employment.** Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, and protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the workmen's compen-

sation acts, though they are only indirectly conducive to the purpose of the employment. Consequently, no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure a drink, refreshments, food, or fresh air, or to rest in the shade. *Ocean Accident & Guar. Corp. v. Pallaro*, 66 Colo. 190, 180 P. 95 (1919); *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 76 Colo. 84, 230 P. 394 (1924); *Warner Constr. Co. v. Watkins*, 107 Colo. 88, 108 P.2d 883 (1940); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953); *Divelbiss v. Indus. Comm'n*, 140 Colo. 452, 344 P.2d 1084 (1959); *Game & Fish Dept. v. Pardoe*, 147 Colo. 363, 363 P.2d 1067 (1961); *Silver Eng'r Works, Inc. v. Simmons*, 30 Colo. App. 396, 495 P.2d 246 (1972). See *Pub. Serv. Co. v. Indus. Comm'n*, 80 Colo. 206, 249 P. 1094 (1926).

**Therefore, an injury while eating lunch on the premises of an employer is compensable.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 76 Colo. 84, 230 P. 394 (1924); *Warner Constr. Co. v. Watkins*, 107 Colo. 88, 108 P.2d 883 (1940); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Divelbiss v. Indus. Comm'n*, 140 Colo. 452, 344 P.2d 1084 (1959).

**Because courts generally have been liberal in protecting workers during the noon hour if the injury occurs while the worker is doing what a person may reasonably do within a time during which the person is employed and at a place where he may reasonably be at that time.** *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952).

**Trips to and from a meal.** Injuries sustained by teacher who leaves his place of employment to go to a restaurant to eat during his lunch hour are compensable under workmen's compensation act where the teacher was required to return to school that afternoon and there was no option of eating in the school cafeteria. *City & County of Denver Sch. Dist. No. 1 v. Indus. Comm'n*, 196 Colo. 131, 581 P.2d 1162 (1978).

**But there must be a sufficient nexus between employment and injury.** Off-premises lunchtime travel generally falls within the to and from work rule and is not compensable. For an injury occurring during such travel to fall within the scope of employment, there must be a sufficient nexus between the employment and the injury. *Perry v. Crawford & Co.*, 677 P.2d 416 (Colo. App. 1983).

**Intentional wrongs are covered.** Intentional wrongs arising out of the course of employment are covered under Colorado's compensation scheme. *Kandt v. Evans*, 645 P.2d 1300 (Colo.

1982); *Ventura v. Albertson's, Inc.*, 856 P.2d 35 (Colo. App. 1992).

Where employee was at a place where he might reasonably be at a time when he was employed doing what he might reasonably do, employee's injuries held to have occurred in the course of his employment. *Portofino Apts. v. Indus. Claim Appeals Office*, 789 P.2d 1117 (Colo. App. 1990).

If the work of an employee creates the necessity for travel, he is in the course of his employment when on the road, although he may at the same time be serving some purpose of his own, and if he is injured during such a trip he, or his dependents, are entitled to compensation. *O.P. Skaggs Co. v. Nixon*, 101 Colo. 203, 72 P.2d 1102 (1937); *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 110 Colo. 422, 135 P.2d 140 (1943); *Alexander Film Co. v. Indus. Comm'n*, 136 Colo. 486, 319 P.2d 1074 (1957); *Lyttle v. State Comp. Ins. Fund*, 137 Colo. 212, 322 P.2d 1049 (1958); *Employers' Liab. Assurance Corp. v. Indus. Comm'n*, 147 Colo. 309, 363 P.2d 646 (1961); *State Comp. Ins. Fund v. Keane*, 160 Colo. 292, 417 P.2d 8 (1966); *Mohawk Rubber Co. v. Claimants in re Death of Cribbs*, 165 Colo. 526, 440 P.2d 785 (1968); *Pat's Power Tongs, Inc. v. Miller*, 172 Colo. 541, 474 P.2d 613 (1970); *Tatum-Reese Dev. Corp. v. Indus. Comm'n*, 30 Colo. App. 149, 490 P.2d 94 (1971); *Silver Eng'r Works, Inc. v. Simmons*, 30 Colo. App. 396, 495 P.2d 246 (1972); *Silver Eng'g Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973).

But in determining whether the risks of travel are also risks of the employment the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure of its perils. *Employers' Liab. Assurance Corp. v. Indus. Comm'n*, 147 Colo. 309, 363 P.2d 646 (1961); *Martin K. Eby Const. Co. v. Indus. Comm'n*, 151 Colo. 320, 377 P.2d 745 (1963); *Capital Chevrolet Co. v. Indus. Comm'n*, 159 Colo. 156, 410 P.2d 518 (1966).

When accident during employee's travel is within scope of employment. If an employee's travel is at the express or implied request of the employer, or if the travel confers a benefit on the employer beyond the sole fact of the employee's arrival, or if the employer makes provisions for the employee's transportation, then any disability resulting from an accident during that travel is within the scope of employment. *Loffland Bros. v. Baca*, 651 P.2d 431 (Colo. App. 1982); *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866 (Colo. 1999).

In any event, when an employee is required to travel away from home, the activities covered by workmen's compensation are enlarged as the employee has no choice but to eat, sleep, and conduct all his other activities away from his home. *Silver Eng'r Works, Inc. v.*

*Simmons*, 30 Colo. App. 396, 495 P.2d 246 (1972).

And the employer may not succeed in showing a deviation from the main objective while traveling by merely establishing that decedent's vehicle, at least momentarily, was proceeding in a direction opposite from his objective. *Employers' Liab. Assurance Corp. v. Indus. Comm'n*, 147 Colo. 309, 363 P.2d 646 (1961).

Where an employee, without express authority but with the intent of acting for the benefit of the employer, returned to his place of work after hours and was injured, his injury arose out of and in the course of his employment. *Maint. Mgt., Inc. v. Tinkle*, 40 Colo. App. 80, 570 P.2d 840 (1977).

When an employer does nothing more than fix an employee's general work time and the employer benefits from an employee's reasonable departure from schedule, he cannot argue that injuries sustained in the departure are not within the course of employment. *Maint. Mgt., Inc. v. Tinkle*, 40 Colo. App. 80, 570 P.2d 840 (1977).

Industrial claim appeals office correctly determined that claimant's injury arose out of and in the course of employment where claimant's injury occurred while claimant, who worked on an "as needed" basis, was voluntarily assisting in a repair of a piece of heavy equipment which furthered the interest of the employer even though the injury occurred two hours after the claimant had been told that he was no longer required to work. *Butland v. Indus. Claim Appeals Office*, 754 P.2d 422 (Colo. App. 1988).

**Travel to required meeting after normal working hours.** Where claimant was attending an off-premises dinner meeting, after normal working hours, under at least the implied direction of her employer, and travel to and from the meeting was a necessity, these special circumstances justify the determination that claimant's injuries while returning from the meeting were compensable. *Dynalectron Corp. v. Indus. Comm'n*, 660 P.2d 915 (Colo. App. 1982).

**Motorman asleep in car barn held to be acting within course of employment.** *Taylor v. Saunders*, 71 Colo. 160, 204 P. 608 (1922).

**As is a man who visits the home of another upon the instructions of his employer.** *London Guarantee & Accident Co. v. McCoy*, 97 Colo. 13, 45 P.2d 900 (1935).

**The same being true of a building foreman who starts to another locality to proceed with another building.** *Indus. Comm'n v. Aetna Life Ins. Co.*, 64 Colo. 480, 174 P. 589 (1918).

**Or an employee who uses his own car to perform services for or at the direction of his employer remains in the course of his employment until he returns home.** *Indus. Comm'n v. Aetna Life Ins. Co.*, 88 Colo. 82, 292 P. 229 (1930); *Driscoll Constr. Co. v. Indus. Comm'n*,



94 Colo. 568, 31 P.2d 491 (1934); Elec. Mut. Liab. Ins. Co. v. Indus. Comm'n, 154 Colo. 491, 391 P.2d 677 (1964).

**And police officer's injury arises out of and in course of city employment even though also employed by bank.** The city employed an officer to enforce the law and authorized him to make arrests. His place of work was the entire territory within the municipal boundaries of the city. The officer was on duty at all times when he was performing the duties required by his employment. At the time of the accident, he was in his official uniform and was attempting to arrest a suspected bank robber in a public street. The accident in which the officer was injured was therefore one arising out of and in the course of his employment by the city, and he is therefore entitled to compensation as a city employee. The officer's claim to compensation is not defeated because he was also employed by the bank as a guard at the time of the accident. *Dore v. City & County of Denver*, 28 Colo. App. 324, 474 P.2d 190 (1970).

**Injury to newsboy while storing bicycle on publishing company property.** Where claimant was obligated to deliver all of his assigned newspapers within the two to three hour time span following his release from school and 6:00 p.m.; a bicycle was a necessary aid in the performance of his job-related activities, and the owner of the publishing company approved claimant's storing his bicycle during school hours on company property after acts of vandalism had occurred on the school grounds, claimant's injury, suffered while storing his bicycle, arose out of and occurred in the course of his employment and was compensable. *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976).

**Truck driver replacing old tires with new is within course of employment.** *Zelle v. Indus. Comm'n*, 100 Colo. 116, 65 P.2d 1429 (1937).

**As is employee compelled to live in house furnished by employer.** *State Comp. Ins. Fund v. Indus. Comm'n*, 98 Colo. 563, 58 P.2d 759 (1936).

**Or university student-employee injured while playing football.** *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953).

**Or coal miner whose eye was injured by a cinder from employer's locomotive.** *Hayden Coal Co. v. Cothran*, 109 Colo. 203, 123 P.2d 1022 (1942).

**And trauma resulting from fall on truck cab compensable.** *Indus. Comm'n v. Betz*, 111 Colo. 401, 142 P.2d 389 (1943).

**As is illness from tick bite.** *Southern Colo. Power Co. v. Indus. Comm'n*, 118 Colo. 186, 193 P.2d 885 (1948).

**Or injuries resulting from vaccination or inoculation.** *Indus. Comm'n v. Messinger*, 116 Colo. 451, 181 P.2d 816 (1947).

**Where an employee on duty suffers an injury caused by the playful action of a fellow employee,** in which the injured employee is not a participant, such injury arises out of and in the course of employment and is compensable under pertinent provisions of the workmen's compensation act. *Gates Rubber Co. v. Indus. Comm'n*, 112 Colo. 480, 150 P.2d 301 (1947); *Indus. Comm'n v. Employers Cas. Co.*, 136 Colo. 396, 318 P.2d 216 (1957).

**But where an employee while engaged in his usual employment was shot by another** without any reason, as appeared by the record, it is held, under the disclosed facts, that the injury did not arise out of and in the course of the employment. *Rocky Mt. Fuel Co. v. Kruzic*, 94 Colo. 398, 30 P.2d 868 (1934).

**There is no recovery where two employees step aside from their employment and indulge in gun play.** *McKnight v. Houck*, 87 Colo. 234, 286 P. 279 (1930).

**In addition, assaults by co-employees are not ordinarily considered as incidental to the employment and do not "arise out of employment".** *Wisdom v. Indus. Comm'n*, 133 Colo. 266, 293 P.2d 967 (1956); *Kirk v. Smith*, 674 F. Supp. 803 (D. Colo. 1987).

**However, injuries might be compensable if assault is reasonably anticipated.** If an assault might reasonably be anticipated because of the general nature or character of the employment, then in some instances, controlled entirely by the facts presented, injuries received as a result thereof are compensable. *Wisdom v. Indus. Comm'n*, 133 Colo. 266, 293 P.2d 967 (1956).

**But injuries compensable under the act include injuries arising from the intentional acts of a co-employee,** as long as the requisite degree of job-relatedness is present. *Bennett v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed.2d 639 (1982).

**Co-employee immunity for intentional wrongs is strictly limited to injuries sustained where both the tortfeasor and the victim are acting in the course of their employment.** *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**Dispositive issue was whether employee was acting in course of her employment, and not whether assaulting employees were acting in course of their employment.** *Stuart v. Frederick R. Ross Inv. Co.*, 773 P.2d 1107 (Colo. App. 1988).

**But where the sexual assault of an employee by a co-employee did not arise from animosity or dispute that is imported into employment from the employee's domestic or private life, the assault arose out of the course of her employment and, therefore, worker's compensation was the exclusive remedy.** In re Question Submitted by U.S. Ct. of Appeals, 759 P.2d 17 (Colo. 1988).

**Injuries arising from assaults by co-employees have an inherent connection with employment conditions if they grow out of an argument over such conditions.** In addition, even though the subject matter of the argument is a personal one, if it was the circumstance of their mutual employment that brought the participating employees together and created the relationship and condition that resulted in the dispute, any injuries are considered to be employment-related. *Banks v. Indus. Claim Appeal Office*, 794 P.2d 1062 (Colo. App. 1990); *Ventura v. Albertson's, Inc.*, 856 P.2d 35 (Colo. App. 1992).

**On the other hand, if a dispute between co-employees relates solely to a personal matter between the combatants, not arising from the employment relationship, any injuries resulting from that dispute have no nexus to the combatants' employment, do not arise out of employment, and are not, therefore, compensable.** *Banks v. Indus. Claim Appeals Office*, 794 P.2d 1062 (Colo. App. 1990).

**Inherently employment-related torts are those that have an inherent connection with employment and emanate from the duties of the job,** while inherently private torts are those that originate in the private affairs of the claimant and tortfeasor and are unrelated to their respective employment functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**For the purpose of the "arising out of employment" requirement of the Workers' Compensation Act,** assaults upon employees can be divided into three categories: (1) Those with an "inherent connection" to employment such as a dispute over performance, pay, or termination; (2) those stemming from "inherently private" disputes imported into the employment from the claimant's domestic or private life and not exacerbated by the employment; and (3) those resulting from a "neutral force" such as random assaults. In re Question submitted by the U.S. Court of Appeals for the 10th Circuit, 759 P.2d 17 (Colo. 1988); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**An assault is compensable** if it grew out of an argument over performance of work, possession of work tools or equipment, delivery of a paycheck, quitting or being terminated, or mediating between quarreling co-employees. In re Question submitted by the U.S. Court of Appeals for the 10th Circuit, 759 P.2d 17 (Colo. 1988); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**The Workers' Compensation Act of Colorado does not expressly authorize a defense against an initial aggressor** in an altercation leading to an otherwise compensable injury. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**Assault on employee by co-employee** did not arise out of employment and therefore employee's tort claim against employer for hiring a rapist was not subject to the exclusive remedies of the act. *Tolbert v. Martin Marietta Corp.*, 621 F. Supp. 1099 (D. Colo. 1985).

**Where it appears that the plaintiff was specifically chosen as the victim in a sexual assault as a result of circumstances arising outside of the plaintiff's employment,** the exclusivity provisions of the Workers' Compensation Act do not apply, and the dismissal of the plaintiff's common law claims is reversed. *Patel v. Thomas*, 793 P.2d 632 (Colo. App. 1990).

If plaintiff proves he was specifically targeted when subjected to racial and ethnic jokes, his tort claim will stand outside of the Workers' Compensation Act. *Mass v. Martin Marietta Corp.*, 805 F. Supp. 1530 (D. Colo. 1992).

**Teacher's injuries allegedly sustained** from reprimand, harassment, retaliatory demotion, and assault by her superintendent did not arise out of her employment and therefore tort action for recovery of damages was not barred by Colorado Workmen's Compensation Act. *Kirk v. Smith*, 674 F. Supp. 803 (D. Colo. 1987).

**Employees' claims of outrageous conduct** based on federal pregnancy discrimination and sexual harassment statutes did not arise out of their employment and therefore were not barred by the Colorado Worker's Compensation Act. *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456 (D. Colo. 1996).

**Injury not compensable where employee left his work at the request of a nine-year-old son of his employer.** *Chaney v. Indus. Comm'n*, 120 Colo. 111, 207 P.2d 816 (1949).

**Nor is injury sustained in submitting to blood test required by health regulation.** *Indus. Comm'n v. Messinger*, 116 Colo. 451, 181 P.2d 816 (1947).

**Injury in auto accident while returning from company baseball game does not arise out of employment.** *Indus. Comm'n v. Murphy*, 102 Colo. 59, 76 P.2d 741 (1938).

**But claimant is entitled to compensation where the claimant was required to play football in order to hold his job.** *Divellbiss v. Indus. Comm'n*, 140 Colo. 452, 344 P.2d 1084 (1959).

**Plaintiff's argument that he was reentering store as a customer rather than an employee when the altercation which resulted in plaintiff's injury occurred is unfounded.** The fact that the employment premises were public and plaintiff could be an employee one minute and a customer the next was irrelevant because it is not the nature of the employment premises, but the nexus between the employment conditions and the injury, which is determinative. *Ventura v. Albertson's, Inc.*, 856 P.2d 35 (Colo. App. 1992).

**The majority rule is that the courts will not look to the relative fault of the combatants to**



determine eligibility for receipt of benefits. If injuries occur as a result of a physical altercation between co-employees which stems from a dispute having a substantial connection with their employment, the employees are entitled to compensation for such injuries, regardless of the identity of the party initiating the altercation. *Banks v. Indus. Claim Appeals Office*, 794 P.2d 1062 (Colo. App. 1990).

**The injuries of an employee of a subcontractor** are not rendered noncompensable for failure to satisfy the "arising out of employment" requirement simply because they were caused by an intentional act of a supervisor employed by the general contractor. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**The fact that a claimant may overreact to an adverse condition of employment**, or that the overreaction may stem from some unusual quality of the claimant's personality, does not alter the fact that the subject of that reaction had an inherent connection with employment. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**Several variables determine by their presence or absence whether a particular recreational activity is within the scope of employment:** Whether the activity occurred during working hours; whether it was on or off the employer's premises; whether participation was required; whether the employer took the initiative in sponsoring or organizing the team; whether the employer made contributions to the team; and whether the employer derived benefit from the team. *Lindsay v. Pub. Serv. Co.*, 146 Colo. 579, 362 P.2d 407 (1961); *Murphey v. Marquez*, 155 Colo. 89, 393 P.2d 553 (1964); *City & County of Denver v. Lee*, 168 Colo. 208, 450 P.2d 352 (1969).

Question of whether an employee who is injured while engaging in a job-related recreational activity is within the course of his employment determined by: (1) Whether the activity occurred during working hours; (2) whether it was on the employer's premises; (3) whether participation was required; (4) whether the employer took the initiative in sponsoring the recreational activity. *Dorsch v. Indus. Comm'n*, 185 Colo. 219, 523 P.2d 458 (1974).

Where the employer's principal business is recreation, the weight of authority holds that the following test should be applied to determine whether the injured employee was in the course of employment: (1) The extent to which the employer derives substantial benefit from the policy—beyond the intangible value of improvement of employee morale; (2) the extent to which the recreational activity represents compensation for employment; (3) the extent to which the obligations of employment create the special danger which precipitates the injury; (4) whether the use of the recreational activity was an inducement for employment; (5) whether the use of the recreational facility was originally

contemplated by the parties at the time of employment. *Dorsch v. Indus. Comm'n*, 185 Colo. 219, 523 P.2d 458 (1974).

**Positional risk doctrine met.** Where claimant's job placed her at a particular place at a particular time and the injury resulted from a neutral force, i.e., an attack which is neither personal to her nor distinctly associated with her employment, claimant met her burden of establishing that injury arose as a result of her employment. *White Star Linen v. Indus. Claim Appeals Office*, 787 P.2d 189 (Colo. App. 1989).

**Encounters with an armed assailant do not constitute facts and circumstances common to all fields of employment.** *White Star Linen v. Indus. Claim Appeals Office*, 787 P.2d 189 (Colo. App. 1989).

**Plaintiff's claims for damages for emotional distress** are based on work-related acts of his program chiefs and his recovery is limited by the provisions of the workmen's compensation act. *Calderon v. Martin Marietta Corp.*, 675 F. Supp. 1279 (D. Colo. 1987).

Workers' Compensation Act is sole remedy for plaintiff's claim for intentional infliction of emotional distress, where the conduct cited in support of the claim relates to disciplinary measures imposed by her employer to prevent her from tending to personal matters during work. *Smith v. Colo. Interstate Gas Co.*, 794 F. Supp. 1035 (D. Colo. 1992).

**The language in subsection (2)(c) requiring that stress-related claims not be based upon facts and circumstances that are common to all fields of employment** does not bar as a matter of law all claims arising out of a common work condition; rather compensability depends upon the particular facts and circumstances of each case. *Holme, Roberts, & Owen v. Indus. Claim Appeals Office*, 800 P.2d 1332 (Colo. App. 1990).

Employee's sudden job demotion was not based upon circumstances which are common to all fields of employment; therefore, claim arising out of job demotion was not barred. *Holme, Roberts, & Owen v. Indus. Claim Appeals Office*, 800 P.2d 1332 (Colo. App. 1990).

**Mental health impairment caused by multiple employment stressors, some of which were common to all fields of employment**, was not compensable. *Trujillo v. Indus. Claim Appeals Office*, 957 P.2d 1052 (Colo. App. 1998).

**Psychological illness arising from work stress associated with harassment by co-workers is eligible for compensation.** When mental illness primarily results from harassment at work, benefits will be awarded. *Pub. Serv. of Colo. v. Indus. Claim Appeals Office*, 68 P.3d 583 (Colo. App. 2003).

**Heart attack not compensable where it follows activity not required by position.** A fatal heart attack to dean of law school following preparation and delivery of speech at banquet of

legal fraternity of which he was province president, which activity was not a requirement of his position as dean of law school, was not compensable as accident arising out of and in the course of his employment. *Univ. of Denver v. Johnston*, 151 Colo. 465, 378 P.2d 830 (1963).

**And heart attack not "arising out of employment" not compensable even if "arising in course of employment".** *Coors Porcelain Co. v. Grenfell*, 109 Colo. 39, 121 P.2d 669 (1942).

**No recovery where deputy water commissioner is killed by gun carried for own sport.** *State Comp. Ins. Fund v. Russell*, 105 Colo. 274, 96 P.2d 846 (1939).

**Nor when employee injured by slipping on soap in bath house maintained by employer for employees.** *Indus. Comm'n v. Rocky Mt. Fuel Co.*, 107 Colo. 226, 110 P.2d 654 (1941).

**Nor when salesman injured while hunting with employees of customer.** *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 127 Colo. 225, 255 P.2d 961 (1953).

**Concrete floor held not to be a special hazard of employment.** *Gates Rubber Co. v. Indus. Comm'n*, 705 P.2d 6 (Colo. App. 1985).

**Trial court was not bound by the findings and conclusions of ALJ and Panel where there was no substantial evidence to support that employer's system of rotating credit union employees was a common practice in credit union industry, much less a practice common to all fields of employment.** *Peterson v. ENT Fed. Credit Union*, 827 P.2d 621 (Colo. App. 1992) (decided under law in effect prior to 1991 amendment).

**Since the language providing that a mental impairment is not compensable if, inter alia, it results from a job transfer, was absent from subsection (2)(a) prior to the 1991 changes by the general assembly, it is reasonable to conclude that the general assembly did not intend to preclude benefits for all job transfers occurring before the 1991 amendment took effect.** *Peterson v. ENT Fed. Credit Union*, 827 P.2d 621 (Colo. App. 1992) (decided under law in effect prior to 1991 amendment).

**For purposes of subsection (2)(c), it is not necessary to logically tie stress producing incidents to a particular line of work.** *City Market, Inc., v. Indus. Claim Appeals Office*, 800 P.2d 1335 (Colo. App. 1990).

**Where claimant's work-related stress occurred as a result of smoking restrictions imposed by the employer, claimant failed to satisfy the requirements of subsection (2) because the evidence was sufficient to show that smoking restrictions are common in today's workplace and that the restriction at issue was not imposed in a manner which was arbitrary, unreasonable, or in bad faith.** *Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992).

**A suicide attempt that is causally related to an industrial injury is compensable.** A self-destructive act is deemed unintentional if the effects of the industrial injury are the cause of a mental condition sufficient in magnitude to impair the ability to resist suicidal impulses or to cause an injured worker to commit self-destructive acts without knowingly intending to end his or her life. *Dependable Cleaners v. Vasquez*, 883 P.2d 583 (Colo. App. 1994).

**The language "intentionally self-inflicted" cannot be read so broadly that it encompasses injuries resulting from grossly negligent or reckless behavior.** *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

**Applied in** *Pittman Motors, Inc. v. Indus. Comm'n*, 156 Colo. 218, 399 P.2d 784 (1964).

## B. Employee Going to and from Work.

**In the absence of special circumstances there is no recovery for injury while employee is on his way to or from work.** *Indus. Comm'n v. Anderson*, 69 Colo. 147, 169 P. 135 (1917); *State Comp. Ins. Fund v. Indus. Comm'n*, 89 Colo. 426, 3 P.2d 414 (1931); *State Comp. Ins. Fund v. Walter*, 143 Colo. 549, 354 P.2d 591 (1960); *J. C. Carlile Corp. v. Antaki*, 162 Colo. 376, 426 P.2d 549 (1967); *Indus. Comm'n v. Lavach*, 165 Colo. 433, 439 P.2d 359 (1968); *Sieck v. Trueblood*, 29 Colo. App. 432, 485 P.2d 134 (1971); *Mineral County v. Indus. Comm'n*, 649 P.2d 728 (Colo. App. 1982); *Staff Adm'rs v. Indus. Claim Appeals Office*, 958 P.2d 509 (Colo. App. 1997), *aff'd*, 977 P.2d 866 (Colo. 1999).

An employee injured while traveling to or from work is generally not entitled to compensation; however, this rule is subject to exception when special circumstances bring the accident within the course of employment. *Colo. Civil Air Patrol v. Hagans*, 662 P.2d 194 (Colo. App. 1983); *Perry v. Crawford & Co.*, 677 P.2d 416 (Colo. App. 1983); *Varsity Contractors & Home Ins. Co. v. Baca*, 709 P.2d 55 (Colo. App. 1985).

The mere presence of the injured employee on the employer's premises is, without more, insufficient to invoke the bar of this section. *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), *cert. denied*, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984).

**Off-premises injuries are not compensable if employees have fixed hours of employment and the injury takes place while going "to or from" work.** *Walsh v. Indus. Comm'n*, 34 Colo. App. 371, 527 P.2d 1180 (1974).

As a general rule, injuries received by an employee off the employer's premises are not compensable when such injuries occur after the fixed hours of employment and in the course of going to or coming from work. *Woodruff World Travel, Inc. v. Indus. Comm'n*, 38 Colo. App. 92, 554 P.2d 705 (1976); *Colo. Civil Air Patrol*



v. Hagans, 662 P.2d 194 (Colo. App. 1983); Varsity Contractors & Home Ins. Co. v. Baca, 709 P.2d 55 (Colo. App. 1985).

**Accident while employee was on way to work arose out of and was in course of employment** where employer agreed to provide or pay for worker's transportation, and where worker was killed while using vehicle strictly for business purposes in direct route to his job accompanied by evidence that worker's home and vehicle had become part of his workplace. *Monolith Portland Cement v. Burak*, 772 P.2d (Colo. App. 1989).

If travel is a substantial part of the employee's service to the employer, then it is sufficient by itself to demonstrate a causal connection between the employee's scope of employment and the injury. *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866 (Colo. 1999).

**One of the exceptions to the "coming and going rule" is that where an employee is in a travel status**, as distinguished from simply going to and from work, he is normally within the course of his employment from the time he leaves his home until he returns to it. *Tatum-Reese Dev. Corp. v. Indus. Comm'n*, 30 Colo. App. 149, 490 P.2d 94 (1971).

**Accident occurred within the scope of employment when employee was traveling between job assignments** for the employer. Because of the nature of the employment of a home health aide, the travel between assignments conferred a benefit on employer beyond the mere fact of the employee's arrival at work, and there is a sufficient nexus between the employee's injury and her employment to determine as a matter of law that the accident occurred within the scope of employment. *Benson v. Colo. Comp. Ins. Authority*, 870 P.2d 624 (Colo. App. 1994).

**Recovery allowed when employee was required to use her automobile to meet with clients during work day.** *Whale Commc'ns v. Osborn*, 759 P.2d 848 (Colo. App. 1988).

**And employer and employee may agree to continue employment relation while going to and from work.** An employer may agree with an employee, either expressly or impliedly, that the relationship of employer and employee shall continue during the period of coming and going to and from his place of employment; in such case the employee is entitled to protection of the compensation act during that period, and such agreement may be inferred from the fact that the employee is compensated for the time consumed in traveling to and from work. *Martin K. Eby Constr. Co. v. Indus. Comm'n*, 151 Colo. 320, 377 P.2d 745 (1963); *Nelson v. Harding*, 29 Colo. App. 76, 480 P.2d 851 (1970); *Sieck v. Trueblood*, 29 Colo. App. 432, 485 P.2d 134 (1971).

An employer may agree, expressly or impliedly, that the employment relation shall continue

during the period of coming to and going from work. *Colo. Civil Air Patrol v. Hagans*, 662 P.2d 194 (Colo. App. 1983).

**"Special circumstances" may give rise to benefits** under the workmen's compensation law even though the workman has "put down his tools" and is in the act of leaving the premises of his employer. *State Comp. Ins. Fund v. Walter*, 143 Colo. 549, 354 P.2d 591 (1960).

**If special circumstances surrounding the employee's injury reflect a causal connection** between the conditions under which the work is to be performed and the resulting off-premises injury, compensation is proper. *Woodruff World Travel, Inc. v. Indus. Comm'n*, 38 Colo. App. 92, 554 P.2d 705 (1976); *Friedman's Mkt., Inc. v. Welham*, 653 P.2d 760 (Colo. App. 1982); *Perry v. Crawford & Co.*, 677 P.2d 416 (Colo. App. 1983).

An injury arises out of and in the course of employment even though incurred on the way to work if special circumstances create a causal connection between the employee's injury and employment. *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984); *Staff Adm'rs v. Indus. Claim Appeals Office*, 958 P.2d 509 (Colo. App. 1997), aff'd, 977 P.2d 866 (Colo. 1999).

**Special hazards on normal route may become hazards of employment.** Where an off-premises injury occurs at a point which lies on the only route, or at least on the normal route, which employees must traverse to reach their employer's premises, special hazards of that route become hazards of the employment. *Friedman's Mkt., Inc. v. Welham*, 653 P.2d 760 (Colo. App. 1982).

**Such as railroad crossings.** Railroad crossings and rights-of-way are typically recognized as a special hazard. *Friedman's Mkt., Inc. v. Welham*, 653 P.2d 760 (Colo. App. 1982).

**But not where access route not used exclusively by employees.** But underlying the exception is the requirement that exposure to the route and the hazard is not shared to too great an extent by the general public. *Perry v. Crawford & Co.*, 677 P.2d 416 (Colo. App. 1983).

**Claimant exposed to additional hazard in going to work.** Where because the employer persisted in directing the employee to come to work, she was exposed to an additional and unusual hazard, namely, the walk from her home over an icy street to her car, employee was injured performing an act necessary to her employment, while under the specific direction of her employer. Her injury, therefore, arose out of and in the course of her employment. *Walsh v. Indus. Comm'n*, 34 Colo. App. 371, 527 P.2d 1180 (1974).

**Accidents occurring in or en route to parking lots are compensable.** Accidents occurring in or en route to parking lots maintained on its

premises or provided by the employer for the benefit of its employees, are compensable as arising out of and in the course of the employment, even though occurring on the way to or from the place of employment and on a public road or way dividing the place of employment from the parking lot. *State Comp. Ins. Fund v. Walter*, 143 Colo. 549, 354 P.2d 591 (1960).

**Injury in adjacent parking lot.** Where claimant was injured in the parking lot adjacent to employer's office building, which lot was not owned, maintained, or controlled by the employer, there were special circumstances which reflected a causal connection between claimant's employment and her injury, since space in the parking lot was afforded the employer for the use of its employees, and the employer was aware that its employees used the lot. Parking privileges constituted an obvious fringe benefit to claimant, and claimant was injured while in the act of enjoying that benefit. *Woodruff World Travel, Inc. v. Indus. Comm'n*, 38 Colo. App. 92, 554 P.2d 705 (1976).

A parking lot injury sustained before work hours is causally related to employment as contemplated by the workmen's compensation act where the work supervisor expects employees to be dressed and ready to work at a certain hour and expects that employees will drive or ride to work in private vehicles because there is no other transportation, and where the principal use of the lot is for employee parking, both employee and employer benefitting from the availability of the lot. *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984).

**Fact that employee had permission to park car on employer's premises is irrelevant when injury received on way home.** *Indus. Comm'n v. Enyeart*, 81 Colo. 521, 256 P. 314 (1927).

**And no recovery even when injury on employer's premises where employee is riding home with a fellow employee.** *Indus. Comm'n v. Enyeart*, 81 Colo. 521, 256 P. 314 (1927).

**However, recovery may be had where employer requests employee to bring his truck to work with him.** *State Comp. Ins. Fund v. Indus. Comm'n*, 89 Colo. 426, 3 P.2d 414 (1931).

**As well as when employer agrees to furnish transportation.** *State Comp. Ins. Fund v. Batis*, 117 Colo. 1, 183 P.2d 891 (1947); *J. C. Carlile Corp. v. Antaki*, 162 Colo. 376, 426 P.2d 549 (1967); *Indus. Comm'n v. Lavach*, 165 Colo. 433, 439 P.2d 359 (1968); *Kitchens v. Dept. of Labor & Emp. Div. of Labor*, 29 Colo. App. 374, 486 P.2d 474 (1971).

**Or where there is a mutual agreement for transportation and employer consents to employee's riding with another.** *Wells v. Cutler*, 90 Colo. 111, 6 P.2d 459 (1931).

**And the same is true of a mailman who**

**furnishes his own truck by contract.** *Comstock v. Bivens*, 78 Colo. 107, 239 P. 869 (1925).

**Or where an automobile salesman has been directed to take a car home.** *Indus. Comm'n v. Irvine*, 72 Colo. 573, 212 P. 829 (1923); *Indus. Comm'n v. Pueblo Auto Co.*, 71 Colo. 424, 207 P. 479, 23 A.L.R. 348 (1922).

**Or a school superintendent who falls through a trap door while removing school supplies from his car.** *Ryan v. Indus. Comm'n*, 89 Colo. 393, 3 P.2d 300 (1931).

**Or an employee making his way home along the line of work it was his duty to patrol.** *Indus. Comm'n v. Hunter*, 73 Colo. 226, 214 P. 393 (1923); *Colo. Contracting Co. v. Indus. Comm'n*, 74 Colo. 206, 219 P. 1075 (1923).

**Bank messenger carrying gun and going into post office is acting within course of employment.** *Security State Bank v. Propst*, 99 Colo. 67, 59 P.2d 798 (1936).

**Coal miner.** When employee had arrived on the premises of his employer, had changed his clothes, and "was hurrying down the pit car track" to the check room to get his mine check and lamp, in direct and immediate response to the employer's warning whistle, he was performing service within the course of his employment. *Indus. Comm'n v. Hayden Coal Co.*, 113 Colo. 62, 155 P.2d 158 (1944).

**The requirement that a policeman be "always on duty" is not an exception to the rule that no recovery is allowed for injury while employee is on his way to or from work.** *Rogers v. Indus. Comm'n*, 40 Colo. App. 313, 574 P.2d 116 (1978).

### III. PROXIMATE CAUSE.

**For meaning of term "arise out of",** see *Rocky Mt. Fuel Co. v. Kruzic*, 94 Colo. 398, 30 P.2d 868 (1934); *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976).

**For meaning of term "injury",** see *Carroll v. Indus. Comm'n*, 69 Colo. 473, 195 P. 1097 (1921); *Indus. Comm'n v. La Foret Camps*, 125 Colo. 503, 245 P.2d 459 (1952); *Wesco Elec. Co. v. Shook*, 143 Colo. 382, 353 P.2d 743 (1960).

**The terms "injury by accident" and "injury caused by accident" can be used interchangeably.** *Carroll v. Indus. Comm'n*, 69 Colo. 473, 195 P. 1097 (1921).

**Injury "arising out of employment" occurs when an employee suffers an injury attributable to unexplained forces which would have injured any person who happened to be in the employee's position at the time.** *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

**Stress-related injury was held to arise out of and in the course of employment when claimant's supervisor threatened claimant with the**



loss of her job and overtime if she ended or revealed their sexual relationship, and claimant's stress resulted from supervisor's authority over her job and his exploitation of that authority. *Gen. Cable Co. v. Indus. Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994).

**Where injury "arises out of employment" where causal connection exists between work conditions and injury.** *Indus. Comm'n v. Anderson*, 69 Colo. 147, 169 P. 135 (1917); *Indus. Comm'n v. Pueblo Auto Co.*, 71 Colo. 424, 207 P. 479 (1922); *Indus. Comm'n v. Eneyart*, 81 Colo. 521, 256 P. 314 (1927); *Indus. Comm'n v. Nissan*, 84 Colo. 19, 267 P. 791 (1928); *McKnight v. Houck*, 87 Colo. 234, 286 P. 279 (1930); *Indus. Comm'n v. Diveley*, 88 Colo. 190, 294 P. 532 (1930); *Rocky Mt. Fuel Co. v. Kruzic*, 94 Colo. 398, 30 P.2d 868 (1934); *Gates v. Central City Opera House Ass'n*, 107 Colo. 93, 108 P.2d 880 (1940); *Chaney v. Indus. Comm'n*, 120 Colo. 111, 207 P.2d 816 (1949); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Indus. Comm'n v. Corwin Hosp.*, 126 Colo. 358, 250 P.2d 135 (1952); *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953); *Divelbiss v. Indus. Comm'n*, 140 Colo. 452, 344 P.2d 1084 (1959); *Game & Fish Dept. v. Pardoe*, 147 Colo. 363, 363 P.2d 1067 (1961).

**Therefore, the test is whether or not there is a causal connection between the injury and the employment;** that is, are they so connected that the injury naturally results from the employment. *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958); *Indus. Comm'n v. Horner*, 137 Colo. 368, 325 P.2d 698 (1958); *Univ. of Denver-Colorado Sem. & Univ. Park Campus v. Johnston*, 151 Colo. 465, 378 P.2d 830 (1963).

The test for determining if the injury arises out of the course of employment is whether there is a causal connection between the duties of the employment and the injuries. *Walsh v. Indus. Comm'n*, 34 Colo. App. 371, 527 P.2d 1180 (1974); *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976); *Irwin v. Indus. Comm'n*, 695 P.2d 763 (Colo. App. 1984).

**Causation is a question of fact for resolution by the administrative law judge.** *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

**All that is necessary to warrant the finding of causal connection between the accident and the disability** is to show facts and circumstances which would indicate with reasonable probability that the injury complained of resulted from, or was precipitated by, the accident.

But if the evidence, as a matter of law, is insufficient to remove the question of causation from the realm of conjecture and mere possibilities, the award cannot be upheld. *Indus. Comm'n v. Royal Indem. Co.*, 124 Colo. 210, 236 P.2d 293 (1951); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 129 Colo. 353, 269 P.2d 1070 (1954); *Vandium Corp. of amp; v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Indus. Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957); *Indus. Comm'n v. Johnson Pontiac, Inc.*, 140 Colo. 160, 344 P.2d 186 (1959); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 152 Colo. 25, 380 P.2d 28 (1963); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Krumbach v. Dow Chem. Co.*, 676 P.2d 1215 (Colo. App. 1983).

**Although a condition precedent to recovery is that death or injury be proximately caused by an accident** arising out of and in the course of the deceased's employment. *Indus. Comm'n v. Hesler*, 149 Colo. 592, 370 P.2d 428 (1962).

**It is not necessary that the accident be the immediate cause,** but only the proximate cause of the death in order to sustain an award. *Prouse v. Indus. Comm'n*, 69 Colo. 382, 194 P. 625 (1920); *Newkirk v. Golden Cycle Mining & Reduction Co.*, 79 Colo. 298, 244 P. 1019 (1926); *Johnson v. Indus. Comm'n*, 148 Colo. 561, 366 P.2d 864 (1961); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

**But accident must be traceable to a definite time, place, and cause.** *Prouse v. Indus. Comm'n*, 69 Colo. 382, 194 P. 625 (1920); *Peer v. Indus. Comm'n*, 94 Colo. 227, 29 P.2d 636 (1934); *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

**Chain-of-causation rule.** If a work connected injury causes a deranged mental condition which in turn is a proximate cause of an injured employee's suicide, the deceased employee's dependents are entitled to benefits. *Jackco Painting Contractors v. Indus. Comm'n*, 702 P.2d 755 (Colo. App. 1985).

**Lack of causal connection may be asserted at any time.** In a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

**Ordinarily the employer cannot be held liable for compensation for disability from lightning.** *Hassell Iron Works Co. v. Indus. Comm'n*, 70 Colo. 386, 201 P. 894 (1921); *Aetna Life Ins. Co. v. Indus. Comm'n*, 81 Colo. 233, 254 P. 995 (1927).

**But where the nature of the work and the nature of doing it exposes the employee to a**

**greater danger the employer is liable.** Hassell Iron Works Co. v. Indus. Comm'n, 70 Colo. 386, 201 P. 894 (1921); Kitchens v. Dept. of Labor & Emp. Div. of Labor, 29 Colo. App. 374, 486 P.2d 474 (1971).

**Cold resulting in pneumonia and death not sufficiently connected with accident.** See Newkirk v. Golden Cycle Mining & Reduction Co., 79 Colo. 298, 244 P. 1019 (1926).

**But this is not true where mechanic is poisoned by fumes and later dies of pneumonia.** See Columbine Laundry Co. v. Indus. Comm'n, 73 Colo. 397, 215 P. 870 (1923).

**Where cause of accident is brought onto the premises by employee for his own purposes there is no recovery.** An accident which is the result of a cause brought onto the employer's premises by the workman himself for his own purposes, is not caused by his employment and does not arise out of it. Indus. Comm'n v. Enyeart, 81 Colo. 521, 256 P. 314 (1927).

Where employee died while attempting to rescue his stepchild, the decision by employee to allow the child to accompany him to work was not the cause of the injury. The cause of the injury was a hazard of his occupation. Tri-State Commodities, Inc. v. Stewart, 689 P.2d 712 (Colo. App. 1984).

**But the fact that the employee performed his duties in a dangerous and unusual manner does not in itself place him outside the provisions of this section.** Indus. Comm'n v. H. Koppers Co., 66 Colo. 596, 185 P. 267 (1919).

**Heart attack following strenuous labor may be injury proximately caused by accident.** Carroll v. Indus. Comm'n, 69 Colo. 473, 195 P. 1097 (1921); Allen v. Gettler, 94 Colo. 528, 30 P.2d 1117 (1934). But see United States Fid. & Guar. Co. v. Indus. Comm'n, 122 Colo. 31, 219 P.2d 315 (1950).

Because if death is due to "overexertion" "arising out of" the employment and would not have occurred save for such employment, then the "overexertion" is "an accident". Indus. Comm'n v. McKenna, 106 Colo. 323, 104 P.2d 458 (1940); Black Forest Fox Ranch v. Garrett, 110 Colo. 323, 134 P.2d 332 (1943); Peter Kiewit Sons' Co. v. Indus. Comm'n, 124 Colo. 217, 236 P.2d 296 (1951); Indus. Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957).

**But overexertion must be established.** In cases of heart failure, a claimant must prove more than the mere exertion attendant upon the usual and ordinary course of the employment. Overexertion must be established. Indus. Comm'n v. Int'l. Minerals & Chem. Corp., 132 Colo. 256, 287 P.2d 275 (1955); Indus. Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957); Claimants in re Death of Bennett v. Durango Furn. Mart., 136 Colo. 529, 319 P.2d 494 (1957); Indus. Comm'n v. Horner, 137 Colo. 368, 325 P.2d 698 (1958); Huff v. Aetna Ins. Co., 146 Colo. 63, 360 P.2d 667 (1961); Indus.

Comm'n v. Hesler, 149 Colo. 592, 370 P.2d 428 (1962); Baca County Sch. Dist. No. RE-6 v. Brown, 156 Colo. 562, 400 P.2d 663 (1965); Evans v. City & County of Denver, 165 Colo. 311, 438 P.2d 698 (1968); Blood v. Indus. Comm'n, 165 Colo. 532, 440 P.2d 775 (1968); City & County of Denver v. Phillips, 166 Colo. 312, 443 P.2d 379 (1968); Jasinski v. Ginley-Soper Constr. Co., 170 Colo. 52, 458 P.2d 734 (1969).

**So that employer is not liable where his evidence is that the exertion was a normal part of decedent's duties** and there was competent medical testimony of a prior heart condition. Huff v. Aetna Ins. Co., 146 Colo. 63, 360 P.2d 667 (1961); Indus. Comm'n v. Hesler, 149 Colo. 592, 370 P.2d 428 (1962); Blood v. Indus. Comm'n, 165 Colo. 532, 440 P.2d 775 (1968).

**Overexertion not element of claim where heart condition aggravated by trauma.** Where there is a claim of aggravation of a preexisting heart condition by trauma, claimant must show his preexisting heart disease was aggravated by trauma, and, in such a case, overexertion is not an element. Legouffe v. Prestige Homes, Inc., 634 P.2d 1010 (Colo. App. 1981), rev'd on other grounds, 658 P.2d 850 (Colo. 1983).

**Absence of proximate causation where employee suffered from prior heart condition.** Jones v. Indus. Comm'n, 148 Colo. 253, 365 P.2d 689 (1961); Indus. Comm'n v. Wolfer, 152 Colo. 205, 381 P.2d 19 (1968).

**Death from heart ailments following operation to correct compensable injury.** The death of an employee following an operation to correct a compensable injury was not compensable, where death was not due to the operation, but to heart ailments, and there was no evidence of a causal connection between the injury, the operation and the heart ailments. Aetna Cas. & Sur. Co. v. Indus. Comm'n, 116 Colo. 98, 179 P.2d 973 (1947).

**No requirement to establish overexertion in brain aneurysm case.** In heart cases, the supreme court generally has required the claimant to prove more than the mere exertion attendant upon the usual and ordinary course of employment, in order to show a causal connection between the employment and death or disability. No such requirement exists in the case of a rupture of a brain aneurysm. Indus. Comm'n v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

**For in brain aneurysm cases the claimant must show either** (1) an unexpected incident or event during the course of his work resulting in injury, or (2) injury as the unexpected result of the claimant's normal activities in his employment. In either case, the injury must arise from an occurrence traceable to a definite time, place, and cause. Indus. Comm'n v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

**One claiming compensation as the result of an altercation with a fellow employee has the**



**burden** of establishing a causal connection between the altercation and his employment, which may not be inferred from the circumstances of a willful assault for which no satisfactory explanation is offered and which did not originate in any risk peculiar to the work. *Wisdom v. Indus. Comm'n*, 133 Colo. 266, 293 P.2d 967 (1956).

**Disability resulting from exploratory operation.** Where claimant slipped and fell, in course of employment, and the accident precipitated symptoms of a kidney disease, which was disclosed during an exploratory operation, resulting in removal of one kidney, regardless of any aggravation of claimant's preexisting condition, he was entitled to recover for the disability resulting from the operation. *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949).

**Death resulting from operation to correct compensable injury.** Where a compensable injury is involved and an operation for the correction thereof follows, resulting in the death of the employee, no contributing cause whatever is necessary or material in the consideration of an award. *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 116 Colo. 98, 179 P.2d 973 (1947).

**Sunstroke does not necessarily constitute death resulting from an accident.** A search of the workmen's compensation cases in this state discloses none where claim has been made for compensation based on death or injury from sunstroke. A review of the cases from other jurisdictions indicate that such injury or death is compensable where there is no question about injury or death being caused by the sunstroke, but where there is evidence of other contributing factors the general rule is as follows: "The mere fact of sunstroke does not constitute a death resulting therefrom an 'accident' within the statute, and harm resulting from a heat stroke is compensable only where the heat stroke is the direct and superinducing cause of the harm". *Wood v. Indus. Comm'n*, 100 Colo. 209, 66 P.2d 806 (1937).

**Employer is liable for claimant's injuries even though there was no direct striking of the claimant.** Where a sudden opening of a door caused the claimant to rapidly move his arm, and the claimant's arm was broken as the result of the sudden movement, the employer is liable since the injury was proximately caused in the course of the employee's employment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

**Applied in** *In re Hampton v. Dir. of Div. of Labor*, 31 Colo. App. 141, 500 P.2d 1186 (1972).

#### IV. EVIDENCE.

##### A. In General.

**Law reviews.** For comment on *Finn v. Indus. Comm'n* appearing below, see 45 Den. L.J. 780 (1968).

**To sustain an award of compensation the industrial commission is required to make a finding of all of the essential facts** required by this section, i.e.: (1) That both employer and employee are subject to the provisions of the act; (2) that at the time and place of the accident the employee was performing services arising out of and in the course of his employment; and (3) that the injury was caused by an accident arising out of and in the course of the employment. *Metros v. Denver Coney Island*, 110 Colo. 40, 129 P.2d 911 (1942); *United States Fid. & Guar. Co. v. Indus. Comm'n*, 128 Colo. 68, 259 P.2d 869 (1953); *Hamilton v. Indus. Comm'n*, 132 Colo. 408, 289 P.2d 639 (1955); *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958).

**And in workmen's compensation cases, both the time and place of the accident must be established,** or at least one or the other of these factors fixed, so that there is evidence to show that the accident arose out of and in the course of the employment. *Deines Bros. v. Indus. Comm'n*, 125 Colo. 258, 242 P.2d 600 (1952).

**Consequently, a denial of compensation should follow a finding of the absence of one or more of the essential facts.** *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958).

**And findings on the remaining requirements of this section, whether pro or con, will not alter the result.** *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958).

**But the fact that the industrial commission assigns the wrong reason for the right conclusion is not sufficient to justify reversal** where it is undisputed that the death of an employee was caused solely by a coronary occlusion. *Skinner v. Indus. Comm'n*, 152 Colo. 97, 381 P.2d 253 (1963).

**However, court may review where contention is made that evidence is so weak as to amount to no evidence.** *Rosenkranz v. Indus. Comm'n*, 83 Colo. 123, 262 P. 1014 (1927).

**Burden of proof is on claimant to show injury was proximate result of accident.** *Olson-Hall v. Indus. Comm'n*, 71 Colo. 228, 205 P. 527 (1922); *Peer v. Indus. Comm'n*, 94 Colo. 227, 29 P.2d 636 (1934); *Wood v. Indus. Comm'n*, 100 Colo. 209, 66 P.2d 806 (1937); *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 127 Colo. 225, 255 P.2d 961 (1953); *Hamilton v. Indus. Comm'n*, 132 Colo. 408, 289 P.2d 639 (1955); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Indus. Comm'n v. London & Lancashire Indem. Co.*, 135 Colo. 372, 311 P.2d 705 (1957); *State Comp. Ins. Fund v. Indus. Comm'n*, 135 Colo. 570, 314 P.2d 288 (1957); *Indus. Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957); *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958); *Indus. Comm'n v. Peterson*, 151 Colo. 289, 377 P.2d 542 (1962); *Breit v. Indus. Comm'n*, 160 Colo.

205, 415 P.2d 858 (1966); *Finn v. Indus. Comm'n*, 165 Colo. 106, 437 P.2d 542 (1968); *Brown v. Indus. Comm'n*, 167 Colo. 391, 447 P.2d 694 (1968).

In order to be entitled to workmen's compensation death benefits, a claimant must establish that the accident causing death arose out of and in the course of the decedent's employment. *Harrison W. Corp. v. Hicks' Claimants*, 185 Colo. 142, 522 P.2d 722 (1974).

**And claim must be established by a preponderance of the evidence.** *Olson v. Erickson*, 105 Colo. 489, 99 P.2d 199 (1940); *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 127 Colo. 225, 255 P.2d 961 (1953); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

**"Clear and convincing" standard under § 8-42-107 (8)(b)(III) did not apply** where the independent medical examiner's opinion was not at issue, and employer had raised the separate issue of causation under this section before the IME was performed. Therefore the ALJ did not err in applying a preponderance standard in determining whether claimant had sustained a compensable injury. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

**A claimant in a workers' compensation case has the initial burden of proving his entitlement to benefits by a preponderance of the evidence.** Therefore, the claimant must present a prima facie case sufficient to establish the existence of his disability and to permit a reasonable determination of the extent of such disability. *Valley Tree Serv. v. Jimenez*, 787 P.2d 658 (Colo. App. 1990).

The claimant must also establish the causal relationship of the injury to his work. *Valley Tree Serv. v. Jimenez*, 787 P.2d 658 (Colo. App. 1990).

**Whether claimant has sustained burden of proof is question of fact.** Whether the claimant in a workmen's compensation case has sustained the burden of establishing that the disability he alleges was proximately caused by his accident, is a question of fact, the determination of which is solely the province of the director. *Wierman v. Tunnell*, 108 Colo. 544, 120 P.2d 638 (1941).

**However, there is no need for finding on burden of proof where evidence makes out prima facie case.** *Gates v. Central City Opera House Ass'n*, 107 Colo. 93, 108 P.2d 880 (1940).

**Burden on employer to show nonemployment causation.** Once the claimant has established a prima facie showing of accident arising out of the employment, the respondent must produce competent evidence of nonemployment causation in rebuttal, or the claimant will prevail. *Colo. Contracting Co. v. Indus. Comm'n*, 74 Colo. 206, 219 P. 1075 (1923); *Skinner v. Indus. Comm'n*, 152 Colo. 97, 381 P.2d 253 (1963).

**But where the claimant is unable to prove more than that he had something happen to him during his employment,** and he does not show how or why his condition arose out of his work, he fails to adduce evidence to the point of making a prima facie case. Thus, urging that some of the employer's evidence was erroneous is immaterial. *Finn v. Indus. Comm'n*, 165 Colo. 106, 437 P.2d 542 (1968).

**Reasonable doubt resolved in claimant's favor.** Any reasonable doubt as to whether a compensable accidental injury arose out of and in the course of employment must be resolved in favor of the claimant herein. *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976).

**The doctrine of res ipsa loquitur does not apply** in workmen's compensation cases. *Finn v. Indus. Comm'n*, 165 Colo. 106, 437 P.2d 542 (1968).

**Standard of review for claim based upon claimant's heart condition.** Where claim for benefits was based upon claimant's heart condition, appropriate standard for industrial commission review was whether claimant's heart condition was the result of an accident, injury, or occupational disease, as defined by § 8-41-108, which meets the conditions of this section. *Eisenberg v. Colo. Indus. Comm'n*, 624 P.2d 361 (Colo. App. 1981).

**The existence of a latent tendency was irrelevant,** and the ALJ's determination that employee's claim was barred by § 8-52-102 (2)(b) was wholly unsupported by the record where employee had functioned well within the range of normal at home and at her job until she was rotated by employer and suffered job-related stress. *Peterson v. ENT Fed. Credit Union*, 827 P.2d 621 (Colo. App. 1992) (decided under law in effect prior to 1991 amendment).

**The language in subsection (2)(c) requiring that stress-related claims not be based upon facts and circumstances that are common to all fields of employment** does not bar as a matter of law all claims arising out of a common work condition; rather, compensability depends upon the particular facts and circumstances of each case. *Holme, Roberts, & Owen v. Indus. Claim Appeals Office*, 800 P.2d 1332 (Colo. App. 1990).

Employee's sudden job demotion was not based upon circumstances which are common to all fields of employment; therefore, claim arising out of job demotion was not barred. *Holme, Roberts, & Owen v. Indus. Claim Appeals Office*, 800 P.2d 1332 (Colo. App. 1990).

**For purposes of subsection (2)(c),** it is not necessary to logically tie stress-producing incidents to a particular line of work. *City Market, Inc., v. Indus. Claim Appeals Office*, 800 P.2d 1335 (Colo. App. 1990).

**A workers' compensation claim resulting from a mental stimulus that results in mental**



**impairment is a "mental-mental" injury which requires proof by testimony of a licensed physician or psychologist.** If there is a physical component that contributes to the injury, such restrictions are not implicated. *Oberle v. Indus. Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996).

#### B. Sufficiency of Evidence.

**Evidence warranting compensation.** If the evidence, and the logical inferences therefrom, can be said to warrant a conclusion that the accident, within a reasonable probability, resulted in the disability, the claimant is entitled to compensation. *Indus. Comm'n v. Royal Indem. Co.*, 124 Colo. 210, 236 P.2d 293 (1951); *J. W. Metz Lumber Co. v. Taylor*, 134 Colo. 249, 302 P.2d 521 (1956); *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

**Although evidence need not establish causal connection by reasonable "medical" probability.** Where the sole issue in dispute was whether there was any causal connection between the accident and the loss of vision in claimant's right eye and the employer asserted that the causal connection must be established with reasonable medical probability, it was held that this is the standard upon which a medical expert must base his opinion but it is not the standard on which the director must make his determination. The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable "medical" certainty. *Indus. Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957); *Ringsby Truck Lines v. Indus. Comm'n*, 30 Colo. App. 224, 491 P.2d 106 (1971); *Legouffe v. Prestige Homes, Inc.*, 634 P.2d 1010 (Colo. App. 1981), rev'd on other grounds, 658 P.2d 850 (Colo. 1983); *Morrison v. Indus. Claim Appeals Office*, 760 P.2d 654 (Colo. App. 1988).

**When doctors are unable to say how much of claimant's disability is due to the accident** for which he claimed compensation and how much to an earlier accident, the industrial commission errs in awarding compensation for the whole disability. *Ohio Cas. Ins. Co. v. Indus. Comm'n*, 115 Colo. 355, 173 P.2d 888 (1946).

**Evidence which relates solely to possibilities or probabilities is not sufficient to support an award.** *Deines Bros. v. Indus. Comm'n*, 125 Colo. 258, 242 P.2d 600 (1952); *Montgomery Ward & Co. v. Indus. Comm'n*, 128 Colo. 465, 263 P.2d 817 (1953); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Maryland Cas. Co. v. Kravig*, 153 Colo. 282, 385 P.2d 669 (1963); *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965).

**On the other hand, awards cannot be denied as the result of speculation or conjecture,** nor upon evidence not in the record. *Indus.*

*Comm'n v. Havens*, 136 Colo. 111, 134 P.2d 698 (1957).

**And the fact that an accident is not witnessed does not preclude proof by circumstantial evidence.** *Employers' Mut. Liab. Ins. Co. v. Indus. Comm'n*, 145 Colo. 91, 357 P.2d 929 (1960).

**Where evidence not usable to support referee's findings.** Where testimony ignores or is contrary to principles of physical science, it cannot serve as a basis for a referee's conclusion that there was no causal connection between the accident and the claimant's injury. *Legouffe v. Prestige Homes, Inc.*, 634 P.2d 1010 (Colo. App. 1981), rev'd on other grounds, 658 P.2d 850 (Colo. 1983).

**Testimony of a dentist is insufficient under subsection (2)(a) to support a stress claim** even though a dentist would be the treating physician for TMJ, the injury specified by the claimant as arising from stress. This section clearly refers only to a physician or psychologist. *Tomsha v. City of Colo. Springs*, 856 P.2d 13 (Colo. App. 1992).

**Subsection (2) does not require that a mental impairment claimant produce a live witness in all cases.** Such a requirement would serve no legitimate purpose and would result in an equal protection violation when other claimants are allowed to submit expert reports and only provide the expert witness when the opposing party chooses to examine the expert. *Esser v. Indus. Claims Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), aff'd on other grounds, 30 P.3d 189 (Colo. 2001).

**For sufficiency of evidence,** see *Adams v. Indus. Comm'n*, 106 Colo. 361, 105 P.2d 403 (1940); *Rand v. Indus. Comm'n*, 110 Colo. 240, 132 P.2d 784 (1942); *Warner v. Mullens*, 111 Colo. 60, 137 P.2d 420 (1943); *Pitchforth v. Macomb*, 111 Colo. 135, 137 P.2d 1021 (1943); *Indus. Comm'n v. Menegatti*, 111 Colo. 484, 143 P.2d 274 (1943); *Indus. Comm'n v. Daniels*, 124 Colo. 329, 236 P.2d 291 (1951); *Employers' Mut. Liab. Ins. Co. v. Indus. Comm'n*, 145 Colo. 91, 357 P.2d 929 (1960); *Hood v. Indus. Comm'n*, 153 Colo. 221, 385 P.2d 256 (1963); *Silver Eng'g Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973); *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

#### C. Admissibility of Evidence.

**Statements of employee to his wife upon returning home held to be inadmissible.** Evidence of statements of an employee to his wife upon his return home from work in the evening, as to the happening of an alleged accident, held, under the attending circumstances, to be hearsay, not a part of the res gestae, and its admission in evidence error. *H. C. Lallier Constr. &*

Eng'g Co. v. Indus. Comm'n, 91 Colo. 593, 17 P.2d 532 (1932).

**As are hospital records and proof of death based on hearsay.** H. C. Lallier Constr. & Eng'g Co. v. Indus. Comm'n, 91 Colo. 593, 17 P.2d 532 (1932).

**But conversation of injured employee with others at the time of the accident held to be admissible.** In a workmen's compensation case, conversations of the injured employee with others at the time of the accident concerning his injury held admissible as a part of the res gestae. Indus. Comm'n v. Diveley, 88 Colo. 190, 294 P. 532 (1930).

**Medical testimony in proceedings as to prior injury not competent to determine degree of permanent disability.** Where for several months a claimant has continuously performed the same type of work in which he was engaged at the time of his injury, a transcript of proceedings, including medical testimony, relating to a prior injury, where no findings were made, is not competent to determine the degree of permanent disability resulting from accidental injury in Colorado two years afterward in the face of unchallenged medical testimony that claimant has suffered a permanent disability of 25 percent as a working unit, based upon aggra-

vation of a preexisting weakness. Gregory v. Swinerton & Walberg Co., 138 Colo. 22, 328 P.2d 948 (1958).

#### D. Presumption against Suicide.

**The well-known rule is that suicide will not be presumed,** and that as between accident and suicide the law supposes accident. Indus. Comm'n v. Peterson, 151 Colo. 289, 377 P.2d 542 (1962).

**But once there appears substantial evidence to overcome the presumption against suicide** it is for the industrial commission to weigh all the evidence and to draw reasonable inferences therefrom. Logical conclusions based upon adequate support in the record should not be disturbed by the courts. Indus. Comm'n v. Peterson, 151 Colo. 289, 377 P.2d 542 (1962).

**There is no authority that makes conclusive evidence the quantum of proof** by which a presumption against suicide must be rebutted. The burden of proof remains upon the claimant to establish that the injury or death resulted from an accident arising out of and in the course of the employment and not intentionally self-inflicted. Indus. Comm'n v. London & Lancashire Indem. Co., 135 Colo. 372, 311 P.2d 705 (1957).

#### 8-41-302. Scope of terms - "accident" - "injury" - "occupational disease".

(1) "Accident", "injury", and "occupational disease" shall not be construed to include disability or death caused by or resulting from mental or emotional stress unless it is shown by competent evidence that such mental or emotional stress is proximately caused solely by hazards to which the worker would not have been equally exposed outside the employment.

(2) "Accident", "injury", and "occupational disease" shall not be construed to include disability or death caused by heart attack unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of the employment.

**Source:** L. 90: Entire article R&RE, p. 480, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-43-108 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-41-302 is similar to § 8-41-108 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Fact of preexisting hypersensitivity or secondary cause** does not defeat a claim for occupational disease unless it can be shown that a nonindustrial cause was an equally exposing stimulus. Hall v. Indus. Claim Appeals Office, 757 P.2d 1132 (Colo. App. 1988).

**Manifestation of preexisting mental condition resulting from job-related mental or**

**emotional stress is compensable.** Ft. Logan Mental Health Center v. Walker, 723 P.2d 740 (Colo. App. 1986).

**In order for a mental condition to be compensable under the Workers' Compensation Act,** the hazards causing the stress must be more attributable to the workplace than to claimant's personal problems. Young v. Indus. Claim Appeals Office, 860 P.2d 591 (Colo. App. 1993).

**The term "solely" in subsection (1) could be interpreted as meaning "primarily"** where the phrase "equally exposed" envisions some exposure to stress outside employment and where compensability arises only on the condition that there not be equal exposure to a stressor



both within and outside the workplace. *Young v. Indus. Claim Appeals Office*, 860 P.2d 591 (Colo. App. 1993).

**Injury caused by emotional or mental stress compensable.** Compensation may be awarded when job-related mental or emotional stress proximately causes an injury or occupational disease which results in disability or death. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

**Provision is constitutional.** Although it requires a different or more severe standard for establishing that a heart attack is a compensable "accident" or "injury" than is required for other types of accidents or injuries, this provision does not deny equal protection of the law and is therefore constitutional. Claimants *In re Kohler v. Indus. Comm'n*, 671 P.2d 1002 (Colo. App. 1983).

**"Overexertion" was not a prerequisite to a recovery of workmen's compensation for a heart attack** sustained in the course of employment; rather, the legislative intent in the 1965 amendment of this section was to make compensable an injury or death which results from exertion in the performance even of usual duties within an employee's scope of employment; there must, of course, be the chain of causation necessary as in all workmen's compensation cases. *T & T Loveland Chinchilla Ranch v. Bourn*, 173 Colo. 267, 477 P.2d 457 (1970).

For accidents occurring between the effective date of the 1965 amendment to former subsection (2) and July 1, 1971, the 1965 amendment allowing for an award for a heart attack without a showing of overexertion is applicable. *Pub. Serv. Co. v. Indus. Comm'n*, 189 Colo. 153, 538 P.2d 430 (1975).

**Legislative intent relating to unusual exertion requirement.** The intent of the general assembly in enacting the unusual exertion requirement was to ensure that only those heart attack-related injuries resulting from more than the normal work activities of the claimant are compensable. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983).

**Where worker's heart attack was an aggravation of preexisting heart disease and the heart attack was not caused by an accident,** the worker was required to prove unusual exertion in order to be eligible for workers' compensation benefits. *Vialpando v. Indus. Claim Appeals Office*, 757 P.2d 1152 (Colo. App. 1988).

**Intent of the 1971 amendment** requiring overexertion for a compensable heart attack was to place the law as it existed before the 1965 amendment which did require overexertion. *Pub. Serv. Co. v. Indus. Comm'n*, 189 Colo. 153, 538 P.2d 430 (1975).

**Overexertion not element of claim where heart condition aggravated by trauma.** Where there is a claim of aggravation of a preexisting heart condition by trauma, claimant must show

his preexisting heart disease was aggravated by trauma, and, in such a case, overexertion is not an element. *Legouffe v. Prestige Homes, Inc.*, 634 P.2d 1010 (Colo. App. 1981), *rev'd on other grounds*, 658 P.2d 850 (Colo. 1983).

**Unusual exertion doctrine is to be applied according to employee's work history** rather than the work patterns of his profession in general. *Beaudoin Constr. Co. v. Indus. Comm'n*, 626 P.2d 711 (Colo. App. 1980).

**Determination of baseline level of fitness required.** If the unusual exertion doctrine is to apply on an individual basis, then a baseline level of fitness of the individual must be determined before a trier of fact can decide what constitutes unusual exertion for that particular individual. This determination must necessarily include consideration of periods of unemployment and consequent deconditioning. *Beaudoin Constr. Co. v. Indus. Comm'n*, 626 P.2d 711 (Colo. App. 1980).

**Application in context of employer-sponsored fitness program.** In order to determine whether an injury suffered by an employee while engaging in an exercise program is compensable under the Workers' Compensation Act, a court should look to the following factors: (1) Whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise program; (4) whether the employer exerted any control or direction over the employee's exercise program; and (5) whether the employer stood to benefit from the employee's exercise program. *Price v. Indus. Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 975 P.2d 1131 (Colo. App. 1997).

**Overexertion not required where heart attack related to accident.** Where the claimant alleges that his heart attack was causally related to an accident as defined by subsection (1), the claimant is not required to show that the injury was also causally related to overexertion. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983); *Vialpando v. Indus. Claim Appeals Office*, 757 P.2d 1152 (Colo. App. 1988).

**But is required where no accident occurs.** Where no accident occurred, the claimant is required to show that the heart attack was proximately caused by an unusual or extraordinary overexertion arising out of the claimant's employment. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983).

**Heart attack victim's work activities compared to normal work activity.** A claimant's work activities near the time of a heart attack must be compared to his normal work activities to determine if the former were unusual; activities claimant would have participated in had he not been working are irrelevant. *Townley Hdwe.*

Co. v. Indus. Comm'n, 636 P.2d 1341 (Colo. App. 1981).

The "unusual overexertion" doctrine must be applied according to the employee's work history. The employee's activities near the time of a heart attack must be compared to his normal work activities in order to determine if the former were unusual. Claimants In re Kohler v. Indus. Comm'n, 671 P.2d 1002 (Colo. App. 1983); Vialpando v. Indus. Claim Appeals Office, 757 P.2d 1152 (Colo. App. 1988).

Unusual duties may require more, or less, or the same exertion as do the normal activities of an employee. And, it is incumbent upon the claimant to prove unusual exertion in the performance of his duties. Claim of Henricks, 676 P.2d 1220 (Colo. App. 1983).

**"Unusual" exertion may be of a kind that recurs.** Where decedent was employed as a security guard and suffered a heart attack while preparing for his annual physical fitness test, the exertion was unusual within the meaning of subsection (2). Wackenhut Corp. v. Indus. Claim Appeals Office, 975 P.2d 1131 (Colo. App. 1997).

**A heart attack resulting from unusual mental stress or tension arising out of and in the course of employment** is compensable. City & County of Denver v. Indus. Comm'n, 40 Colo. App. 202, 573 P.2d 562 (1977), modified, 195 Colo. 431, 579 P.2d 80 (1978); Matter of Carr v. Indus. Comm'n, 709 P.2d 52 (Colo. App. 1985); Vialpando v. Indus. Claim Appeals Office, 757 P.2d 1152 (Colo. App. 1988).

**Even if events preceding heart attack constituted unusual exertion,** a finding that such events did not cause heart attack is fatal to claim for benefits. Kinninger v. Indus. Claim Appeals Office, 759 P.2d 766 (Colo. App. 1988).

**8-41-303. Loaning employer liable for compensation.** Where an employer, who has accepted the provisions of articles 40 to 47 of this title and has complied therewith, loans the service of any of the employer's employees who have accepted the provisions of said articles to any third person, the employer shall be liable for any compensation thereafter for any injuries or death of said employee as provided in said articles, unless it appears from the evidence in said case that said loaning constitutes a new contract of hire, express or implied, between the employee whose services were loaned and the person to whom the employee was loaned.

**Source:** L. 90: Entire article R&RE, p. 480, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-52-101 as it existed prior to 1990.

#### ANNOTATION

The common law rule that a worker can simultaneously be the employee of two persons applies to cases arising under the workers' compensation act. The rule allows an employee to be simultaneously in the general employment of one employer and in the special employment of another, provided the employee

**When unusual or extraordinary stress may occur.** For purposes of determining the right to workmen's compensation, "unusual or extraordinary" stress may occur while the employee is engaged in activities of the same general type as those in which he is regularly employed. City & County of Denver v. Indus. Comm'n, 40 Colo. App. 202, 573 P.2d 562 (1977), modified, 195 Colo. 431, 579 P.2d 80 (1978); Matter of Carr v. Indus. Comm'n, 709 P.2d 52 (Colo. App. 1985).

**Standard of review for claim based upon heart condition.** Where a claim for benefits was based upon the claimant's heart condition, the appropriate standard for the industrial commission's review was whether the claimant's heart condition was the result of an accident, injury, or occupational disease which meets the conditions of § 8-52-102. Eisenberg v. Indus. Comm'n, 624 P.2d 361 (Colo. App. 1981).

**Medical certainty of heart attack cause not necessary.** The evidence must establish a causal connection between unusual exertion and a heart attack with reasonable probability, but it need not establish it with reasonable "medical" certainty. Townley Hdwe. Co. v. Indus. Comm'n, 636 P.2d 1341 (Colo. App. 1981).

**And evidence of emotional or mental tension is not prerequisite** to recovery for a heart attack caused by job-related overexertion and stress. Townley Hdwe. Co. v. Indus. Comm'n, 636 P.2d 1341 (Colo. App. 1981).

**Expert medical testimony not required to prove causal connection between heart attack and employment** and circumstantial evidence may be sufficient to prove such causal connection. In re Talbert, 694 P.2d 864 (Colo. App. 1984).

understands that he or she is submitting to the control of the special employer. In the dual employment situation, the employee's only remedy for an injury sustained while in the course of employment with the borrowing employer is through worker's compensation. A separate tort action against the special employer is barred.



Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

**Unless there is new contract of hire, loaned employee does not become covered employee.** Where an employee is loaned to another by his covered employer, he does not become a covered employee of the other, nor does the other become a covered employer unless a new contract of hire is made between the employee and the borrowing employer. *Continental Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969); *Continental Sales Corp. v. Indus. Comm'n*, 31 Colo. App. 223, 501 P.2d 90 (1972).

**Thus, when an employer loans an employee he remains liable for injuries to or death of that loaned employee** "... unless it shall appear from the evidence in said case that said loaning constitutes a new contract of hire, express or implied, between the employee whose services were loaned and the person to whom he was loaned". *Rocky Mt. Dairy Prods. v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966).

**"Loaned employee" may maintain negligence action.** A "loaned employee" and an "employee" under workmen's compensation are not the same, and no provision prohibits or limits a "loaned employee" from maintaining a negligence action against the borrowing employer. *Continental Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**For no provision of the workmen's compensation act either specifically or impliedly grants immunity from common-law liability for injury to one who borrows the services of an employee from an employer who has a policy of workmen's compensation insurance.** The loaning employer is the only employer whose compliance with the workmen's compensation act makes him immune from a common-law action for injury to the loaned employee. *Continental Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**But employee loaned for special purpose is employee of borrowing company.** Where an employee of one company is loaned to another for a special purpose and while engaged in such purpose is injured, he is an employee of the borrowing company with the attendant rights and duties incident thereto. *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**And the special employee loses the right to sue the special employer at common law for negligence.** But the courts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common law suit. *Continental Sales Corp. v. Stookesberry*, 170 Colo. 16, 459 P.2d 566 (1969).

**There are nine criteria relevant to determining whether a special employment relationship exists.** They are: (1) Whether the borrowing employer has the right to control the employee's conduct; (2) whether the employee is performing the borrowing employer's work; (3) whether there was an agreement between the original and borrowing employer; (4) whether the employee has acquiesced in the arrangement; (5) whether the borrowing employer had the right to terminate the employee; (6) whether the borrowing employer furnished the tools and place for performance; (7) whether the new employment was to be for a considerable length of time; (8) whether the borrowing employer had the obligation to pay the employee; and (9) whether the original employer terminated its relationship with the employee. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

Of the nine criteria, three are decisive: Whether the employee has acquiesced in the arrangement; whether the borrowing employer has the right to control the employee's conduct; and, whether the borrowing employer had the right to terminate the employee. *Evans v. Webster*, 932 P. 2d 951 (Colo. App. 1991).

**A tort suit against a special employer is barred by the workers' compensation act** when an employee consents to work for the special employer pursuant to a contract of hire within the workers' compensation act and the employee is an employee of both the general and special employer. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Truck driver special employee of carrier.** Truck driver, whose general employer lent him to a carrier pursuant to a lease, became a special employee of the carrier for the purposes of liability for workmen's compensation. *Archer Freight Lines v. Horn Transp., Inc.*, 32 Colo. App. 412, 514 P.2d 330 (1973).

**Applied in** *Horn Transp., Inc. v. Claimants in re Death of Wards*, 40 Colo. App. 395, 576 P.2d 195 (1978).

**8-41-304. Last employer liable - exception.** (1) Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease and suffered a substantial permanent aggravation thereof and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier. In the case of silicosis, asbestosis, or anthracosis, the only employer and insurance carrier liable shall be the last employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide (SiO<sub>2</sub>) dust, asbestos dust, or coal dust on each of at least sixty days or more

and the insurance carrier, if any, on the risk when the employee was last so exposed under such employer.

(2) In any case where an employee of an employer becomes disabled from silicosis, asbestosis, anthracosis, or poisoning or disease caused by exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or in the event death results from silicosis, asbestosis, anthracosis, or poisoning or disease caused by exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, and, if such employee has been injuriously exposed to such diseases while in the employ of another employer during the employee's lifetime, the last employer or that employer's insurance carrier, if any, shall be liable for compensation and medical benefits as provided by articles 40 to 47 of this title, including funeral expenses and death benefits.

**Source:** **L. 90:** Entire article R&RE, p. 480, § 1, effective July 1. **L. 91:** (1) amended, p. 1295, § 8, effective July 1. **L. 93:** (2) amended, p. 2140, § 1, effective April 1, 1994.

**Editor's note:** This section is similar to former § 8-51-112 as it existed prior to 1990.

### ANNOTATION

**Law reviews.** For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "Occupational Disease Claims Under Senate Bill 218", see 22 Colo. Law. 2421 (1993).

**Annotator's note.** Since § 8-41-304 is similar to § 8-51-112 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Constitutional guarantees of equal protection not violated** by overall statutory scheme for assessing and apportioning liability among different classes of employees because legitimate governmental interest to encourage the employment of partially disabled persons is furthered. *Electron Corp. v. Indus. Claim Appeals Office*, 833 P.2d 821 (Colo. App. 1992).

**Liability on last employer not violative of equal protection.** The imposition of liability of the last employer, while absolving all previous employers from liability, does not violate equal protection. *Union Carbide Corp. v. Indus. Comm'n*, 196 Colo. 56, 581 P.2d 734 (1978).

**Legislative purpose.** The overriding legislative purpose in enacting this section was that losses due to industrial illness be compensated. Claimants in *re Death of Garner v. Vanadium Corp. of Am.*, 194 Colo. 358, 572 P.2d 1205 (1977).

**"Employer" means "Colorado employer".** It is clear that "employer" as used in subsection (1) of this section cannot subject to liability an out-of-state employer even when it is the last "employer". A reasonable reading of the act leads to the conclusion that "employer" means, *prima facie*, "Colorado employer". Claimants

in *re Death of Garner v. Vanadium Corp. of Am.*, 194 Colo. 358, 572 P.2d 1205 (1977).

**Section takes precedence over § 8-51-106 (1)(a) (now § 8-46-101).** The specific provisions of this section, applicable to occupational disease, take precedence over the general provisions of § 8-51-106 (1)(a) (now § 8-46-101), applicable to "injury", notwithstanding that the statutory definition of injury, § 8-41-108 (2), includes occupational disease. *Denver v. Hansen*, 650 P.2d 1319 (Colo. App. 1982).

**The common law rule that a "special employment" relationship exists whenever an employer provisionally assigns to another employer the services of an employee who thereby surrenders to the borrowing employer the right of control over the employee's actions** applies to cases arising under the Workers' Compensation Act and allows an employee to be simultaneously in the general employment of one employer and in the special employment of another, provided the employee understands that he or she is submitting to the control of the special employer. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**A separate tort action against a special employer was barred in dual employment situation** and the employee's only remedy for an injury sustained while in the course of employment with the borrowing employer is through workers' compensation. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**The criteria considered by courts to be relevant in the determination of whether a special employment relationship exists** are (1) whether the borrowing employer has the right to control the employee's conduct; (2) whether the employee is performing the borrowing employer's work; (3) whether there was an agreement between the original and borrowing employer;



(4) whether the employee has acquiesced in the arrangement; (5) whether the borrowing employer had the right to terminate the employee; (6) whether the borrowing employer furnished the tools and place for performance; (7) whether the new employment was to be for a considerable length of time; (8) whether the borrowing employer had the obligation to pay the employee; and (9) whether the original employer terminated its relationship with the employee. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Application of facts to the test of a loaned employee relationship was a question of law** where the facts relating to the nature of claimant's work activities and claimant's consent to work for employer were not in dispute. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Liability fixed as of date of last injurious exposure.** This statutory provision and a similar provision, former § 8-60-113 (1), evidences a legislative intent to impose liability for injury resulting from an occupational disease on the basis of the date of the last injurious exposure to the hazards of the disease, rather than the date of the initial onset of the disease. *Martinez v. Indus. Comm'n*, 40 Colo. App. 485, 580 P.2d 36 (1978).

**"Injurious exposure" defined.** An injurious exposure is a concentration of toxic material which would be sufficient to cause the disease in the event of prolonged exposure to such concentration. *Union Carbide Corp. v. Indus. Comm'n*, 40 Colo. App. 182, 573 P.2d 938 (1977), *aff'd*, 196 Colo. 56, 581 P.2d 734 (1978).

**The length of exposure is immaterial.** *Union Carbide Corp. v. Indus. Comm'n*, 40 Colo. App. 182, 573 P.2d 938 (1977), *aff'd*, 196 Colo. 56, 581 P.2d 734 (1978).

**The employee is not required to ascertain the exact amount that each employer contributed in causing his or her occupational disease,** nor is he or she required to pin point exactly which employer most injuriously exposed the claimant. Instead, such an employee is allowed to recover from the last employer in whose employ the last injurious exposure occurred and resulted in an aggravation that is both permanent and substantial. *Monfort, Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993).

**Compliance with federal guidelines for safe standards of radiation is immaterial** to liability under workmen's compensation statute. *Union Carbide Corp. v. Indus. Comm'n*, 40 Colo. App. 182, 573 P.2d 938 (1977), *aff'd*, 196 Colo. 56, 581 P.2d 734 (1978).

**Last injurious exposure need not cause a worsening of condition.** *Redfield Scope Co. v. Indus. Comm'n*, 689 P.2d 657 (Colo. App. 1984), *aff'd in part and rev'd in part*, 723 P.2d 731 (Colo. 1986).

**Last injurious exposure rule applied only to compensation benefits,** including temporary

disability benefits. *Royal Globe Ins. Co. v. Collins*, 723 P.2d 731 (Colo. 1986).

**Last injurious exposure rule is applicable only to determine apportionment of full liability for occupational diseases among the parties who could potentially be liable.** *Robbins Flower Shop v. Cinea*, 894 P.2d 63 (Colo. App. 1995).

**This section does not require that the last injurious exposure be the cause in fact** of the disease. *Union Carbide Corp. v. Indus. Comm'n*, 40 Colo. App. 182, 573 P.2d 938 (1977), *aff'd*, 196 Colo. 56, 581 P.2d 734 (1978); *Royal Globe Ins. Co. v. Collins*, 723 P.2d 731 (Colo. 1986).

**But liability limited.** The last employer which injuriously exposes an employee to toxic materials is liable only for the initial occupational disease benefits and any additional benefits are paid out of the subsequent injury fund to which all employers contribute. *Union Carbide Corp. v. Indus. Comm'n*, 196 Colo. 56, 581 P.2d 734 (1978).

**This section establishes the "last injurious exposure" rule for disabilities attributable to occupational diseases** and is an exception to the general rule set forth in § 8-51-106(1)(a), (now § 8-46-101) providing that the employer and its insurance carrier in whose employment the employee was "last injuriously exposed to the hazards of such disease" shall have full responsibility for that part of the permanent total disability caused by the occupational disease. *Subsequent Injury Fund v. Grant*, 827 P.2d 574 (Colo. App. 1991).

**The phrase, "any type of malignancy caused thereby" must be construed broadly,** not narrowly, in order to avoid thwarting policy on which subsequent injury fund provisions are based. The phrase includes cancer caused by exposure to asbestos and not simply "asbestosis" as strictly defined. *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991).

**The phrase, "any type of malignancy caused thereby", refers to all preceding conditions** listed in subsection (2), and does not limit the liability of the subsequent injury fund to disability resulting from asbestosis, as opposed to cancer resulting from asbestosis. *Subsequent Injury Fund v. Comp. Ins. Auth.*, 768 P.2d 751 (Colo. App. 1988).

**Where employee died of lung cancer** incurred as a result of his exposure to radioactive materials during his work as uranium miner for several employers, last employer was liable for benefits even though last exposure of eight days duration was probably not the cause in fact of the disease. *Union Carbide Corp. v. Indus. Comm'n*, 40 Colo. App. 182, 573 P.2d 938 (1977), *aff'd*, 196 Colo. 56, 581 P.2d 734 (1978).

**Section not applied when employee's back was reinjured.** Reinjury of back did not implicate the "last injurious exposure" rule. *Univ.*

Park Care Ctr. v. Indus. Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001).

**Where claimant's permanent total disability is solely attributable to the occupational disease of silicosis, employer is correctly assessed full liability for claimant's disability benefits.** Electron Corp. v. Indus. Claim Appeals Office, 833 P.2d 821 (Colo. App. 1992).

**Where a worker's permanent total disability has been caused by the combination of two or more injuries and the subsequent occupational disease of silicosis, liability is apportioned.** Liability for that portion of the permanent total disability directly attributable to silicosis is governed by this section. Climax Molybdenum Co. v. Walter, 812 P.2d 1168 (Colo. 1991).

**Claimant need not be totally disabled solely as a result of asbestosis to qualify for compensation under subsection (2).** If asbestosis is the proximate cause of the claimant's disability, i.e., the necessary precondition for the disability, then, even where the claimant was a heavy cigarette smoker, the disability is caused by asbestos is within the meaning of this section. Subsequent Injury Fund v. Comp. Ins. Auth., 768 P.2d 751 (Colo. App. 1988), aff'd, 793 P.2d 580 (Colo. 1990).

**Employer properly assessed with full liability for claimant's disability benefits where claimant's permanent total disability is solely attributable to the occupational disease of silicosis.** Electron Corp. v. Indus. Claims Appeals Office, 833 P.2d 821 (Colo. App. 1992).

**Subsequent injury fund may be held liable for interest on award.** Henderson v. RSI, Inc., 824 P.2d 91 (Colo. App. 1991).

**The subsequent injury fund was not liable for compensation in excess of ten thousand dollars although the decedent was employed by more than one employer.** The decedent's radiation exposure after the date the new employer became the manager of the plant was found to be insufficient to constitute an injurious exposure. Dow Chemical Co. v. Indus. Claim Appeals Office, 843 P.2d 122 (Colo. App. 1992) (decided prior to 1993 amendment to subsection (2)).

An occupational disease or disability "occurs", within the meaning of § 8-46-104, on the onset of disability, rather than upon the date of diagnosis. Union Carbide Corp. v. Indus. Claim Appeals Office, 128 P.3d 319 (Colo. App. 2005).

**An employer's total liability, including interest, cannot exceed ten thousand dollars, and any interest payable that exceeds the employer's maximum obligation remains the sole obligation of the fund.** Subsequent Injury Fund

v. Indus. Claim Appeals Office, 859 P.2d 276 (Colo. App. 1993).

**Where diagnosis occurred before April 1, 1994, the subsequent injury fund was liable for benefits claimed under previous version of statute for disability caused by exposure to radioactive materials even though decedent died after such date.** Subsequent Injury Fund v. King, 961 P.2d 575 (Colo. App. 1998).

**Payment of interest.** The interest awarded in excess of the \$7,500 award is payable out of the subsequent injury fund, rather than by employer and insurance company. Union Carbide Corp. v. Indus. Comm'n, 40 Colo. App. 182, 573 P.2d 938 (1977), aff'd, 196 Colo. 56, 581 P.2d 734 (1978).

**The addition of the phrase "substantial permanent aggravation" to subsection (1) did not eliminate or change the last injurious exposure test for causation.** The phrase does not reflect an intent of the general assembly to depart from the principles set forth in Royal Globe Ins. Co. v. Collins, 713 P.2d 731 (Colo. 1986), including rejection of the contribution test for application of a last injurious exposure standard to occupational diseases caused by physical activities. Monfort, Inc. v. Rangel, 867 P.2d 122 (Colo. App. 1993).

Under the present version of subsection (1), the length of employment with a particular employer continues to be immaterial to a finding of liability. Instead, the focus is now on both the harmful nature of the concentration of the exposure and the magnitude of the effect of such exposure. Monfort, Inc. v. Rangel, 867 P.2d 122 (Colo. App. 1993).

**Claimant's tort suit against the employer was barred by the Workers' Compensation Act as a matter of law where claimant had consented to work for the employer pursuant to a contract of hire within the meaning of the Act and she was an employee of both a dual employer and the employer.** Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

**Where the administrative law judge determined, based on the evidence, that claimant's disability arose from an upper extremity injury during claimant's tenure with employer, evidence that claimant sustained an aggravation of his condition upon return to self-employment was not relevant.** Delta Drywall v. Indus. Claim Appeals Office, 868 P.2d 1155 (Colo. App. 1993).

**Applied in** High v. Indus. Comm'n, 638 P.2d 818 (Colo. App. 1981); Mendisco & Urralburu Mining Co. v. Johnson, 687 P.2d 492 (Colo. App. 1984); Dow Chem. Co. v. Gabel, 746 P.2d 1357 (Colo. App. 1987).



## PART 4

## CONTRACTORS AND LESSEES

**8-41-401. Lessor contractor-out deemed employer - liability - recovery.**

(1) (a) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 47 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees' dependents, except as otherwise provided in subsection (3) of this section.

(a.5) The general assembly hereby finds and determines that the decision of the Colorado court of appeals in the case of *Newsom v. Frank M. Hall & Co.*, No. 02CA1375 (February 26, 2004), in which the court held that an independent contractor may be an entity other than a natural person, did not accurately reflect the intent of the general assembly when it passed Senate Bill 93-132 and Senate Bill 95-072. The general assembly hereby declares that the term "individual", as used in this section and in section 8-40-202, means a natural person.

(b) The employer, before commencing said work, shall insure and keep insured against all liability as provided in said articles, and such lessee, sublessee, contractor, or subcontractor, as well as any employee thereof, shall be deemed employees as defined in said articles. The employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due said lessee, sublessee, contractor, or subcontractor.

(2) If said lessee, sublessee, contractor, or subcontractor is also an employer in the doing of such work and, before commencing such work, insures and keeps insured its liability for compensation as provided in articles 40 to 47 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind, including actions under section 8-41-203, against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof, or against its employees, servants, or agents.

(3) Notwithstanding any provision of this section or section 8-41-402 to the contrary, any individual who is excluded from the definition of employee pursuant to section 8-40-202 (2), or a working general partner or sole proprietor who is not covered under a policy of workers' compensation insurance, or a corporate officer or member of a limited liability company who executes and files an election to reject coverage under section 8-41-202 (1) shall not have any cause of action of any kind under articles 40 to 47 of this title. Nothing in this section shall be construed to restrict the right of any such individual to elect to proceed against a third party in accordance with the provisions of section 8-41-203. The total amount of damages recoverable pursuant to any cause of action resulting from a work-related injury brought by such individual that would otherwise have been compensable under articles 40 to 47 of this title shall not exceed fifteen thousand dollars, except in any cause of action brought against another not in the same employ.

(4) (a) Notwithstanding any provision of this section to the contrary, any person, company, or corporation who contracts with a landowner or lessee of a farm or ranch to perform a specified farming or ranching operation shall, prior to entering into such contract, provide for and maintain, for the period of such contract, workers' compensation coverage pursuant to articles 40 to 47 of this title covering all the employees and laborers to be utilized under such contract. Proof of such coverage on forms or certificates issued by the insurer shall be provided to the person, company, or corporation contracting for the labor prior to performing such contract.

(b) Any person, company, or corporation contracting with a landowner or lessee of a farm or ranch to provide a specified farming or ranching operation who fails to provide

coverage pursuant to subsection (1) of this section or who fails to maintain such coverage for the term of the contract is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail for not more than sixty days, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

(c) Notwithstanding any provision of this section to the contrary, no person, company, or corporation contracting with a landowner or lessee of a farm or ranch operation to perform a specified farming or ranching operation nor any employee of such person, company, or corporation required to be covered by workers' compensation pursuant to this subsection (4) shall have any right of contribution from, or any action of any kind, including actions under section 8-41-203, against, the person, company, or corporation contracting to have such agricultural labor performed.

(d) (I) If any person, company, or corporation contracting to provide labor to perform specified farming or ranching operations and required to provide workers' compensation coverage pursuant to articles 40 to 47 of this title fails to provide such coverage and the person, company, or corporation for whom the labor is provided incurs any liability thereby, the person, company, or corporation providing the labor shall be subject to a cause of action for said liability and for reasonable attorney fees.

(II) If the person, company, or corporation for whom the labor for the performance of a specified farming or ranching operation is provided is sued by the injured employee, said person, company, or corporation may join the person, company, or corporation providing the labor as a third-party defendant in lieu of filing an independent action.

(5) The provisions of this section shall not apply to licensed real estate brokers and licensed real estate sales agents, as regulated in article 61 of title 12, C.R.S., who are excluded from the definition of employee pursuant to section 8-40-301 (2).

(6) Notwithstanding any provision of this section to the contrary, any person, company, or corporation operating a commercial vehicle as defined in section 42-4-235 (1) (a), C.R.S., who holds oneself or itself out as an independent contractor only to perform for-hire transportation, including loading and unloading, and who contracts to perform a specific transportation job, transportation task, or transportation delivery for another person, company, or corporation is not entering into an employee and employer relationship for purposes of workers' compensation coverage pursuant to articles 40 to 47 of this title. Nothing in this subsection (6) shall be construed to prohibit a determination that an individual is excluded from the definition of employee pursuant to section 8-40-202 (2) if such individual is operating a commercial vehicle as defined in section 42-4-235 (1) (a), C.R.S.

(7) This section shall not apply to any person excluded from the definition of "employee" pursuant to section 8-40-301 (5) or (7).

**Source:** L. 90: Entire article R&RE, p. 481, § 1, effective July 1. L. 92: (7) added, p. 1798, § 2, effective June 6. L. 93: (3) amended, p. 357, § 3, effective April 12; (6) amended, p. 1861, § 1, effective June 6. L. 94: (6) amended, p. 2544, § 16, effective January 1, 1995. L. 95: (1) and (3) amended, p. 344, § 3, effective July 1. L. 96: (1) and (3) amended, p. 647, § 2, effective May 1. L. 2000: (7) amended, p. 1497, § 2, effective August 2. L. 2004: (1)(a) amended and (1)(a.5) added, p. 1078, § 1, effective May 21.

**Editor's note:** This section is similar to former § 8-48-101 as it existed prior to 1990.

## ANNOTATION

I. General Consideration.

II. Liability of Lessor or Employer.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Uranium Mining Lease", see 27 Rocky Mt. L. Rev. 425 (1955). For article, "One Year Review of Corporations, Partnership and Agency", see 37 Dicta 11

(1960). For article, "Independent Contractors and the Colorado Workers' Compensation Act — Parts I and II", see 22 Colo. Law. 545 and 1281 (1993). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 117 (November 2004).

**Annotator's note.** (1) Since § 8-41-401 is similar to § 8-48-101 as it existed prior to the 1990 repeal and reenactment of the "Workers'



Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under the act to the industrial claim appeals office.

**This section is constitutional.** *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Maryland Cas. Co. v. Indus. Comm'n*, 86 Colo. 553, 283 P. 548 (1929).

This section does not deprive one of due process and equal protection. *Ellerman v. Amax, Inc.*, 194 Colo. 392, 572 P.2d 836 (1977).

**Furthermore, this section is not class legislation and not unconstitutional** on that ground. Neither is this section unconstitutional because inconsistent with § 8-41-105; they may be construed together. *Flick v. Indus. Comm'n*, 78 Colo. 117, 239 P. 1022 (1925).

**Subsection (3), limiting damages available to one who waives workers' compensation insurance, is constitutional.** The amount of the cap on damages was arrived at through legislative compromise in an effort to address the competing concerns of providing support for sole proprietors while encouraging participation in the workers' compensation system and protecting the interests of builders and general contractors. It is not special legislation nor does it deprive claimants of property without due process. *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210 (Colo. App. 2009).

**Not modification of § 8-41-105.** The contracting-out provision of this section does not modify the exemption for farm and ranch labor of § 8-41-105. *Hefley v. Morales*, 197 Colo. 523, 595 P.2d 233 (1979).

**Section also held to comport with constitutional provisions on due process, equal protection, and special legislation.** *O'Quinn v. Walt Disney Prods., Inc.*, 177 Colo. 190, 493 P.2d 344 (1972).

The creation of the classification of statutory employers and employees under this section is not a denial of equal protection. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977); *Buzard v. Super Walls, Inc.*, 681 P.2d 520 (Colo. 1984).

While this section does not bar negligence actions by employees of one subcontractor against another subcontractor, nor negligence actions by employees of the general contractor against a subcontractor, but employees of a subcontractor are barred from bringing an action against the general contractor, this classification does not deny equal protection of the laws, since the classification is not based upon "a suspect

classification", nor does it infringe upon "a fundamental right", and it satisfies the "rational basis" test. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977).

**The purpose of this section** is to prevent the avoidance of the insurance contract by calling the relation one of principal and independent contractor when such relation does not exist. The statute is intended to cover every business conducted by one through the activities of another under any kind of a contract. *Indus. Comm'n v. Bracken*, 83 Colo. 72, 262 P. 521 (1927); *Rogers v. Solem*, 103 Colo. 52, 83 P.2d 154 (1938); *Zimmerman v. Indus. Comm'n*, 109 Colo. 533, 127 P.2d 878 (1942); *Faith Realty & Dev. Co. v. Indus. Comm'n*, 170 Colo. 215, 460 P.2d 228 (1969); *Morales v. Indus. Comm'n*, 41 Colo. App. 180, 584 P.2d 1229 (1978), rev'd on other grounds, 197 Colo. 523, 595 P.2d 233 (1979).

The statutory intent behind this statute is to prevent employers from evading compensation coverage by contracting-out work instead of directly hiring the workmen. *San Isabel Elec. Ass'n v. Bramer*, 182 Colo. 15, 510 P.2d 438 (1973).

To implement the general purpose of the workmen's compensation laws, this section was enacted to prevent an employer from avoiding responsibility under the workmen's compensation act by contracting-out his work to an uninsured subcontractor. *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973); *Hefley v. Morales*, 197 Colo. 523, 595 P.2d 233 (1979).

**State policy.** It is the policy in Colorado to make the more financially solvent general contractor ultimately responsible for workmen's compensation benefits arising out of injuries to employees of all subcontractors. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977).

It is the general contractor to whom the employees of all subcontractors may look for workmen's compensation if their immediate employer is uninsured or financially irresponsible. This distinguishes the general contractor from the subcontractor and is the rationale which sustains the different treatment accorded general contractors by statute. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977).

**Basis for policy.** The public policy upon which the workmen's compensation act is founded derives from the need to provide monetary relief for workmen injured in the course of their employment, regardless of the negligence of the employer or the lack of negligence on the part of the employee. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dis-

missed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977).

**Burden of proof in workers' compensation case rests on the employer asserting the affirmative defense** that the section bars the independent contractor from bringing such a claim. *Stampados v. Colo. D & S Enters.*, 833 P.2d 815 (Colo. App. 1992).

Section bars only claims by independent contractors who have the option of obtaining workers' compensation insurance under the listed statutes and fail to do so, therefore it can apply only to those independent contractors who are corporate officers, working partners, individual employers, or employers in general who do not obtain insurance coverage. *Stampados v. Colo. D & S Enters.*, 833 P.2d 815 (Colo. App. 1992).

**Award based upon erroneous interpretation of law sustained if award proper absent misinterpretation.** Even though a court may determine that the industrial commission erroneously interpreted the law, if the commission's award would have been correct had the law been properly interpreted, that award will be sustained. *Univ. of Colo. Med. Center v. Indus. Comm'n*, 622 P.2d 596 (Colo. App. 1980).

**A supplier is not a subcontractor within meaning of this section.** While statutory employer provisions have been liberally construed by the courts, it is not every relationship that constitutes a contract within the purview of the act. Thus, the term "subcontractor" is not intended to include suppliers of goods and materials. This construction rests not only upon the legal distinction between a "subcontractor" and a "supplier", but also upon recognition that if this section were applied to ordinary sales of merchandise, business dealings would be seriously hampered. *Doyle v. Missouri Valley Contractors, Inc.*, 288 F. Supp. 121 (D. Colo. 1968).

**Lessor is liable irrespective of the number of men employed.** The liability of the lessor of a business, under the workmen's compensation act, is fixed by this section, irrespective of the number of men employed. *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925).

**Likewise, a person operating or engaged in a business, who contracts out a part or all of the work to another contractor or subcontractor, is an employer regardless of the number of employees engaged in the work.** *Snyder v. Indus. Comm'n*, 138 Colo. 523, 335 P.2d 543 (1959).

**A person need not be engaged in a business in order to be considered an employer under the Workers' Compensation Act.** *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Without control one is not a statutory employer.** An owner who leases equipment to a corporation for use in the corporation's business, and who has no control or interest in such business or in its operation, is not an employer within the meaning of this section. *Flake Motors*

*v. Huskins*, 128 Colo. 414, 262 P.2d 736 (1953); *Indus. Comm'n v. Vancil*, 133 Colo. 238, 293 P.2d 641 (1956); *White v. Indus. Comm'n*, 140 Colo. 11, 342 P.2d 688 (1959).

**But where the claimant and the equipment are admittedly under the exclusive control, and subject at all times to the exclusive direction of a company when claimant begins an interstate journey in consummation of the business objectives of the company, he becomes a special employee of that company so far as liability for payment of workmen's compensation is concerned.** *Am. Red Ball Transit Co. v. Indus. Comm'n*, 145 Colo. 509, 359 P.2d 1018 (1961).

**Statutory employment relationship is not predicated on a finding of employer control.** Rather, the alleged statutory employer's control over the employee is but one method of demonstrating the importance of the contracted services to the alleged employer. *Virginians Heritage Square Co. v. Smith*, 808 P.2d 366 (Colo. App. 1991); *Finlay v. Storage Tech. Corp.*, 733 P.2d 322 (Colo. App. 1986), *aff'd*, 764 P.2d 62 (Colo. 1988).

In contrast to the borrowed employee relationship, the statutory employment relationship does not rest upon a finding of employer control. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Test for statutory employer.** Company is a statutory employer if it engages in contract work when: (1) The work contracted out is a part of the normal business of the company contracting out such business and (2) the work contracted out is business which the company would ordinarily accomplish with its own employees. *Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379 (Colo. App. 1983).

**For purposes of deciding whether company qualifies as "statutory employer" of independent contractor's employees, work that company contracts out may constitute part of its regular business operation, even though it does not contribute directly to particular business in which company is engaged.** *Finlay v. Storage Tech. Corp.*, 733 P.2d 322 (Colo. App. 1986), *aff'd*, 764 P.2d 62 (Colo. 1988); *Humphrey v. Whole Foods Mkt. Rocky Mtn.*, 250 P.3d 706 (Colo. App. 2010).

And fact that work is always performed by independent contractor is not material in deciding whether work is part of contracting party's regular business operation under workers' compensation statute. *Finlay v. Storage Tech. Corp.*, 733 P.2d 322 (Colo. App. 1986), *aff'd*, 764 P.2d 62 (Colo. 1988).

One can be a statutory employer and liable for benefits under this section even if the work contracted out is casual and not related to the business or profession of the property owner. *O'Neill v. Indus. Claim Appeals Office*, 778 P.2d 295 (Colo. App. 1989).



**Regular business is defined by its total business operation** considering elements of routineness, regularity, and importance of contracted service to the employer. *Finlay v. Storage Tech. Corp.*, 764 P.2d 62 (Colo. 1988); *Porta-Pacific v. Smithers*, 781 P.2d 147 (Colo. App. 1989); *Littlefield v. Mobil Exploration & Producing, North Am., Inc.*, 988 F. Supp. 1403 (D. Utah 1996); *Rowan v. Vail Holdings, Inc.*, 31 F. Supp.2d 889 (D. Colo. 1998).

**Thus, this section by definition extends the concepts of employer and employee** far beyond the meanings of these terms at common law. By such extension there have been introduced into the nomenclature of the law on master and servant the terms statutory employer and statutory employee. *Snyder v. Indus. Comm'n*, 138 Colo. 523, 335 P.2d 543 (1959); *Morales v. Indus. Comm'n*, 41 Colo. App. 180, 584 P.2d 1229 (1978), rev'd on other grounds, 197 Colo. 523, 595 P.2d 233 (1979).

**And to bring this section into application the test is whether the subcontracted work is part of the regular business of the constructive employer** as the statute covers all situations in which the subcontracted work is such part of his regular business operation as the statutory employer ordinarily would accomplish with his own employees. *Pioneer Constr. Co. v. Davis*, 152 Colo. 121, 381 P.2d 22 (1963); *Gardner Motor Co. v. Feistel*, 160 Colo. 135, 414 P.2d 915 (1966); *San Isabel Elec. Ass'n v. Bramer*, 31 Colo. App. 134, 500 P.2d 821 (1972); *Posey v. Intermountain Rural Elec. Ass'n*, 41 Colo. App. 7, 583 P.2d 303 (1978).

**Condominium owner was a statutory employer** of house cleaner hired by maintenance company where owner, although using condominium unit as a second residence, was also in the regular business of renting it out. *Thornbury v. Allen*, 39 P.3d 1195 (Colo. App. 2001).

**Alleged statutory employer was exempt from operation of this section** where its primary business was to lease property for investment purposes. The fact that the lease contained provisions specifically applicable to business of lessee was not sufficient to show that lessor was involved in lessee's business. *Virginians Heritage Square Co. v. Smith*, 808 P.2d 366 (Colo. App. 1991).

**General contractor remains statutory employer of subcontractor's employee** and is entitled to a corresponding immunity from suit, despite the fact that the subcontractor is an independent contractor of the general contractor. The exception stated in subsection (1)(a) (now subsection (3)) of this section applies only to individuals working as independent contractors and to individual partners, members, corporate officers, and sole proprietors who have waived coverage under the workers' compensation act. *Frank M. Hall & Co. v. Newsom*, 125 P.3d 444 (Colo. 2005) (decided prior to the 2004 amend-

ment to subsection (1)(a) and adoption of subsection (1)(a.5)).

**Employer's past practices are relevant in determining whether an employer is a statutory or constructive employer.** *San Isabel Elec. Ass'n v. Bramer*, 182 Colo. 15, 510 P.2d 438 (1973); *Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379 (Colo. App. 1983).

**Trucking company by statute construed to be employer.** Where the work contracted out by trucking company was part of its regular business operation that ordinarily would have been accomplished by its own employees, under such circumstances, trucking company is by statute construed to be an employer. *Archer Freight Lines v. Horn Transp., Inc.*, 32 Colo. App. 412, 514 P.2d 330 (1973).

**Governmental entity cannot be a constructive employer** pursuant to subsection (1). *Antal v. Delta County Mosquito Control Dist. No. 1*, 644 P.2d 87 (Colo. App. 1982).

**Parent corporation, sued by employee of its wholly-owned subsidiary, is not an "employer"** entitled to immunity from tort liability under the workmen's compensation act. *Peterson v. Trailways, Inc.*, 555 F. Supp. 827 (D. Colo. 1983).

**Parent company was a statutory employer** where court found an implied contract existed between parent and subsidiary in which there was a mutuality of obligation. Therefore, parent company was immune from suit pursuant to subsection (1)(a). *Rowan v. Vail Holdings, Inc.*, 31 F. Supp.2d 889 (D. Colo. 1998).

**This section is not intended to apply to employers otherwise exempted.** *Hefley v. Morales*, 197 Colo. 523, 595 P.2d 233 (1979).

**Whether a person or entity has the status of statutory employer is generally a question of fact.** *Thornbury v. Allen*, 991 P.2d 335 (Colo. App. 1999); *Humphrey v. Whole Foods Mkt. Rocky Mtn.*, 250 P.3d 706 (Colo. App. 2010).

**However, where the facts are undisputed, the trial court's determination of statutory employment status drawn from those facts is a question of law** that is reviewed de novo. *Newsom v. Frank M. Hall & Co.*, 101 P.3d 1107 (Colo. App. 2004), rev'd on other grounds, 125 P.3d 444 (Colo. 2005); *Humphrey v. Whole Foods Mkt. Rocky Mtn.*, 250 P.3d 706 (Colo. App. 2010).

**Type of employee deemed question of law.** Where the facts are undisputed, the question of whether an individual is an employee, as defined by § 8-41-106, or a constructive employee, to whom work has been contracted out as defined by subsection (1) of this section, is a question of law, not a question of fact. *Univ. of Colo. Med. Center v. Indus. Comm'n*, 622 P.2d 596 (Colo. App. 1980).

**"Cost of such insurance" recoverable by statutory employer is actual cost**, where general contractor seeks reimbursement from unin-

sured subcontractor under subsection (1)(b). This provision should not be construed to encourage subcontractors to ignore their primary responsibility for insuring their own employees, as by allowing the statutory employer to recover only the hypothetical cost of insuring the one employee of the subcontractor that happened to be injured under a "guaranteed cost" type of policy. *Winer's Pumping Units v. Emerald Gas Operating Co.*, 936 P.2d 627 (Colo. App. 1997).

**The Workers' Compensation Act excepts from coverage employers of persons engaged in domestic or other work "about a private home" and excepts from employer status "the owner of a private home who contracts out any work done to or about said home."** These exceptions are not intended to abrogate the borrowed servant doctrine in the case of work performed at a private home, except in the limited situations in which the domestic employment is not on a full-time basis. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Dispositive considerations as to whether construction constitutes work "to or about" a home** are the location of the improvement and the purpose for which it is to be used. *O'Neill v. Indus. Claim Appeals Office*, 778 P.2d 295 (Colo. App. 1989).

**The Workers' Compensation Act was intended to apply to claimant who was hired to perform domestic services on a full-time basis**, when employer compensated dual employer for claimant's services, and dual employer maintained workers' compensation coverage on claimant's behalf. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**Proper characterization of employment relationship depends upon facts determined by commission.** The determination of the proper characterization of the employment relationship depends upon the facts in each case. This determination must properly be made by the commission rather than the court, even though the facts are largely undisputed, because this matter is not within the court's scope of review. *Schultz v. Indus. Comm'n*, 34 Colo. App. 122, 523 P.2d 164 (1974).

**Examination of nature and needs of employer's business determines nature of work contracted out.** The issue of whether work contracted out is part of the regular business of an employer is not affected by the fact that the subcontractor is an independent entity who has a business of his own; rather, the question is to be determined by examining the nature and needs of the employer's business. *Melody Homes, Inc. v. Lay*, 44 Colo. App. 49, 610 P.2d 1081 (1980).

**Lessees are liable for accidental injuries to their employees, regardless of the liability of the lessor.** *Index Mines Corp. v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (1927).

**This section cannot be limited to cases where lessees are themselves employees.** In-

*dex Mines Corp. v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (1927).

**This section extends common-law immunity** from suit by an injured employee to an agent of the claimant's statutory employer. *Posey v. Intermountain Rural Elec. Ass'n*, 41 Colo. App. 7, 583 P.2d 303 (1978).

**This section has no force if it applies only to the case of actual employer and employee.** Its force lies in the fact that it says that one shall "be construed to be" an employer who would not otherwise be such. *Index Mines Corp. v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (1927); *Zimmerman v. Indus. Comm'n*, 109 Colo. 533, 127 P.2d 878 (1942).

**This section pertains to the potential liability of a general contractor under the Act for injuries to a subcontractor's employee** when the general contractor has not borrowed the subcontractor's employee; the focus is whether the work contracted out is part of the employer's regular business operation. *Evans v. Webster*, 832 P.2d 951 (Colo. App. 1991).

**One who contracts out his work or any part of it to a subcontractor is himself an employer of the subcontractor and the subcontractor's employees.** *Herriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970).

**This statute makes an employer responsible for subcontractors and their employees** when the employer has contracted-out part of his regular business. *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

The general assembly, by extending workers' compensation liability to cover the injury or death of "contractors, or subcontractors", intended that workers' compensation be the remedy for all contractors "downstream" from the one contracting work, regardless of how many intermediate contractors there might be. *Buzard v. Super Walls, Inc.*, 681 P.2d 520 (Colo. 1984).

**And it provides that a subcontractor and his employees are deemed to be employees of the employer** who contracts for others to do his work. *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**The general assembly did not intend that a subcontractor should be free of responsibility** for his own negligence or the negligence of his employees. *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**And a subcontractor may be sued by an employee of a general contractor.** *Frohlick Crane Serv., Inc. v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973).

**Subcontractor's violation of contract could not prevent operation of section.** If a violation by a subcontractor of the terms of his contract could prevent the operation of the contracting-out statute, the statute's effectiveness in the statutory scheme would be lost. *San Isabel Elec. Ass'n v. Bramer*, 182 Colo. 15, 510 P.2d 438 (1973).



**This section is not limited to specific technical relationships.** It covers every business conducted by one through the activities of another under any kind of contract. *Rhodes v. Indus. Comm'n*, 99 Colo. 271, 61 P.2d 1035 (1936); *Cont'l Oil Co. v. Sirhall*, 122 Colo. 332, 222 P.2d 612 (1950).

**And one may be an employee by virtue of this section, when in fact he is not an employee by common-law definition.** *Cont'l Oil Co. v. Sirhall*, 122 Colo. 332, 222 P.2d 612 (1950).

**Where claimant worked full-time and there was no evidence that he was hired for the completion of single tasks, or on a per task basis, ALJ erred in concluding that he was not an actual employee.** The "relative nature of the work" test, if applied, would show that the claimant was an actual employee and not an independent contractor barred from making a claim by this section. *Stampados v. Colo. D & S Enters.*, 833 P.2d 815 (Colo. App. 1992).

**The "business" of a person is that calling which he pursues for livelihood or gain.** *Am. Radiator Co. v. Franzen*, 81 Colo. 161, 254 P. 160 (1927).

**Owners of leased property become "employers" of lessee within meaning of this section.** *Rogers v. Solem*, 103 Colo. 52, 83 P.2d 154 (1938).

**Application of subsection (1).** Subsection (1) has been construed to apply to businesses conducted through the activities of another under a contractual relationship. *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 552 P.2d 1029 (1976).

**A general contractor is only immune from tort liability under subsection (2) if it is a statutory employer under subsection (1)(a).** *Cowger v. Henderson Heavy Haul Trucking*, 179 P.3d 116 (Colo. App. 2007).

**Provisions apply on federal land.** State workmen's compensation provisions apply to land owned by the federal government. Hence, statutory employer immunity bars a suit for damages for personal injuries incurring in an accident at a nuclear weapons facility in Colorado, owned by the United States and operated by a private company. *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984).

**Employees of lessee.** Where an oil company owned a good many filling stations which it leased out for a term of one year and it was shown that all of the lessees sold only the lessor's products, by virtue of this section any employee of the lessee was an employee of the oil company as far as workmen's compensation is concerned. *Cont'l Oil Co. v. Sirhall*, 122 Colo. 332, 222 P.2d 612 (1950).

**Oil company was the constructive statutory employer of claimant who worked at a service**

station leased by the oil company to its dealer. *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 552 P.2d 1029 (1976).

**Officer rejecting coverage under the act pursuant to § 8-41-202 is subject to the cap on tort recovery found in this section.** *Kelly v. Mile Hi Single Ply, Inc.*, 890 P.2d 1161 (Colo. 1995).

**As a sole proprietor and a person excluded from the definition of employee, sole proprietor who chose not to purchase workers' compensation coverage is within the group of individuals generally subject to the statutory limit on damages pursuant to subsection (3).** *Pulsifer v. Pueblo Prof'l Contractors, Inc.*, 161 P.3d 656 (Colo. 2007).

**In reconciling § 8-41-103 and subsection (3), the court upheld trial court's reasoning that corporate officer who has elected to reject workers' compensation coverage may bring tort action only against employer.** Whether or not a corporate officer has elected to reject such coverage, employees covered by Workers' Compensation Act are still limited to their rights and remedies under the Act. *Kelly v. Mile Hi Single Ply, Inc.*, 873 P.2d 13 (Colo. App. 1993).

**Tort suit against borrowed employee barred where:** Special employer had the exclusive right to control the work of the borrowed employee operator pursuant to the lease agreement, at the time of the accident the borrowed employee operator was performing work for the special employer, the special employer was controlling the work, and the borrowed employee operator acquiesced to this special employment relationship. *Morphew v. Ridge Crane Serv., Inc.*, 902 P.2d 848 (Colo. App. 1995).

**The focus on "another not in the same employ" is on whether the services are being directly performed for another and not on whether one of the parties meets the statutory definition of employer;** therefore, an injured plaintiff is entitled to sue a defendant who is not a direct party to the agreement for services and is not subject to the statutory limitation on damages. If the parties are principle parties to the agreement for services, the limitation on damages does apply. *Pulsifer v. Pueblo Prof'l Contractors, Inc.*, 161 P.3d 656 (Colo. 2007).

**Independent contractor who elects not to obtain a policy of workers' compensation insurance covering himself is precluded from recovering more than the \$15,000 statutory limit in damages from an uninsured motorist policy of the employer of a tortfeasor who is in the same employ as the independent contractor.** *Cont'l Divide Ins. Co. v. Dickinson*, 179 P.3d 202 (Colo. App. 2007).

**Applied in** *Horn Transp., Inc. v. Claimants in re Death of Wards*, 40 Colo. App. 395, 576 P.2d 195 (1978); *Kalmon v. Indus. Comm'n*, 41 Colo. App. 259, 583 P.2d 946 (1978); *Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379

(Colo. App. 1983); *Buzard v. Super Walls, Inc.*, 681 P.2d 520 (Colo. 1984); *Wagner v. Coors Energy Co.*, 685 P.2d 1380 (Colo. App. 1984); *Black v. Cabot Petroleum Corp.*, 877 F.2d 822 (10th Cir. 1989).

## II. LIABILITY OF LESSOR OR EMPLOYER.

**Employee of a trust.** *Rhodes v. Indus. Comm'n*, 99 Colo. 271, 61 P.2d 1035 (1936), distinguishing *Flick v. Indus. Comm'n*, 78 Colo. 117, 239 P. 1022 (1925).

**General contractor liable for benefits to survivors of subcontractor's employee.** As a statutory employer, a general contractor is liable for workmen's compensation benefits to survivors of an employee of a subcontractor if the subcontractor fails to obtain workmen's compensation insurance coverage. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977).

**Security service employee entitled to benefits under section.** An employee of a security service, who is injured while patrolling a construction site which the security service has been hired to guard, is a statutory employee of the general contractor and, therefore, he is entitled to benefits under this section. *Melody Homes, Inc. v. Lay*, 44 Colo. App. 49, 610 P.2d 1081 (1980).

**Application of subsection (2).** Even though subcontractor had workmen's compensation coverage for his employees, the subcontractor himself was not covered by the policy and therefore was covered by the policy of the prime contractor as an employee thereof. *Oliver Const. Co., Inc. v. Indus. Comm'n*, 680 P.2d 1308 (Colo. App. 1983).

**This section confers an immunity on a general contractor or a real property owner in exchange for a duty which inheres to the benefit of a workman, so that, while a workman will be required to forego a negligence action against a general contractor or real property owner, he will be assured that regardless of fault, the more solvent general contractor or real property owner stands behind and secures the workmen's compensation liability of the workman's immediate employer.** *O'Quinn v. Walt Disney Prods., Inc.*, 177 Colo. 190, 493 P.2d 344 (1972).

**Where the survivors of an employee of a subcontractor received their workmen's compensation benefits from the subcontractor, this section provides that the survivors cannot maintain a negligence action against the general contractor or any of its principals.** *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977).

**Liability as employer of corporation leasing or contracting out.** This section provides

that any corporation engaged in any business by leasing, or contracting out any part or all of the work thereof to any contractor or subcontractor, shall be construed to be and be an employer as defined in articles 42 to 66 of this title, and shall be liable to pay compensation for injury or death resulting therefrom to the contractors and subcontractors and their employees. *Index Mines Corp. v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (1927); *Cont'l Oil Co. v. Sirhall*, 122 Colo. 332, 222 P.2d 612 (1950); *Indus. Comm'n v. Vancil*, 133 Colo. 238, 293 P.2d 641 (1956); *White v. Indus. Comm'n*, 140 Colo. 11, 342 P.2d 668 (1959); *Nicks v. Electron Corp.*, 29 Colo. App. 114, 478 P.2d 683 (1970); *San Isabel Elec. Ass'n v. Bramer*, 31 Colo. App. 134, 500 P.2d 821 (1972).

A lessor is liable as a statutory employer under this section when it is shown that the lessor operates, engages in, or conducts his business by leasing his property. *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 552 P.2d 1029 (1976).

**And single act of leasing constitutes "operating" or "conducting" business under this section.** *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925).

**Apparent corporate status of contractor not basis for estoppel defense of employer.** An employer who fails to obtain workmen's compensation coverage for a contractor who is not himself an "employer" as defined by § 8-41-105 (1)(b) cannot assert a defense of equitable estoppel based upon the contractor's alleged corporate status. *Canda v. Indus. Comm'n*, 44 Colo. App. 70, 607 P.2d 403 (1980).

**Company not a statutory employer.** Where a contract speaks in terms of an independent contractor and not of an employee; it has little to do with a company's business; it contemplates a single definite result without the company's having the slightest control as to the method or time of work; and it refers to no semblance of wages, the company is not construed to be a statutory employer. *London Guarantee & Accident Co. v. Indus. Comm'n*, 95 Colo. 306, 35 P.2d 1010 (1934).

**The test as to whether a lessor is liable is whether the subcontracted work is part of the regular business of the lessor.** *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 552 P.2d 1029 (1976).

**Principals engaged in a joint enterprise are jointly responsible under the workmen's compensation act.** *Snyder v. Indus. Comm'n*, 138 Colo. 523, 335 P.2d 543 (1959).

A joint venture falls within the meaning of the term "company" in this section. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed.2d 773 (1977).

**No comparative liability between subcontractor and contractor.** Although this section



gives the power to impose liability for the payment of compensation upon the original employer, who has become a subcontractor, and upon the contractor in the case of a compensable injury to an employee of the subcontractor, this section gives no authority to determine or fix a comparative degree of liability for the compensation as between the subcontractor employer and the contractor. *Sechler v. Pastore*, 103 Colo. 139, 84 P.2d 61 (1938).

**Party who contracts work away is construed to be the employer.** If the party to whom this statutory employer has contracted work out fails to secure workmen's compensation insurance, the statutory employer is liable to respond in damages to the injured employees of the other party. *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982).

**Employment of claimants by an uninsured contractor operated to impose liability for compensation** on the person contracting out the work of its business, and contractor was not liable for compensation. *Breckenridge Co. v. Swales Mgt. Corp.*, 33 Colo. App. 51, 517 P.2d 476 (1973), modified, 185 Colo. 160, 522 P.2d 737 (1974).

**Automobile manufacturer neither contractor nor statutory employer of dealer's employee.** *Bukowich v. Ford Motor Co.*, 99 Colo. 56, 59 P.2d 470 (1936).

**Unincorporated self-employed repairman.** Self-employed sheet metal and heating repairman, using the name "M. Kunz and Sons, Inc.", although he had not completed incorporation, is not an "employer" and not required to carry workmen's compensation insurance for himself. *Canda v. Indus. Comm'n*, 44 Colo. App. 70, 607 P.2d 403 (1980).

**Lessor is not liable where his lessee is an employer who has insured his liability under the act.** *Indus. Comm'n v. Bracken*, 83 Colo. 72, 262 P. 521 (1927).

**But lessor liable where lessee's insurance did not cover leased business.** A lessee who carried compensation insurance for a business separate and distinct from operation of a leased mine, which insurance did not cover the mining operations, had not insured and kept insured his liability for compensation as required by this section, the lessor was thus liable. *State Comp. Ins. Fund v. Batis*, 117 Colo. 1, 183 P.2d 891 (1947).

**And failure of lessee to carry out agreement to insure does not relieve the lessor from liability.** *Index Mines Corp. v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (1927); *Joe Dandy Mining Co. v. Indus. Comm'n*, 112 Colo. 241, 148 P.2d 817 (1944); *Chevron Oil Co. v. Indus. Comm'n*, 169 Colo. 336, 456 P.2d 735 (1969).

**Likewise where a subcontractor fails to keep his compensation insurance in force, the contractor was not released from its liability**

under the act, and said subcontractor and deceased, under this section, are both constructive employees of the contractor and covered by its insurance policy. *Hartford Accident & Indem. Co. v. Clifton*, 117 Colo. 547, 190 P.2d 909 (1948).

**Section does not apply to state board of land commissioners unless it elects to come under provisions of act.** Where the state board of land commissioners, in exercising its administrative functions, executes a lease of mineral lands under its supervision for mining purposes, it is not conducting a mining business by leasing as contemplated by this section, unless it elects to place itself within the provisions of the act. *Indus. Comm'n v. State Comp. Ins. Fund*, 94 Colo. 194, 29 P.2d 372 (1934).

**Lessors of coal mining property, operated by lessee, are employers within the meaning of this section** and liable for compensation to an employee of lessee injured on the property in the course of his employment. *McKune v. Indus. Comm'n*, 94 Colo. 523, 31 P.2d 322 (1934).

**Lessee who subleases construed as employer.** Where owner of coal lease subleases to a partnership and thereby the partnership conducts mining operations, the owner of the lease is a lessor and employer under this section and liable to the employees of the partnership. *Zimmerman v. Indus. Comm'n*, 109 Colo. 533, 127 P.2d 878 (1942).

**Failure of lessee to protect employees held to be a breach of the lease.** *Rocky Mt. Fuel Co. v. New Std. Coal Mining Co.*, 89 F.2d 147 (10th Cir. 1937).

**Owner of property liable as "employer" unless independent contractor carries insurance** covering employee. *Indus. Comm'n v. Int'l Mut. Liab. Ins. Co.*, 103 Colo. 419, 86 P.2d 970 (1939).

**Under previous section primary contractor was liable as third-party tortfeasor** even though subcontractor had workmen's compensation insurance. *Thomas v. Farnsworth Chambers Co.*, 286 F.2d 270 (10th Cir. 1960), rev'g 183 F. Supp. 764 (D. Colo. 1960).

**Common-law action barred now unless subcontractor not an employer or not insured.** While the definition of an employer found in § 8-48-101 adds a contractor-out to the definition of an employer in § 8-41-105, the language of the statute is clear to the effect that no common-law action under the act may be brought against a contractor-out by an injured employee of a subcontractor unless the subcontractor is either not an employer as defined by the act or has not insured his liability for compensation as required by the act. *Herriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970); *Nicks v. Electron Corp.*, 29 Colo. App. 114, 478 P.2d 683 (1970).

**But subcontractor not immune from action in tort for injury to employee of another**

**subcontractor.** Inasmuch as the statute does not impose any workmen's compensation liability on a subcontractor for injury to an employee of another subcontractor on the same job, the statute does not grant immunity to such a subcontractor for torts against employees of other subcontractors. *Krueger v. Merriman Elec.*, 29 Colo. App. 492, 488 P.2d 228 (1971).

**For right to third-party action denied only as against one contracting out.** The right to bring third-party actions, referred to in the statute as "actions under section 8-52-108", is denied only as against the person, engaged in or conducting any business by contracting out any part or all of the work thereof. The person thus protected from third-party liability is the person on whom statutory liability is imposed; i.e., the principal contractor. *Krueger v. Merriman Elec.*, 29 Colo. App. 492, 488 P.2d 228 (1971).

**Lessor is not liable for hospital bills contracted with strangers.** While under this section a lessor of property upon which business operations are conducted sustains the relationship of employer to the lessee thereof and his employees, the law does not extend its liability beyond that of paying compensation for accidental injury or death sustained in the course of employment, and the commission is without jurisdiction to order it to discharge medical and hospital bills contracted with strangers to the law, the parties and proceedings, the bills not being authorized by such lessor. *Rocky Mt. Fuel Co. v. Indus. Comm'n*, 105 Colo. 220, 96 P.2d 413 (1939). *Rocky Mt. Fuel Co. v. Indus. Comm'n*, 105 Colo. 226, 96 P.2d 416 (1939).

**Where a canning company, in order to obtain products for canning, enters into contracts with growers** giving the company an option to assist growers to produce, or to produce for the grower the crews, trucks, and other equipment proper for the expeditious harvesting and delivery of peas, and at company's option to pay for such labor, trucks and services and charge same against grower's account, and the company exercises such option by directing a grower's employee to gather peas for other contracting growers, the gathering of peas becomes "a part of the work thereof" and grower's employee is an employee of the company under this section. *Betz v. Indus. Comm'n*, 109 Colo. 385, 125 P.2d 958 (1942).

**Death of independent contractor.** A country club, whose organization was merely for the convenience and pleasure of its members, was held not to be liable for benefits payable under workmen's compensation for the death of a contractor who was accidentally electrocuted while constructing three manholes along the club sewer line, as all of the facts showed that decedent was an independent contractor. *Meyer v. Lakewood Country Club*, 122 Colo. 110, 220 P.2d 371 (1950).

**Interstate moving company liable for helper's compensation benefits.** Where interstate moving company leased truck from its New York intrastate agent and where truck driver, who was a driver for the agent, was directly supervised and controlled by the interstate company, the driver was an employee of the interstate company at the time of the injury to his helper while working in Colorado and thus, the interstate company was liable for the helper's workmen's compensation benefits. *Market v. Feuer Moving & Storage*, 33 Colo. App. 80, 515 P.2d 126 (1973).

**Subsection (6) creates a narrow exception to statutory employment status for independent transportation contractors who contract for a single delivery.** The exception does not apply to a transportation contractor who contracts for regular delivery of eight to twelve loads a day for six weeks. *Hurst Constr. Co. v. Ramey*, 821 P.2d 858 (Colo. App. 1991).

**Person cleaning windows for heating company held to be employee of window cleaning company.** A person accidentally injured while cleaning windows for a company engaged in manufacturing and selling heating plants and which employed a window cleaning company to clean its windows, held to be an employee of the window cleaning company by which he was regularly employed, and not of the heating company. *Am. Radiator Co. v. Frazen*, 81 Colo. 161, 254 P. 160 (1927).

**One engaged by a coal company to haul coal with his own truck at a fixed price per ton,** held, under the facts disclosed, to be an employer and not a contractor. *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925).

**The terms farming, ranching, or agricultural labor,** using their ordinary meanings, do not include construction of a building. *Sorensen v. Goldman*, 837 P.2d 266 (Colo. App. 1992).

**Contracting out for delivery of part of crop was a "farming operation"** within meaning of subsection (3). Therefore, the contractor, not the farmer, was primarily responsible for workers' compensation coverage. *State Comp. Ins. Fund v. Indus. Comm'n*, 713 P.2d 405 (Colo. App. 1985).

**Owner of land agreeing that another might enter and operate a gravel pit on a royalty basis is not liable as a lessor.** Where the owner of land agreed that another might enter thereon and operate a gravel pit on a royalty basis, it is held that the industrial commission was not justified in finding him liable for the payment of compensation as a lessor, under this section. *Flick v. Indus. Comm'n*, 78 Colo. 117, 239 P. 1022 (1925).

**Assignees of mining property contracting with original lessee held to be contracting out part of work.** Assignees of mining lease with option to purchase, who contracted with the original lessee for mining work on the property,



held to have been engaged in the operation of a mining business by contracting out part of the work, under this section, and liable for compensation for the accidental death of their assignor contractor occurring while he was engaged in such work. *Devereux v. Indus. Comm'n*, 87 Colo. 594, 290 P. 287 (1930).

**And fact that assignees with option to purchase did not own property held not to affect their liability.** The fact that assignees of a mining lease with option to purchase did not own the property and had not perfected any interest therein when their assignor was killed while doing work for them under contract on the property, held not to affect their liability for his death under the workmen's compensation act. *Devereux v. Indus. Comm'n*, 87 Colo. 594, 290 P. 287 (1930).

**Owner of mining property liable for injuries to employee of contractor constructing an upraise on mining property.** An owner who contracted with another to construct an upraise on his mining property, held to be an employer engaged in the business of mining and liable for compensation for injuries received by an em-

ployee of the contractor received while engaged in the work, under this section. *Ontario Mining Co. v. Indus. Comm'n*, 86 Colo. 206, 280 P. 483 (1929).

**A person employed by an independent contractor to drive a truck in delivering coal,** held, under the provisions of this section, to be an employee of the company under which the contractor was doing business. *Indus. Comm'n v. Cont'l Inv. Co.*, 78 Colo. 399, 242 P. 49 (1925).

**Claim of regular employee of university's medical center controlled by § 8-41-106 (1)(a)(I).** Where nurse claiming benefits was a regular employee of the university of Colorado medical center, § 8-41-106 (1)(a)(I) controlled the award of benefits, not subsection (1) of this section. *Univ. of Colo. Med. Center v. Indus. Comm'n*, 622 P.2d 596 (Colo. App. 1980).

**Injury to employee of company contracting with municipality.** *State Comp. Ins. Fund v. Alishio*, 125 Colo. 242, 250 P.2d 1015 (1952).

**Applied in** *Pittman Motors, Inc. v. Indus. Comm'n*, 156 Colo. 218, 399 P.2d 784 (1964).

**8-41-402. Repairs to real property - exception for liability of occupant of residential real property.** (1) Every person, company, or corporation owning any real property or improvements thereon and contracting out any work done on and to said property to any contractor, subcontractor, or person who hires or uses employees in the doing of such work shall be deemed to be an employer under the terms of articles 40 to 47 of this title. Every such contractor, subcontractor, or person, as well as such contractor's, subcontractor's, and person's employees, shall be deemed to be an employee, and such employer shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said contractor, subcontractor, or person and said employees or employees' dependents and, before commencing said work, shall insure and keep insured all liability as provided in said articles. Such employer shall be entitled to recover the cost of such insurance from said contractor, subcontractor, or person and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due to said contractor, subcontractor, or person. Articles 40 to 47 of this title shall not apply to the owner or occupant, or both, of residential real property which meets the definition of a "qualified residence" under section 163 (h) (4) (A) of the federal "Internal Revenue Code of 1986", as amended, who contracts out any work done to the property, unless the person performing the work is otherwise an employee of the owner or occupant, or both, of the property.

(2) If said contractor, subcontractor, or person doing or undertaking to do any work for an owner of property, as provided in subsection (1) of this section, is also an employer in the doing of such work and, before commencing such work, insures and keeps insured all liability for compensation as provided in articles 40 to 47 of this title, neither said contractor, subcontractor, or person nor any employees or insurers thereof shall have any right of contribution or action of any kind, including actions under section 8-41-203, against the person, company, or corporation owning real property and improvements thereon which contracts out work done on said property, or against its employees, servants, or agents.

(3) (Deleted by amendment, L. 91, p. 1295, § 9, effective July 1, 1991.)

**Source:** L. 90: Entire article R&RE, p. 483, § 1, effective July 1. L. 91: Entire section amended, p. 1295, § 9, effective July 1.

**Editor's note:** This section is similar to former § 8-48-102 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-41-402 is similar to § 8-48-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**There is no reason that compensation coverage need be linked to common-law definitions of employment in order to be constitutional.** *Lancaster v. C.F. & I. Steel Corp.*, 190 Colo. 463, 548 P.2d 914 (1976).

**Section held to comport with constitutional provisions on due process, equal protection, and special legislation.** *Flick v. Indus. Comm'n*, 78 Colo. 117, 239 P. 1022 (1925); *O'Quinn v. Walt Disney Prods., Inc.*, 177 Colo. 190, 493 P.2d 344 (1972).

**The industrial claim appeals panel's interpretation of subsection (1) does not violate equal protection requirements.** The owners of other real property are not similarly situated with owners or occupants of qualified residential real property. The exemption is compatible with the normal expectations of property owners who contract with craftsmen and artisans for work on residential properties. *Brown v. Muto*, 943 P.2d 38 (Colo. App. 1996).

**The 1991 amendment to subsection (1) did not violate equal protection** by distinguishing between residential properties with encumbrances and those that are free from any encumbrances; the amendment did not draw such distinction. *Colo. AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

**The intent of the workmen's compensation law** was to create special categories of employees and employers to provide protection for employees and to compel employers to maintain insurance coverage. *Lancaster v. C.F. & I. Steel Corp.*, 190 Colo. 463, 548 P.2d 914 (1976).

**Lack of ownership would, of course, preclude the applicability of this section.** *Lancaster v. C.F. & I. Steel Corp.*, 190 Colo. 463, 548 P.2d 914 (1976).

**This section confers an immunity on a real property owner** in exchange for a duty which inheres to the benefit of a workman, so that, while a workman will be required to forego a negligence action against a real property owner, he will be assured that regardless of fault, the more solvent real property owner stands behind and secures the workmen's compensation liability of the workman's immediate employer. *O'Quinn v. Walt Disney Prods., Inc.*, 177 Colo. 190, 493 P.2d 344 (1972).

**And this section was intended to cover** a case where the landowners owned the real property and the improvements thereon, and contracted out work on and to the property to a contractor who hired at least four employees on

this job, where the claimant was a regular employee. *Stewart v. Indus. Comm'n*, 163 Colo. 12, 428 P.2d 367 (1967).

**Enhancement of real property's capital value is a relevant but not essential factor in determining whether an object is an improvement.** The intention of the owner of the object located on the real property or the intention of the real property owner may be considered in determining whether the object constituted an improvement to real property within the meaning of subsection (1). *Barron v. Kerr-McGee Rocky Mtn. Corp.*, 181 P.3d 348 (Colo. App. 2007).

The following three factors made the installation an improvement: (1) The owner intended the object to be an improvement; (2) the object enhanced the utility of the property; and (3) the object was permanently affixed to the property. *Barron v. Kerr-McGee Rocky Mtn. Corp.*, 181 P.3d 348 (Colo. App. 2007).

**To establish whether a workers' compensation award was the exclusive remedy available to a contract house cleaner who was injured while cleaning a leased condominium,** case had to be remanded to determine whether the condominium was a "qualified residence", and, if so, whether the house cleaner was "otherwise an employee" of the condominium owner. *Thornbury v. Allen*, 991 P.2d 335 (Colo. App. 1999).

House cleaner was "otherwise an employee" of condominium owner where owner qualified as a statutory employer under § 8-41-401(1)(a). *Thornbury v. Allen*, 39 P.3d 1195 (Colo. App. 2001).

**Legislative purpose of the 1963 amendment to this section, which added subsection (2),** was to protect all landowners from all common-law liability if the landowner requires his contractor to carry approved workmen's compensation insurance. *City of Colo. Springs v. Ellsworth*, 187 Colo. 193, 529 P.2d 646 (1974).

**Government entity cannot be an employer** under subsection (1). *Univ. of Colo. v. Graham*, 807 P.2d 1204 (Colo. App. 1990).

**General assembly did not exempt municipal corporations from coverage under subsection (2).** *City of Colo. Springs v. Ellsworth*, 187 Colo. 193, 529 P.2d 646 (1974).

**But cities protected if employee covered in primary employment.** Cities that are landowners are among those protected from claims for either compensation or for negligence if the employee is covered by workmen's compensation in his primary employment. *City of Colo. Springs v. Ellsworth*, 187 Colo. 193, 529 P.2d 646 (1974).

**No competency test to be contractor.** Subsection (2) requires no minimal competency test for designation as a "contractor, subcontractor,



or other person". *Schwartz v. Tom Brown, Inc.*, 649 P.2d 733 (Colo. App. 1982).

**Pleadings must allege that company "contracted out".** Although alleged to have been a co-owner of the land on which the accident occurred, if it does not appear from the pleadings that the company "contracted out" the work to the employer, it is not possible to bring the company within the terms of this section. *Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed.2d 706 (1969).

**Where work not "contracted out".** Under the latter part of this section if the owner is contracting out a job, he protects himself against liability for anyone injured on the job by seeing that the contractor with whom he is dealing provides or carries a policy on all workmen on the job contracted for, but this part of the section does not apply where the work was not "contracted out" to claimant even though claimant is by business or trade a contractor and when doing contract work had his men insured at the time of the accident involved. *Indus. Comm'n v. State Comp. Ins. Fund*, 122 Colo. 128, 220 P.2d 721 (1950).

**Term "private home" in subsection (1) means a structure that is inhabited or capable of being inhabited,** not substantially uncompleted structures. *Betts v. Kempers*, 745 P.2d 283 (Colo. App. 1987).

**"Private home" under subsection (1) neither requires that structure be homeowner's primary residence, nor that homeowner be a citizen of or domiciled in locale of property, nor a minimum usage time.** Homeowners were exempted from statutory employer status even though homeowners primarily resided in Mexico, were Mexican citizens, and used property less than six months during the year. *English v. Indus. Claim Appeals Office*, 764 P.2d 386 (Colo. App. 1988).

**A residence may be a "qualified residence" entitling the owner or occupant to an exception from statutory employment status under subsection (1) even if the owner or occupant is not claiming an interest deduction under I.R.C. § 163(h) at the time of the injury or hearing on compensability.** *Organ v. Jorgensen*, 888 P.2d 336 (Colo. App. 1994).

**Definition of "qualified residence" under I.R.C. § 163(h) includes a second residence used by the taxpayer in accordance with related I.R.C. provisions.** *Thornbury v. Allen*, 39 P.3d 1195 (Colo. App. 2001).

**Respondent met his burden of proof that the barn on which claimant was injured was a "qualified residence".** The administrative law judge's determination is supported by testimony as to the planned use of the barn and the ultimate construction of a primary or secondary residence on the parcel. *Brown v. Muto*, 943 P.2d 38 (Colo. App. 1996).

**The qualified residential property exemption applies to actual as well as statutory employment relationships.** The exemption applies to actual as well as statutory employees of the owner or occupant of qualified residential real property unless the person is otherwise an employee of the owner or occupant. *Brown v. Muto*, 943 P.2d 38 (Colo. App. 1996).

**The 1991 amendment to subsection (1) replaced the term "private home" with the phrase "owner or occupant, or both of residential real property which meets the definition of a "qualified residence" under the Internal Revenue Code.** Accordingly, home owners' residence under construction at the time of claimant's injury constituted a "qualified residence" under the Internal Revenue Code and the owners were exempt from statutory liability under the Workers' Compensation Act, regardless of the fact that they did not actually claim any interest on their tax return. *Organ v. Jorgensen*, 888 P.2d 336 (Colo. App. 1994).

**Joint venturers may be held liable for claims arising under the workmen's compensation statutes where a joint activity results in injury.** *Breckenridge Co. v. Swales Mgt. Corp.*, 185 Colo. 160, 522 P.2d 737 (1974).

**Where the record indicates that the parties anticipated only the regular presence of the claimant and one assistant for the duration of the project, and assuming that one could include the respondent and a nine-year-old boy, the fact that on one day four people actually worked does not bring the employment within this section.** *Schultz v. Indus. Comm'n*, 34 Colo. App. 122, 523 P.2d 164 (1974).

**Machinery operator rented to contractor is employee of company.** Where a company contracts for work to be done on its premises and rents machinery to a contractor together with its operator, the operator is the employee of the company and not of the contractor. *Great W. Sugar Co. v. Erbes*, 148 Colo. 566, 367 P.2d 329 (1961).

**But where a hotel company hired a plasterer to do remodeling and there was no specific time mentioned as to how long he would be hired nor any specific amount of plastering that was to be done and the company furnished all the materials to be used on the job, the plasterer was an employee of the hotel company even though he was an insured employer himself.** *Indus. Comm'n v. State Comp. Ins. Fund*, 122 Colo. 128, 220 P.2d 721 (1950).

**Owner's liability to contractor working on job.** The provision of this section that the building owner "shall keep insured his liability" means a liability not only to the employees of a contractor, but also to the contractor himself if working on the job. *Indus. Comm'n v. State Comp. Ins. Fund*, 122 Colo. 128, 220 P.2d 721 (1950).

**Owner immune if contractor insured.** An owner of real property or improvements thereon who contracts out work to be performed thereon is immune from suit by the injured employees of the contractor, so long as the contractor is properly insured under this act. *Wagner v. Coors Energy Co.*, 685 P.2d 1380 (Colo. App. 1984).

**The landowner may protect himself in such situations** by requiring the contractor to secure and maintain proper insurance coverage against such accidents as the one in the case at bar, or secure insurance coverage himself and deduct the premiums from the contract price. *Stewart v. Indus. Comm'n*, 163 Colo. 12, 428 P.2d 367 (1967).

**But if the contractor or subcontractor is unable to meet his responsibilities under the act, then those responsibilities devolve upon the owner.** *Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 444, P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed.2d 706 (1969); *Nicks v. Electron Corp.*, 29 Colo. 114, 478 P.2d 683 (1970).

**However, where employer insures his liability to employees it is held that insurer's liability does not extend to employees of subcontractor.** Where an employer of men lets out part of his work to contractors and insured his liability to employees, the insurer's liability extends only to employees of the employer — its policy so providing — and not to those of the contractors. *United States Fid. & Guar. Co. v. Turkey Creek Stone, Clay & Gypsum Co.*, 75 Colo. 611, 227 P. 569 (1924).

**Under previous section, landowner was not immune from common-law liability where contractor was insured.** *Great W. Sugar Co. v. Erbes*, 148 Colo. 566, 367 P.2d 329 (1961).

**But now, under this section, owner is free of tort liability if contractor is insured.** If the

contractor undertaking to do such work "shall before commencing such work insure and keep insured his liability for compensation", the owner of the property shall be free of responsibility to the injured workman, including tort liability. *Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed.2d 706 (1969); *Nicks v. Electron Corp.*, 29 Colo. App. 114, 478 P.2d 683 (1970); *Varela v. Colo. Milling & Elevator Co.*, 31 Colo. App. 49, 499 P.2d 1206 (1972).

**In order to be an employer under this statute**, the owner must have contracted with a contractor, subcontractor, or person who, in turn, must hire or use employee in the doing of the contracted work. *Moe v. Indus. Comm'n*, 734 P.2d 661 (Colo. App. 1986); *English v. Indus. Claim Appeals Office*, 764 P.2d 386 (Colo. App. 1988).

**Architects were immune under subsection (2)** where contract provided that architects were "representative(s) of the Owner", creating an agency relationship. *Halter v. Waco Scaffolding & Equip. Co.*, 797 P.2d 790 (Colo. App. 1990).

**Calculation of \$2,000 threshold limit in subsection (3).** The \$2,000 threshold limit of subsection (3) is to be calculated on all property owned by the owner, irrespective of its location, in the pro rata share of ownership interest. *Porta-Pacific v. Smithers*, 781 P.2d 147 (Colo. App. 1989).

**Applied in** *Lackey v. Indus. Comm'n*, 80 Colo. 112, 249 P. 662 (1926); *Index Mines Corp. v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (1927); *Ontario Mining Co. v. Indus. Comm'n*, 86 Colo. 206, 280 P. 483 (1929); *Alson Inv. Co. v. Youngquist*, 107 Colo. 1, 108 P.2d 228 (1940); *State Comp. Ins. Fund v. Batis*, 117 Colo. 1, 183 P.2d 891 (1947).

**8-41-403. Exemption of certain lessors of real property.** (1) The provisions of this part 4 shall not apply to any lessor or sublessor of real property who rents or leases real property to any lessee or sublessee for the purpose of conducting the business of such lessee or sublessee, whether as a franchise holder, independent agent, or consignee or in any other separate capacity and whether or not such person is an employer, as defined in section 8-40-203, but in no event where such lessee or sublessee is an employee, as defined in section 8-40-202.

(2) No such lessee or sublessee, or any employee or insurer thereof, shall have any right of contribution from or action against such lessor or sublessor under articles 40 to 47 of this title.

(3) The provisions of this part 4 shall not apply to any lessor or sublessor of real property who leases or rents real property to any lessee or sublessee for the purpose of conducting any agricultural production business of such lessee or sublessee, and no such lessee or sublessee, or any employee or insurer thereof, shall have any right of contribution from or action against such lessor or sublessor under articles 40 to 47 of this title.

**Source:** L. 90: Entire article R&RE, p. 483, § 1, effective July 1. L. 93: (1) and (3) amended, p. 1771, § 22, effective June 6.

**Editor's note:** This section is similar to former § 8-48-103 as it existed prior to 1990.



## ANNOTATION

**Annotator's note.** Since § 8-41-403 is similar to § 8-48-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Subsection (1) continues to constitute an exception only to the concept of statutory employment;** it is inapplicable in those instances in which the evidence establishes an actual employment relationship between the parties. *Bailey v. C.P. Const., Inc.*, 837 P.2d 277 (Colo. App. 1992).

**Application of the statute hinges upon whether the property upon which the injury occurred is under lease to a lessee who conducts its business upon the property.** *Bain v. Doyle*, 807 P.2d 1225 (Colo. App. 1990).

**What lessors exempt.** This section provides that those lessors who rent property which is

used for the purpose of conducting the business of the lessee are exempt from the liability imposed by § 8-48-101. *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 552 P.2d 1029 (1976).

**The test as to whether a lessor is liable** is whether the subcontracted work is part of the regular business of the lessor. *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 552 P.2d 1029 (1976).

**Oil company was the constructive statutory employer** of claimant who worked at a service station leased by the oil company to its dealer. *Standard Oil Co. v. Indus. Comm'n*, 38 Colo. App. 39, 552 P.2d 1029 (1976).

**Applied in** *Rian v. Imperial Mun. Serv. Group, Inc.*, 768 P.2d 1260 (Colo. App. 1988); *Virginians Heritage Square Co. v. Smith*, 808 P.2d 366 (Colo. App. 1991).

**8-41-404. Construction work - proof of coverage required - violation - penalty - definitions.** (1) (a) Except as otherwise provided in subsection (4) of this section, every person performing construction work on a construction site shall be covered by workers' compensation insurance, and a person who contracts for the performance of construction work on a construction site shall either provide, pursuant to articles 40 to 47 of this title, workers' compensation coverage for, or require proof of workers' compensation coverage from, every person with whom he or she has a direct contract to perform construction work on the construction site.

(b) A site owner, general contractor, or other person who is not a direct party to a contract for construction work shall not be held liable under subsection (3) of this section solely as a result of the person's ownership interest or general supervisory role in a construction project.

(c) Any person who contracts for the performance of construction work on a construction site and who exercises due diligence by either providing workers' compensation coverage as required by this section or requiring proof of workers' compensation coverage as required by this section from every person with whom he or she has a direct contract to perform construction work on the construction site shall not be liable under subsection (3) of this section.

(2) If the parties to a contract that includes construction work agree that part of the contract price shall be withheld to cover workers' compensation premiums for coverage required under this section, the premiums shall be calculated based only on that portion of the contract price that represents the labor portion of the contract.

(3) A violation of subsection (1) of this section is punishable by an administrative fine imposed pursuant to section 8-43-409 (1) (b). The division shall transmit revenues collected through the imposition of fines pursuant to this section to the state treasurer, who shall credit them to the workers' compensation cash fund created in section 8-44-112 (7). Such revenues shall be appropriated to the division for the purpose of enforcing this section.

(4) (a) This section shall not apply to:

(I) An owner or occupant, or both, of residential real property that meets the definition of a "qualified residence" under section 163 (h) (4) (A) of the federal "Internal Revenue Code of 1986", as amended, who contracts out any work done to the real property, unless the person performing the work is otherwise an employee of the owner or occupant, or both, of the real property;

(II) An owner or occupant of real property who hires a person or persons specifically to do routine repair and maintenance on the real property of such owner or occupant;

(III) An independent contractor, who is a natural person, who has formed a corporation pursuant to section 7-102-103, C.R.S., or a limited liability company pursuant to section 7-80-203, C.R.S., and who has rejected workers' compensation coverage pursuant to section 8-41-202;

(IV) Corporate officers and members of a limited liability company who have rejected workers' compensation coverage pursuant to section 8-41-202;

(V) A partner in a partnership who has filed a certificate of limited partnership pursuant to section 7-62-201, C.R.S., a partnership registration statement pursuant to section 7-60-144 or 7-64-1002, C.R.S., or a statement of trade name pursuant to section 7-71-103, C.R.S., and has filed with the division a form, approved by the director, rejecting workers' compensation; or

(VI) A sole proprietor who has filed a statement of trade name pursuant to section 7-71-103, C.R.S., and has filed with the division a form, approved by the director, rejecting workers' compensation.

(b) Nothing in this section shall be construed to limit the responsibility of corporations, limited liability companies, partnerships, or sole proprietorships to provide coverage for their employees as required under articles 40 to 47 of this title.

(5) As used in this section:

(a) "Construction site" means a location where a structure that is attached or will be attached to real property is constructed, altered, or remodeled.

(b) "Construction work" includes all or any part of the construction, alteration, or remodeling of a structure. "Construction work" does not include surveying, engineering, examination, or inspection of a construction site or the delivery of materials to a construction site.

(c) "Proof of workers' compensation coverage" includes a certificate or other written confirmation, issued by the insurer or authorized agent of the insurer, of the existence of workers' compensation coverage in force during the period of the performance of construction work on the construction site.

**Source: L. 2007:** Entire section added, p. 2070, § 1, effective June 1.

**Cross references:** For the federal "Internal Revenue Code of 1986", see title 26 of the United States Code.

## PART 5

### DEPENDENCY

**8-41-501. Persons presumed wholly dependent.** (1) For the purposes of articles 40 to 47 of this title, the following described persons shall be presumed to be wholly dependent (however, such presumption may be rebutted by competent evidence):

(a) Widow or widower, unless it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support;

(a.5) A person who is designated in a designated beneficiary agreement for purposes of receiving workers' compensation benefits in accordance with the provisions of article 22 of title 15, C.R.S., unless it is shown that the designated beneficiary was voluntarily separated and living apart from the other designated beneficiary at the time of the injury or death or was not dependent in whole or in part on the deceased for support;

(b) Minor children of the deceased under the age of eighteen years, including posthumous or legally adopted children;

(c) Minor children of the deceased who are eighteen years or over and under the age of twenty-one years if it is shown that:

(I) At the time of the decedent's death they were actually dependent upon the deceased for support; and

(II) Either at the time of the decedent's death or at the time they attained the age of eighteen years they were engaged in courses of study as full-time students at any accredited



school. The period of presumed dependency of such persons shall continue until they attain the age of twenty-one years or until they cease to be engaged in courses of study as full-time students at an accredited school, whichever occurs first.

**Source:** **L. 90:** Entire article R&RE, p. 484, § 1, effective July 1. **L. 91:** Entire section amended, p. 1350, § 1, effective May 29. **L. 2009:** (1) amended, (HB 09-1260), ch. 107, p. 439, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-50-101 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Widow or Widower as Dependent.
- III. Minor Child as Dependent.

### I. GENERAL CONSIDERATION

**Law reviews.** For comment on *McBride v. Indus. Comm'n* appearing below, see 8 Rocky Mt. L. Rev. 292 (1936).

**Annotator's note.** Since § 8-41-501 is similar to § 8-50-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**The workmen's compensation act is to be liberally construed** in order to effectuate its beneficent purposes. *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935).

**No specific provision prescribes an equal apportionment among dependents.** It does not follow from the language of former section, "conclusively presumed to be wholly dependent", when read in conjunction with § 8-50-115, that all such dependents must, as a matter of law, be treated on an equal basis. To so conclude would be to ignore the express provisions of § 8-50-115. *Spoo v. Spoo*, 145 Colo. 268, 358 P.2d 870 (1961).

**The question of dependency of a widow and minor children is purely a question of law.** *United States Nat'l Bank v. Indus. Comm'n*, 128 Colo. 417, 262 P.2d 731 (1953).

**Dependency rests upon an obligation of support** and not upon the question as to whether that obligation is being discharged. *Latting v. Broadmoor Hotel*, 105 Colo. 386, 98 P.2d 857 (1940).

**"Wholly dependent" means dependent on no one else.** *London Guarantee & Accident Co. v. Indus. Comm'n*, 78 Colo. 478, 242 P. 680 (1925).

**Applied in** *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399 (Colo. App. 1981); *Frontier Airlines v. Indus. Comm'n*, 654 P.2d 1333 (Colo. App. 1982).

### II. WIDOW OR WIDOWER AS DEPENDENT.

**State law of marriage applied to establish marital relationship.** In compensation proceedings where a claimant must establish a marital relationship to the deceased, the domestic relations law of the state where the marriage was contracted is controlling. *Williams v. Fireman's Fund Ins. Co.*, 670 P.2d 453 (Colo. App. 1983).

**This section applies where the wife makes a claim for compensation on account of the death of her husband**, and not where she makes a claim for compensation on account of the death of a child. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 82 Colo. 281, 260 P. 106 (1927).

**The dependency of a wife is determined as a matter of law** where there is a showing that she was living with her husband at the time of his death and was dependent on him for support. *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935), citing *London Guarantee & Accident Co. v. Indus. Comm'n*, 78 Colo. 478, 242 P. 680 (1925); *Vaughn v. Indus. Comm'n*, 79 Colo. 257, 245 P. 712 (1926).

**Thus, a wife living with her husband as such is conclusively presumed to be wholly dependent** upon him for her support. *Employer's Mut. Ins. Co. v. Indus. Comm'n*, 82 Colo. 281, 260 P. 106 (1927). See *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935).

**Presumptive dependency overcome by finding of nonsupport by deceased.** Widow is "wholly" dependent under this section regardless of whether she receives all or only part of her support from the deceased, and the presumption afforded by the statute is overcome only by a finding that the widow receives no support from the deceased. *Diamond Indus. v. Claimants in Death of Crouse*, 41 Colo. App. 541, 589 P.2d 1383 (1978); *Michalski v. Indus. Claim Appeals Office*, 781 P.2d 183 (Colo. App. 1989).

**Presumptive dependency overcome only by showing that the surviving spouse was voluntarily separated and living apart from the decedent or was not dependent on the decedent for support at the time of death.** *Exeter*

Drilling v. Colo. Indus. Claim, 801 P.2d 20 (Colo. App. 1990).

**The party desiring to overcome the presumption has the burden of bringing forward the necessary proof.** Colo. Fuel & Iron Co. v. Indus. Comm'n, 93 Colo. 188, 24 P.2d 1117 (1933).

**But the presumption is overthrown only by the appearance of three specific elements.** A wife is conclusively presumed, under the language of this section, to be wholly dependent, unless it shall be made to appear that she was (1) voluntarily separated and (2) living apart from her husband at the time of his death, and (3) was not dependent in whole or in part on him for support. This section is in the conjunctive, and all three of these elements must be made to appear before the conclusive presumption of dependency of the wife can be overthrown. Vaughn v. Indus. Comm'n, 79 Colo. 257, 245 P. 712 (1926); Latting v. Broadmoor Hotel, 105 Colo. 386, 98 P.2d 857 (1940); Empire Zinc Co. v. Indus. Comm'n, 71 Colo. 251, 206 P. 158 (1952).

Statutory presumption of dependency in subsection (1)(a) can be rebutted only by a showing that all three elements — voluntary separation, living apart, not dependent for support — exist in a particular case. Tilley v. Bill's Sinclair, 34 Colo. App. 141, 524 P.2d 314 (1974).

**And mere prolonged separation does not overcome presumption.** Although a separation is an unusually protracted one, the question of dependency does not turn on time or distance, but upon the nature and character of the absence and the intention of the parties respecting it. Intent is an important element in determining the nature of the absence. Empire Zinc Co. v. Indus. Comm'n, 71 Colo. 251, 206 P. 158 (1922); Latting v. Broadmoor Hotel, 105 Colo. 386, 98 P.2d 857 (1940).

**An act of adultery on the part of the wife constitutes a voluntary separation** from the husband. Indus. Comm'n v. Fanganiello, 72 Colo. 140, 209 P. 803 (1922).

**Voluntary separation a question of fact.** Whether a wife is voluntarily separated and living apart from her husband, within the meaning of this section, is a question of fact. Gold Mines Consol. v. Simmons, 107 Colo. 359, 112 P.2d 555 (1941).

Voluntary separation established by the fact that the couple was living apart and that the claimant filed a petition for dissolution of marriage prior to his wife's death. City of Aurora v. Corr, 689 P.2d 659 (Colo. App. 1984).

**Estrangement and divorce of the parties** may not be controlling in determining whether there was a voluntary separation under this section, but does have a bearing in construing the evidence. Gold Mines Consol. v. Simmons, 107 Colo. 359, 112 P.2d 555 (1941).

**Where the parties to a divorce resume living together** both before and after the formal entry of a divorce decree and hold themselves out to their family and neighbors as being husband and wife, the wife will be considered a widow under this section. Employers' Mut. Liab. Ins. Co. v. Indus. Comm'n, 145 Colo. 91, 357 P.2d 929 (1960).

**Wife of employee married after injury held to be a dependent.** Where an employee married more than a year after receiving accidental injuries in the course of his employment resulting in his death subsequently, it is held that the wife was a dependent within the meaning of this section. McBride v. Indus. Comm'n, 97 Colo. 166, 49 P.2d 386 (1935); State Comp. Ins. Fund v. Hartman, 99 Colo. 324, 64 P.2d 122 (1936).

**Decedent's legal obligation to support wife establishes dependency.** If a widow of a deceased workman demonstrates a need for support, then, under subsection (1)(a), the decedent's legal obligation to support his wife, whether or not that duty is being discharged, is sufficient to establish dependency. Tilley v. Bill's Sinclair, 34 Colo. App. 141, 524 P.2d 314 (1974); Black Mt. Spruce, Inc. v. Johnson, 670 P.2d 1241 (Colo. App. 1983).

**Innocent claimant held to be spouse.** An innocent claimant who would qualify as a spouse but for decedent's failure before his death to reduce an interlocutory decree dissolving a prior marriage to final judgment is entitled to spousal benefits. Williams v. Fireman's Fund Ins. Co., 670 P.2d 453 (Colo. App. 1983).

**Common-law marriage entitles wife to benefits of section.** Clayton Coal Co. v. Indus. Comm'n, 93 Colo. 145, 25 P.2d 170 (1933); Rocky Mt. Fuel Co. v. Reed, 110 Colo. 88, 130 P.2d 1049 (1942).

**Evidence insufficient to establish common-law marriage.** Zuzich v. Leyden Lignite Co., 120 Colo. 21, 206 P.2d 883 (1949); Employers' Mut. Liab. Ins. Co. v. Indus. Comm'n, 124 Colo. 68, 234 P.2d 901 (1951).

**Finding on dependency will not be disturbed on review if supported by evidence.** Indus. Comm'n v. Elkas, 73 Colo. 475, 216 P. 521 (1923); New Jersey Fid. & Plate Glass Ins. Co. v. Richey, 85 Colo. 376, 275 P. 937 (1929); Pub. Serv. Co. v. Indus. Comm'n, 89 Colo. 440, 3 P.2d 799 (1931); Indus. Comm'n v. Coop. Oil Co. 93 Colo. 192, 24 P.2d 753 (1933); Clarke v. Clarke, 95 Colo. 409, 36 P.2d 461 (1934).

### III. MINOR CHILD AS DEPENDENT.

**Children of deceased worker are entitled to death benefits as full-time students even though they were not 18 at the time of death.** Western Gas v. Indus. Claim App. Office, 797 P.2d 823 (Colo. App. 1990).

**The statutory presumption that a child is**



wholly dependent upon parent is based upon the legal obligation of a parent to support a child. *Truitt v. Indus. Comm'n*, 31 Colo. App. 166, 499 P.2d 621 (1972).

**But adoption of decedent's children by decedent's parents terminates a decedent's obligation of support**, and the statutory presumption that a child is wholly dependent upon a parent is not applicable. *Truitt v. Indus. Comm'n*, 31 Colo. App. 166, 499 P.2d 621 (1972).

**Furthermore, this section does not hold that minor children must be wholly dependent upon only one of the parents.** *United States Nat'l Bank v. Indus. Comm'n*, 128 Colo. 417, 262 P.2d 731 (1953).

**More specifically, this section does not confine the conclusive presumption of dependency wholly on the father.** In determining who is conclusively presumed to be wholly dependent it says, "Minor children of the deceased". *United States Nat'l Bank v. Indus. Comm'n*, 128 Colo. 417, 262 P.2d 731 (1953).

**And where the provision is that the minor children are wholly dependent on the deceased, it means a deceased mother equally as much as a deceased father, and especially where the statute does not specifically provide that the minor children are wholly dependent on the father alone.** *United States Nat'l Bank v. Indus. Comm'n*, 128 Colo. 417, 262 P.2d 731 (1953).

**So that under this section, an employer, being within the terms of the statute, is re-**

**quired to insure its employees, including the mother of claimants**, and therefore the insurer cannot escape liability to answer to her minor children for her death. *United States Nat'l Bank v. Indus. Comm'n*, 128 Colo. 417, 262 P.2d 731 (1953).

**The insurer's liability is fixed as distinguished from measured liability to be determined upon questions of fact** concerning the relationship of dependents. These fixed statutory payments are what may be regarded as the appropriate responsibility of an employer, and not what it actually takes to support a child. An employer cannot successfully argue about the responsibility under this conclusive presumption. The fixed liability and the fixed payments are not a substitute for the actual parents' support of their children. Prior to the enactment of workmen's compensation laws, an employer was subjected to actions for damages in such cases commensurate with the loss of the parents' support. *United States Nat'l Bank v. Indus. Comm'n*, 128 Colo. 417, 262 P.2d 731 (1953).

**Stepchildren not legally adopted are precluded from being dependents** for purposes of an award of death benefits. *Tri-State Commodities, Inc. v. Stewart*, 689 P.2d 712 (Colo. App. 1984).

**A minor under 18 years of age cannot conclusively be presumed to be a dependent of a brother** under the terms of this section. *Central Sur. & Ins. Corp. v. Indus. Comm'n*, 94 Colo. 341, 30 P.2d 253 (1934).

**8-41-502. Other dependents - temporary dependency.** Except as otherwise provided in section 8-41-501 (1) (c), a child eighteen years of age or over and a mother, father, grandmother, grandfather, sister, brother, or grandchild who was wholly or partially supported by the deceased employee at the time of death and for a reasonable period of time immediately prior thereto is considered an actual dependent. To be entitled to compensation, such dependents, except as provided in section 8-41-501 (1) (c), must prove that they were incapable of or actually disabled from earning their own living. If said incapacity or disability is temporary only, compensation shall be paid only during the period of such temporary incapacity or disability.

**Source: L. 90:** Entire article R&RE, p. 484, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-102 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For comment on *McBride v. Indus. Comm'n* appearing below, see 8 *Rocky Mt. L. Rev.* 292 (1936).

**This section fixes the condition upon which certain persons are to be considered dependent.** *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935).

**And each case depends on its facts.** Failure of an employee, after contributing to the support of his sister, to so contribute for a short time prior to his death, caused by accident, would not

negative her dependency. Dependency must rest upon the prevailing facts and conditions of each particular case. *Empire Zinc Co. v. Indus. Comm'n*, 102 Colo. 26, 77 P.2d 130 (1938); *Regal Coal Co. v. Jackvich*, 105 Colo. 479, 99 P.2d 196 (1940).

Under this section the question of dependency is to be determined as a matter of fact and cannot be based upon an existing legal duty to provide support. *Tilley v. Bill's Sinclair*, 34 Colo. App. 141, 524 P.2d 314 (1974).

**No presumption as to dependency.** Claimant in a workmen's compensation case, being a sister of deceased employee, there was no presumption of dependency, and the burden was upon her to establish such dependency as would bring her within the provisions of the workmen's compensation act. *Empire Zinc Co. v. Indus. Comm'n*, 102 Colo. 26, 77 P.2d 130 (1938).

**Financial contributions by an employee to the support of a sister is evidence of recognition of her dependency upon him.** *Empire Zinc Co. v. Indus. Comm'n*, 102 Colo. 26, 77 P.2d 130 (1938).

**But dependency can exist without any actual money payment** where that payment might have been prevented by some cause operating against the will of the employee. *Empire Zinc Co. v. Indus. Comm'n*, 102 Colo. 26, 77 P.2d 130 (1938).

**Mother not precluded from recovery because living with husband.** The fact that a mother, at the time of the death of her employee son, was living with her husband who was able and bound to support her, does not preclude an award to her as a partial dependent of the deceased son and the same rule applies to brothers under 18 years of age and who claim compensation for the death of their brother. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 82 Colo. 281, 260 P. 106 (1927); *Indus. Comm'n v. DiNardi*, 103 Colo. 591, 87 P.2d 494 (1939).

**And partially dependent minor not required to show his inability to earn his own living.** Under this section a minor, partially dependent upon a brother who has sustained an accident arising out of and in the course of his employment, is not required to establish he was unable to earn his own living during the period involved in order to be entitled to compensation as a dependent. *Indus. Comm'n v. DiNardi*, 103 Colo. 591, 87 P.2d 494 (1939).

**Entire or partial support is necessary for recovery as a dependent.** The father of an

employee to be dependent under this section must have been wholly or partially supported by the son at the time of his death and for a reasonable period of time immediately prior thereto. *Indus. Comm'n v. Ahel*, 80 Colo. 128, 249 P. 866 (1926).

**The question of what is "a reasonable period of time" is one of fact** which will not ordinarily be disturbed on review. *Indus. Comm'n v. Ahel*, 80 Colo. 128, 249 P. 866 (1926).

**Findings on conflicting evidence will not be disturbed on review.** *Passini v. Indus. Comm'n*, 64 Colo. 349, 171 P. 369 (1918); *Indus. Comm'n v. Johnson*, 66 Colo. 292, 181 P. 977 (1919); *McPhee & McGinnity Co. v. Indus. Comm'n*, 67 Colo. 86, 185 P. 268 (1919); *Youngquist v. Indus. Comm'n* 67 Colo. 187, 184 P. 381 (1919); *Crawford v. Indus. Comm'n*, 72 Colo. 581, 212 P. 828 (1923).

**Thus, no review of finding on evidence that father was not incapable.** The ground upon which the claimant was denied the compensation was that the father was not shown to be "incapable of or actually disabled from earning his own living", as provided in this section. The district court had no power and the supreme court has no power to review this finding upon the evidence. *Picardi v. Indus. Comm'n*, 70 Colo. 266, 199 P. 420 (1921).

**The word "incapable" as employed in this section has a common and generally accepted meaning.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 152 Colo. 256, 381 P.2d 267 (1963).

**And no definition of the word "incapable" would justify the conclusion as a matter of law** that a person over the age of 18 years is incapable of earning his living because he has voluntarily removed himself from the labor market and elected to go to college. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 152 Colo. 256, 381 P.2d 267 (1963).

**Applied in** *Byrd v. Indus. Comm'n*, 658 P.2d 274 (Colo. App. 1982).

**8-41-503. Dependency and extent determined - how.** (1) Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions except as provided in section 8-41-501 (1) (c). Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the director may designate.

(2) In case an employee or claimant entitled to compensation dies leaving dependents, any accrued and unpaid portion of the compensation or benefits up to the time of the death of such employee or claimant shall be paid to such dependents as may be ordered by the director and not to the legal representative as such of said decedent. In case the injured employee or claimant leaves no dependents, the director may order the application of any accrued and unpaid benefits up to the time of the death of such employee or claimant paid upon the expenses of the last sickness or funeral of such decedent, the preference in such payment to be to funeral expenses.

(3) In case an injured employee or dependent of a deceased employee entitled to benefits under articles 40 to 47 of this title is declared incompetent or insane, any benefits



accrued or to accrue may be paid to the conservator of the estate, if any, or to any dependents, or to the party or institution having custody of the person of such injured employee or dependent of a deceased employee as may be ordered by the director in the director's discretion.

**Source:** L. 90: Entire article R&RE, p. 484, § 1, effective July 1. L. 91: (1) amended, p. 1351, § 2, effective May 29.

**Editor's note:** This section is similar to former § 8-50-105 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For comment on McBride v. Indus. Comm'n appearing below, see 8 Rocky Mt. L. Rev. 292 (1936).

**Purpose of section.** The purpose of the workmen's compensation act is to cast upon the particular industry the burden resulting from accidental injuries sustained by its employees while performing duties arising out of and in the course of their employment. It is not intended to compensate employees for injuries or illness not due to their employment, or to pay benefits to their dependents when death results from such injuries or illness; or to pay the medical, hospital, funeral, or other expenses incurred by reason of such injuries, illness, or death. In such case, however, it is not unreasonable to pay to such dependents, or, where there are no dependents, to pay on account of such expenses, any unpaid installments of compensation that may have become due and payable to the employee during his lifetime, under a disability award made during his lifetime. That is the purpose of this section. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931).

**The survival statute is applicable to claims filed under the Workers' Compensation Act.** The conditions of recovery under the Act were fulfilled on the date that the injury was incurred and are dependent only on whether claimant's claim is timely filed. Claimant's death by unrelated causes prior to final adjudication has no effect on the claim. *Estate of Huey v. J.C. Trucking*, 837 P.2d 1218 (Colo. 1992).

**This section deals with the fact of dependency and not with the amount of compensation to be paid.** *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 93 Colo. 188, 24 P.2d 1117 (1933).

**Fact of dependency cannot be based on legal duty to support.** Under this section and §§ 8-50-102 and 8-50-104 of this article the question of dependency is to be determined as a matter of fact and cannot be based upon an existing legal duty to provide support. *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 90 Colo. 330, 9 P.2d 285 (1932); *Subsequent Injury Fund v. Indus. Claim Appeals Office*, 131 P.3d 1224 (Colo. App. 2006).

**Innocent party in prohibited marriage.** While it is true that a marriage entered into prior

to the dissolution of a previous marriage is prohibited in Colorado, an innocent party to such a marriage is not deprived of the rights conferred upon a legal spouse. As a putative spouse, upon the other person's death, she acquires the legal spouse's right to workmen's compensation. *Williams v. Fireman's Fund Ins. Co.*, 670 P.2d 453 (Colo. App. 1983).

**Mother a partial dependent of deceased employee son at time of his death.** *Indus. Comm'n v. DiNardi*, 103 Colo. 591, 87 P.2d 494 (1939).

**This section does not fix all dependencies as of the time of the accident.** Section 8-50-102 fixes the condition upon which certain persons are to be considered dependent. It determines their dependency as of the time of employee's death, and does so, regardless of the time of the accident. It then follows that § 8-50-102 is in conflict with this section, if this section is to be construed as fixing all dependencies as of the time of the accident. We do not so construe it. Injury and death are not always coincident. This being true, conditions constituting dependency may change during the intervening period, as is often the case, and it must follow, that the extent of the right to death benefits cannot always be fixed as of the date of the accident. *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935).

**And the wording of this section presupposes a question to be determined. That question is "who" and "the extent".** Sections 8-50-101 and 8-50-102 leave no question to be determined. Dependency and extent are fixed as a matter of law. "For all purposes of the act" the general assembly said the wife is conclusively presumed to be wholly dependent on the husband if living with him at the time of his injury or his death. Had the general assembly intended to exclude a post-injury wife, words were just as available then as now, to so specifically state. *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935).

**Amount of death benefits should be fixed as of the date of death, not the date of injury.** *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983).

The final clause in the first sentence of subsection (1) refers not to the amount of death

benefits to be paid, rather it refers to a dependent's right to death benefits which is fixed as of the date of the injury regardless of any subsequent change in that dependent's status. *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983).

**Payment of balance of partial disability award after death of employee.** If, at the time of the employee's death, there was an unpaid balance of the temporary partial disability award made prior thereto, that had become due and payable to the employee in his lifetime, such balance was "accrued and unpaid" within the meaning of this section, and was applicable to payment upon the expenses of the last sickness or funeral. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931).

**Authority to discharge expenses is permissive.** This section is merely a grant of authority to discharge expenses of last sickness and funeral from accrued and unpaid benefits instead of paying the total to the personal representative. Moreover, the word is "may" not "shall", hence, that authority is apparently permissive not mandatory. *Moffat Coal Co. v. Hilliard*, 117 Colo. 556, 190 P.2d 907 (1948).

**Employee's estate may collect accrued payments.** Were an insurance company had been paying compensation to employee for disability, and said employee returns to his native country of Greece, residing there until its occupation by an enemy during which time he died, even though payments were authorized to be suspended during occupation, the deceased employee's estate may now collect accrued payments. *Moffat Coal Co. v. Hilliard*, 117 Colo. 556, 190 P.2d 907 (1948).

**"Irrespective of any subsequent change in conditions" refers only to dependents.** *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935).

**But a child is entitled to compensation even though adopted since father's death.** *Employers'*

*Mut. Ins. Co. v. Indus. Comm'n*, 70 Colo. 229, 199 P. 483 (1921).

**Phrase "irrespective of any subsequent change in conditions"** is evidence of the general assembly's intent that death benefit awards, once fixed, should not be reopened because of later changes in a beneficiary's economic condition. *Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996).

**The word "accrued" in this section is used in the sense of due and payable.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931).

"Accrue" means "to come into existence as an enforceable claim: vest as a right." Permanent partial disability benefits do not come into existence as an enforceable claim or vest as a right until maximum medical improvement is reached. *Dependents of Nunnally v. Wal-Mart Stores, Inc.*, 943 P.2d 26 (Colo. App. 1996).

**The term "accrued" as used in subsection (2) means "to come into existence as an enforceable claim: vest as a right."** *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

**"Accrued and unpaid", as used in subsection (2), means "due and payable".** Therefore, workers' compensation benefits that accrued prior to claimant's death but were not awarded by an administrative law judge until after his death could not be awarded to his estate. *Estate of Huey v. J.C. Trucking Co.*, 824 P.2d 89 (Colo. App. 1991).

**And the work "benefits" means compensation.** As used in this section the word "benefits" is construed to mean compensation. "Compensation" is awarded to an employee; "benefits" are awarded to his dependents. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931).

**Applied in** *Frontier Airlines v. Indus. Comm'n*, 654 P.2d 1333 (Colo. App. 1982); *Byrd v. Indus. Comm'n*, 658 P.2d 274 (Colo. App. 1982); *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983).

**8-41-504. Action by injured employee - dependents not parties in interest.** No dependent of an injured employee, during the life of the employee, shall be deemed a party in interest to any proceeding by said employee for the enforcement of any claim for compensation nor with respect to any settlement thereof by said employee.

**Source:** L. 90: Entire article R&RE, p. 485, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-108 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-41-504 is similar to § 8-50-108 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provi-

sion has been included in the annotations to this section.

**Dependents are not parties in interest to any action by the injured employee during his lifetime.** In re *Hampton v. State*, 31 Colo.



App. 141, 500 P.2d 1186 (1972).

**And an employee's dependent's right to death benefits under workmen's compensation are independent** and distinct from right of employee. In re Hampton v. State, 31 Colo. App. 141, 500 P.2d 1186 (1972).

**Thus, the statute of limitations applicable to an employee's claim for compensation does not bar dependent's subsequent claim for**

death benefits. In re Hampton v. State, 31 Colo. App. 141, 500 P.2d 1186 (1972).

**Also, as a consequence of the independent nature of dependents' right, an employee's release or waiver of his rights does not bar his dependents' subsequent claim for death benefits.** In re Hampton v. State, 31 Colo. App. 141, 500 P.2d 1186 (1972).

**8-41-505. Illegitimate minor children.** Illegitimate minor children of a deceased putative father shall be entitled to compensation in the same respect as a legitimate minor child of said decedent when it is proved to the satisfaction of the director that the father, during his lifetime, has acknowledged said children to be his and has regularly contributed to their support and maintenance for a reasonable period of time prior to his death.

**Source: L. 90:** Entire article R&RE, p. 485, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-109 as it existed prior to 1990.

## ARTICLE 42

### Benefits

**Editor's note:** This article was numbered as articles 3 and 5 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

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**8-42-101. Employer must furnish medical aid - approval of plan - fee schedule - contracting for treatment - no recovery from employee - medical treatment guidelines - accreditation of physicians - rules - repeal.** (1) (a) Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

(b) In all cases where the injury results in the loss of a member or part of the employee's body, loss of teeth, loss of vision or hearing, or damage to an existing prosthetic device, the employer shall furnish within the limits of the medical benefits provided in paragraph (a) of this subsection (1) artificial members, glasses, hearing aids, braces, and other external prosthetic devices, including dentures, which are reasonably required to replace or improve the function of each member or part of the body or prosthetic device so affected or to improve the employee's vision or hearing. The employee may petition the division for a replacement of any artificial member, glasses, hearing aid, brace, or other external prosthetic device, including dentures, upon grounds that the employee has undergone an anatomical change since the previous device was furnished or for other good cause shown, that the anatomical change or good cause is directly related to and caused by the injury, and that the replacement is necessary to improve the function of each member or part of the body so affected or to relieve pain and discomfort. Implants or devices necessary to regulate the operation of, or to replace, with implantable devices, internal organs or structures of the body may be replaced when the authorized treating physician deems it necessary. Every employer subject to the terms and provisions of articles 40 to 47 of this title must insure against liability for the medical, surgical, and hospital expenses provided for in this article, unless permission is given by the director to such employer to operate under a medical plan, as set forth in subsection (2) of this section.

(c) In any case in which a firefighter, emergency medical services provider, or peace officer, as described in section 16-2.5-101, C.R.S., is exposed during the course and within the scope of employment to a known or possible source of hepatitis C, the employer, or if insured, the insurer, shall, at their expense, provide for baseline testing within the period of time specified in section 8-41-208 (1) (a) to determine whether the employee was free of hepatitis C at the time of the on-the-job exposure. The employer, or if insured, the insurer, shall pay for all reasonable and necessary medical procedures and treatment for exposure to hepatitis C during the period of time set forth in section 8-41-208 (1) (d).

(2) Every such plan, which is agreed to between the employer and employee, for the furnishing of medical, surgical, and hospital treatment, whether or not the employee is to pay any part of the expense of such treatment, before being put into effect, shall receive the approval of the director. The director has full power to formulate the terms and conditions under which any such plan may operate and the essentials thereof, and at any time the director may order modifications or changes in any such plan or withdraw prior approval thereof. No plan shall be approved by the director which relieves the employer from the burden of assuming and paying for any part of the medical, surgical, and hospital services and supplies required.

(3) (a) (I) The director shall establish a schedule fixing the fees for which all surgical, hospital, dental, nursing, vocational rehabilitation, and medical services, whether related to treatment or not, pertaining to injured employees under this section shall be compensated. It is unlawful, void, and unenforceable as a debt for any physician, chiropractor, hospital, person, expert witness, reviewer, evaluator, or institution to contract with, bill, or charge any party for services, rendered in connection with injuries coming within the purview of this



article or an applicable fee schedule, which are or may be in excess of said fee schedule unless such charges are approved by the director. Fee schedules shall be reviewed on or before July 1 of each year by the director, and appropriate health care practitioners shall be given a reasonable opportunity to be heard as required pursuant to section 24-4-103, C.R.S., prior to fixing the fees, impairment rating guidelines, which shall be based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991, and medical treatment guidelines and utilization standards. Fee schedules established pursuant to this subparagraph (I) shall take effect on January 1. The director shall promulgate rules concerning reporting requirements, penalties for failure to report correctly or in a timely manner, utilization control requirements for services provided under this section, and the accreditation process in subsection (3.6) of this section. The fee schedule shall apply to all surgical, hospital, dental, nursing, vocational rehabilitation, and medical services and to expert witness, expert reviewer, or expert evaluator services, whether related to treatment or not, provided after any final order, final admission, or full or partial settlement of the claim.

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a) the fees set forth in the schedule established pursuant to subparagraph (I) of this paragraph (a) shall be those fees in effect immediately prior to July 1, 1991, and such fees shall remain in effect until July 1, 1995.

(III) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), until the impairment rating guidelines and medical treatment guidelines and utilization standards required by subparagraph (I) of this paragraph (a) and subsection (3.5) of this section are adopted and level I accreditation is received, compensation for fees for chiropractic treatments shall not be made more than ninety days after the first of such treatments nor after the twelfth such treatment, whichever first occurs, unless the chiropractor has received level I accreditation.

(b) Medical treatment guidelines and utilization standards, developed by the director, shall be used by health care practitioners for compliance with this section.

(3.5) (a) (I) "Physician" means, for the purposes of the level I and level II accreditation programs, a physician licensed under the "Colorado Medical Practice Act". For the purposes of level I accreditation only and not level II accreditation, "physician" means a dentist licensed under the "Dental Practice Law of Colorado", a podiatrist licensed under the provisions of article 32 of title 12, C.R.S., and a chiropractor licensed under the provisions of article 33 of title 12, C.R.S. No physician shall be deemed to be accredited under either level I or level II solely by reason of being licensed.

(II) The director shall promulgate rules establishing a system for the determination of medical treatment guidelines and utilization standards and medical impairment rating guidelines for impairment ratings as a percent of the whole person or affected body part based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991.

(b) A medical impairment rating system shall be maintained by the director.

(c) (I) This subsection (3.5) is repealed, effective July 1, 2014.

(II) Prior to such repeal the accreditation process created by this subsection (3.5) and subsection (3.6) of this section shall be reviewed as provided for in section 24-34-104, C.R.S.

(3.6) The two-tier accreditation system shall comprise the following programs:

(a) (I) A program establishing the accreditation requirements for physicians providing primary care to patients who have, as a result of their injury, been unable to return to work for more than three working days, referred to in this section as "time-loss injuries", which program shall be voluntary except in the case of chiropractors, for whom it shall be mandatory, and which shall be known as level I accreditation; and

(II) A program establishing the accreditation requirements for physicians providing impairment evaluation of injured workers, which program shall be known as level II accreditation.

(b) A physician who provides impairment evaluation of injured workers shall complete and must have received accreditation under the level II accreditation program. However, the authorized treating physician providing primary care need not be level II accredited to

determine that no permanent medical impairment has resulted from the injury. Specialists who do not render primary care to injured workers and who do not perform impairment evaluations do not require accreditation. The facility where a physician provides such services cannot be accredited.

(c) Both the level I and level II accreditation programs shall be implemented and available to physicians. All physicians who are required to be accredited shall complete the level II accreditation program or programs.

(d) The level I and level II accreditation programs shall operate in such a manner that the costs thereof shall be fully met by registration fees paid by the physicians. The registration fee for level I accreditation shall not exceed two hundred fifty dollars, and the registration fee for level II accreditation shall not exceed four hundred dollars. The registration fee for each program shall cover the cost of all accreditation course work and materials.

(e) The accreditation system shall be established so as to provide physicians with an understanding of the administrative, legal, and medical roles and in such a manner that accreditation is accessible to every licensed physician, with consideration of specialty and geographic diversity.

(f) Initial accreditation shall be for a three-year period and may be renewed for successive three-year periods. The director by regulation may determine any additional training program required prior to accreditation renewal.

(g) The director shall, upon good cause shown, revoke the accreditation of any physician who violates the provisions of this subsection (3.6) or any rule promulgated by the director pursuant to this subsection (3.6), following a hearing on the merits before an administrative law judge, subject to review by the industrial claim appeals office and the court of appeals, in accordance with all applicable provisions of article 43 of this title.

(h) If a physician whose accreditation has been revoked submits a claim for payment for services rendered subsequent to such revocation, the physician shall be considered in violation of section 10-1-128, C.R.S., and neither an insurance carrier nor a self-insured employer shall be under any obligation to pay such claim.

(i) A physician who provides treatment for nontime loss injuries need not be accredited to be reimbursed for the costs of such treatment pursuant to the provisions of the "Workers' Compensation Act of Colorado".

(j) (Deleted by amendment, L. 96, p. 151, § 2, effective July 1, 1996.)

(k) The division shall make available to insurers, claimants, and employers a list of all accredited physicians and a list of all physicians whose accreditation has been revoked. Such lists shall be updated on a monthly basis.

(l) The registration fees collected pursuant to paragraph (d) of this subsection (3.6) shall be transmitted to the state treasurer, who shall credit the same to the physicians accreditation program cash fund, which is hereby created in the state treasury. Moneys in the physicians accreditation program cash fund are hereby continuously appropriated for the payment of the direct costs of providing the level I and level II accreditation courses and materials.

(m) All administrative costs associated with the level I and level II accreditation programs shall be paid out of the workers' compensation cash fund in accordance with appropriations made pursuant to section 8-44-112 (7).

(n) The director shall contract with the medical school of the university of Colorado for the services of a medical director to advise the director on issues of accreditation, impairment rating guidelines, medical treatment guidelines and utilization standards, and case management and to consult with the director on peer review activities as specified in this subsection (3.6) and section 8-43-501. Such medical director shall be a medical doctor licensed to practice in this state with experience in occupational medicine. The director may contract with an appropriate private organization which meets the definition of a utilization and quality control peer review organization as set forth in 42 U.S.C. sec. 1320c-1 (1) (A) or (1) (B), to conduct peer review activities under this subsection (3.6) and section 8-43-501 and to recommend whether or not adverse action is warranted.

(o) Except as provided in this subsection (3.6), neither an insurance carrier nor a self-insured employer or injured worker shall be liable for costs incurred for an impairment



evaluation rendered by a physician where there is a determination of permanent medical impairment if such physician is not level II accredited pursuant to the provisions of this subsection (3.6).

(p) (I) For purposes of this paragraph (p):

(A) "Case management" means a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers' compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided.

(B) "Managed care" means the provision of medical services through a recognized organization authorized under the provisions of parts 1, 3, and 4 of article 16 of title 10, C.R.S., or a network of medical providers accredited to practice workers' compensation under this subsection (3.6).

(II) Every employer or its insurance carrier shall offer at least managed care or medical case management in the counties of Denver, Adams, Jefferson, Arapahoe, Douglas, Boulder, Larimer, Weld, El Paso, Pueblo, and Mesa and shall offer medical case management in all other counties of the state.

(q) The division is authorized to accept moneys from any governmental unit as well as grants, gifts, and donations from individuals, private organizations, and foundations; except that no grant, gift, or donation may be accepted by the division if it is subject to conditions which are inconsistent with this article or any other laws of this state or which require expenditures from the workers' compensation cash fund which have not been approved by the general assembly. All moneys accepted by the division shall be transmitted to the state treasurer for credit to the workers' compensation cash fund.

(r) (I) This subsection (3.6) is repealed, effective July 1, 2014.

(II) Prior to such repeal the accreditation process created by subsection (3.5) of this section and this subsection (3.6) shall be reviewed as provided for in section 24-34-104, C.R.S.

(3.7) On and after July 1, 1991, all physical impairment ratings used under articles 40 to 47 of this title shall be based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991. For purposes of determining levels of medical impairment pursuant to articles 40 to 47 of this title a physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings.

(4) Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

(5) If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

**Source:** L. 90: Entire article R&RE, p. 485, § 1, effective July 1. L. 91: (3)(b) repealed, p. 694, § 4, effective April 20; (1)(b) and (3) amended and (3.5), (3.6), and (3.7) added, p. 1296, § 10, effective July 1. L. 92: (3.5)(a)(II) amended, p. 2165, § 1, effective June 2; (3.6)(p)(I)(B) amended, p. 1723, § 2, effective July 1. L. 94: (1)(b) amended, p. 311, § 1, effective March 22; (3.5)(k) and (3.6)(r) amended, p. 1457, § 7, effective May 25; (3)(a)(II) amended, p. 2001, § 2, effective July 1. L. 95: (3.6)(g) amended, p. 234, § 1, effective April 17. L. 96: (3.6)(b) and (3.6)(o) amended, p. 268, § 1, effective April 8; (3)(a)(I), (3)(b), (3.5), and (3.6) amended, p. 151, § 2, effective July 1. L. 2002: (1)(c) added, p. 441, § 2, effective May 16. L. 2003: (3.5)(c)(I) and (3.6)(r)(I) amended, p. 918, § 2, effective July 1; IP(3.6) and (3.6)(h) amended, p. 614, § 4, effective July 1; (1)(c) amended, p. 1613, § 4, effective August 6. L. 2004: (3)(a)(I) amended, p. 396, § 4, effective August 4. L. 2007: (3)(a)(I) and (3.6)(k) amended, p. 1471, § 1, effective May 30.

**L. 2008:** (1)(b) and (3)(a)(I) amended, p. 1675, § 1, effective July 1. **L. 2009:** (3)(a)(I) amended, (SB 09-243), ch. 269, p. 1222, § 2, effective July 1. **L. 2010:** (5) added, (SB 10-187), ch. 310, p. 1456, § 2, effective July 1.

**Editor's note:** (1) This section is similar to former § 8-49-101 as it existed prior to 1990.

(2) Although subsection (3)(b) was repealed by House Bill 91-1100, the repeal was harmonized with the amendments to the entire subsection (3) by Senate Bill 91-218.

(3) Amendments to subsection (3.6) by House Bill 96-1040 and House Bill 96-1126 were harmonized.

**Cross references:** For the "Colorado Medical Practice Act", see article 36 of title 12; for the "Dental Practice Law of Colorado", see article 35 of title 12.

## ANNOTATION

**Law reviews.** For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "A Review of Medical Issues in Worker's Compensation", see 19 Colo. Law. 667 (1990).

**Annotator's note.** (1) Since § 8-42-101 is similar to § 8-49-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Many of the cases annotated below which arose prior to July 1, 1987, were decided under the former provisions of § 8-49-101 which have been substantially amended or which have been repealed.

(3) Cases included in the annotations which refer to the industrial commission were decided prior to the 1969 amendment which removed powers formerly exercised by the industrial commission and vested them in the division of labor and its director.

**Property interest created requiring procedural due process.** A claimant has a property interest in receiving treatment and supplies that may reasonably be needed at the time of injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury. Colo. Comp. Ins. Auth. v. Nofio, 886 P.2d 714 (Colo. 1994).

**Litigation expenses not exempt.** The director's authority to establish a fee schedule under this section is not limited to fees for treatment but may extend to the amount charged by a physician for review of a deposition in connection with a hearing. Janssen v. Indus. Claim Appeals Office, 40 P.3d 1 (Colo. App. 2001), rev'd on other grounds sub nom. Indus. Claim Appeals Office v. Zarlingo, 57 P.3d 736 (Colo. 2002).

**Failure of the director of the division of workers' compensation to adopt rules for rating psychological impairment pursuant to this section did not deprive employer and the compensation insurance authority of due**

**process** where the appropriate report form for impairment ratings was used, the provider that gave the impairment rating was accredited, and an opinion of independent medical examiner was not sought pursuant to § 8-42-107 (8)(b) after the initial medical impairment assessment. City of Boulder v. Dinsmore, 902 P.2d 925 (Colo. App. 1995).

**This section requires all physical impairment ratings to be based on the AMA Guides.** Gonzales v. Advanced Component Sys., 949 P.2d 569 (Colo. 1997).

The AMA Guides do not preclude a physician from concluding that an injury primarily occurred to or affected only one side of the back. Wackenhut Corp. v. Indus. Claim Appeals Office, 17 P.3d 202 (Colo. App. 2000).

The date of maximum medical improvement is not relevant in and of itself to applying the AMA guidelines. Therefore, a date of maximum medical improvement does not invalidate a physician's findings that a condition, such as pain, has existed after such date, and applying such findings to the AMA guidelines. McLane Western Inc. v. Indus. Claim Appeals Office, 996 P.2d 263 (Colo. App. 1999).

**Neither subsection (3.7) of this section nor the AMA Guides can be read as superseding or overriding the express legislative directive in § 8-42-107 (1) regarding how benefits are to be calculated for employees who have sustained only scheduled injuries.** Kolar v. Indus. Claim Appeals Office, 122 P.3d 1075 (Colo. App. 2005).

**Disabling industrial injury suffered prior to July 1, 1987.** A worker who has been awarded temporary partial disability benefits and who has been directed to undergo a vocational rehabilitation evaluation is entitled to receive temporary partial disability benefits until the commencement of a vocational rehabilitation program or the entry of an administrative ruling that vocational rehabilitation is not necessary to render the worker fit for a remunerative occupation. Allee v. Contractors, Inc., 783 P.2d 273 (Colo. 1989); Gerber v. CAN-USA Construction, Inc., 783 P.2d 269 (Colo. 1989);



Phillips v. Indus. Claim Appeals Office, 783 P.2d 271 (Colo. 1989); Indus. Claim Appeals Office v. Mid-Continent Res., Inc., 783 P.2d 290 (Colo. 1989); Arndt v. Elec. Metal Prods., Inc., 783 P.2d 290 (Colo. 1989); Northeastern Junior Coll. v. Kenyon, 783 P.2d 853 (Colo. 1989) (decided prior to 1987 repeal of subsections (4) and (5)).

**This section imposes upon an employer the duty** of furnishing medical, surgical, nursing and hospital treatment and supplies and apparatus for a fixed time and to a fixed minimum regardless of the compensation allowed, and where such bills are not paid but are included in the award they are paid direct to those who have rendered the service or furnished the supplies. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957); Publix Cab Co. v. Colo. Nat'l Bank, 139 Colo. 205, 338 P.2d 702 (1959).

**The act authorizes an award of medical benefits reasonably necessary** to relieve the injured worker from the effects of the industrial injury. Employers have been required to provide services which are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment. Atencio v. Quality Care, Inc., 791 P.2d 7 (Colo. App. 1990); Colo. Comp. Ins. Auth. v. Nofio, 886 P.2d 714 (Colo. 1994).

**A prosthetic hip is an internal device that may be replaced when the treating physician deems it necessary;** therefore, an employee who suffers a left hip prosthetic shift is entitled to workers' compensation benefits. Because the prosthesis is an internal device, it is not subject to the same limitations as an external device. Am. Appliances, Inc. v. Indus. Claim Appeals Office, 166 P.3d 267 (Colo. App. 2007).

**Treatments for a condition not caused by employment are not compensated.** Claimant was not entitled to increased costs for cancer treatment even when the increased costs were caused by an employment injury. The condition being treated was not caused by employment; therefore, the treatments will not "relieve the employee of the effects of the injury." Owens v. Indus. Claim Appeals Office, 49 P.3d 1187 (Colo. App. 2002).

**In certain instances an employer can be held liable for treatment of a nonindustrial condition necessary to prepare a claimant for surgery to treat a compensable industrial injury.** Pub. Serv. Co. v. Indus. Claim Appeals Office, 979 P.2d 584 (Colo. App. 1999).

**Obligation of employer.** This section obligates the employer to furnish the necessary medical assistance for treatment of the claimant's injury both at the time of the injury "and thereafter during the disability". Granite Constr. Co. v. Leonard, 40 Colo. App. 20, 568 P.2d 500 (1977).

**Disability is determined as of the time physicians notify claimant they can do nothing further for him.** There is no provision of the

workmen's compensation act which specifies the time at which disability is to be determined, and the industrial commission has authority to fix the disability as of the time physicians for the employer and insurance carrier notify claimant they can do nothing further for him. This is true notwithstanding that the employee, by undergoing further surgical treatment at his own expense, is able to decrease the extent of his disability below the percentage fixed by the division. London Guarantee & Accident Co. v. Indus. Comm'n, 72 Colo. 177, 210 P. 70 (1922).

**The language of this section is clear and unambiguous** in stating that the employer, through his insurance carrier, shall not be required to pay for medical expenses beyond \$7,500 (now \$20,000). Weaver-Beatty Motor Co. v. Billen, 36 Colo. App. 442, 541 P.2d 120 (1975).

**Income maintenance benefits are not included in listing of benefits to be offset** by any disability annuity payments; to extend this section to include such benefits would not only be tantamount to indulging in judicial legislation but would ignore the express statutory language. State Comp. Ins. Fund v. Velasquez, 628 P.2d 190 (Colo. App. 1981).

**Director may not extend rehabilitation beyond 52 weeks.** The director does not have any discretion to extend the period of vocational rehabilitation once the 52-week limitation of subsection (4) is reached. In re Sterling v. Indus. Comm'n, 662 P.2d 1096 (Colo. App. 1982).

**Claimant's temporary disability benefits should not have been suspended** because he withdrew monthly amounts from his company's assets for living expenses, where claimant was not earning any income. Winters v. Indus. Comm'n, 736 P.2d 1256 (Colo. App. 1986).

**Determination of permanent disability under former subsection (5).** Former subsection (5) required that permanent disability be determined as if the employee had successfully completed the rehabilitation program. From the commission's finding that, since the claimant voluntarily withdrew from the rehabilitation program, the industrial disability equaled physical impairment, it cannot be determined that the physical disability was assessed from subsection (5)'s perspective. Thus, further findings on this issue are needed. Churchill v. Sears Roebuck & Co., 720 P.2d 171 (Colo. App. 1986) (decided prior to 1986 abolishment of the industrial commission).

**Assertion of permanent disability claim not necessary for vocational rehabilitation.** This section does not impose a burden upon one who seeks vocational rehabilitation to assert first a permanent disability claim. Timberline Sawmill & Lumber, Inc. v. Indus. Comm'n, 624 P.2d 367 (Colo. App. 1981).

**And ineligibility for vocational rehabilitation benefits not inconsistent with award of**

**disability benefits.** A finding that a claimant is not eligible for vocational rehabilitation benefits is not inconsistent with its award of permanent partial disability benefits. *Southwest Inv. Co. v. Indus. Comm'n*, 650 P.2d 1355 (Colo. App. 1982).

**Issue of the claimant's entitlement to vocational rehabilitation must be reevaluated where** there is further medical treatment for her disability and her subsequent ability to perform work for which she has previous training or experience. This issue is not precluded by an initial determination that the claimant does not meet the statutory standards for vocational rehabilitation. *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983).

**Subrogation has no effect on limits of liability under this section.** The right of subrogation granted to the state fund under § 8-52-108 is a separate and distinct right which has no effect on the limits of liability under this section established by the general assembly. *Weaver-Beatty Motor Co. v. Billen*, 36 Colo. App. 442, 541 P.2d 120 (1975).

**Because subrogation would be meaningless if the limit of liability fluctuated with every recovery.** *Weaver-Beatty Motor Co. v. Billen*, 36 Colo. App. 442, 541 P.2d 120 (1975).

**When limit is reached, application under § 8-66-108 is appropriate.** The general assembly established the limit of liability under this section, and when this limit has been initially reached, application for major medical benefits under § 8-66-108 is appropriate. A later recovery or lack of recovery will only affect the employer's loss experience and premium charges; it cannot affect the question of whether the statutory limit of liability has been exhausted. *Weaver-Beatty Motor Co. v. Billen*, 36 Colo. App. 442, 541 P.2d 120 (1975).

**Initial responsibility for identifying the need for a vocational rehabilitation plan rests with the employer or insurance carrier.** *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**Rules of procedure relative to vocational rehabilitation** allows a claimant the remedy of securing official intervention when an insurer delays or denies providing rehabilitation services. This remedy does not compensate a claimant for any injury caused by a bad faith delay or denial by the employer or insurance carrier. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**Requisites for major medical insurance fund liability for vocational rehabilitation benefits** are that the employee suffer a compensable injury rendering him incapable of employment for which he has training or experience and that total benefits expended by the employer for medical and vocational rehabilitation benefits exceed \$20,000. *White v. State Comp. Ins. Fund*, 700 P.2d 923 (Colo. App. 1985).

**Claimant remained eligible to recover vocational rehabilitation benefits from the major medical insurance fund despite his settlement** with the state compensation insurance fund which recited that it was not to compromise claims against the major medical fund. *White v. State Comp. Ins. Fund*, 700 P.2d 923 (Colo. App. 1985).

**Injured employee must have permanent physical impairment which renders him unable to work in order to receive vocational rehabilitation benefits.** However, no determination need be made of the employee's degree of permanent partial disability until after completion of the rehabilitation program. *Freilinger v. Gates Rubber Co.*, 733 P.2d 1214 (Colo. App. 1987).

**The authority to determine a claimant's eligibility for vocational rehabilitation** is not an unconstitutional delegation of authority because the legislative standards and procedural safeguards are sufficient to protect against an arbitrary exercise of administrative discretion. *Electron Corp. v. Wuerz*, 820 P.2d 356 (Colo. App. 1991).

**Vocational rehabilitation benefits denied.** Where the evidence establishes that the injury to claimant's thumb neither permanently precludes him from engaging in his usual and customary occupation, nor has it rendered him unable to perform work for which he has previous training or experience, the commission correctly held that claimant was not entitled to vocational rehabilitation benefits. *Smith v. Indus. Comm'n*, 735 P.2d 921 (Colo. App. 1986).

**Injured employee not entitled to vocational rehabilitation benefits** where accident which occurred at most recent work place did not result in any permanent disability and was not the cause of the employee's inability to work. *Freilinger v. Gates Rubber Co.*, 733 P.2d 1214 (Colo. App. 1987).

**Vocational rehabilitation benefits may be suspended** when claimant declines offer of suitable gainful employment. Employability in general labor market may be considered but is not essential to the determination of such employment. *Roe v. Indus. Comm'n*, 734 P.2d 138 (Colo. App. 1986).

**Waiver of right to retraining in another field was not waiver of all rights under vocational rehabilitation statute** and therefore the commission should adopt claimant's plan so long as it is feasible and could reasonably be expected to accomplish its goals. *Winters v. Indus. Comm'n*, 736 P.2d 1256 (Colo. App. 1986).

**Retraining plan may be approved even if it might not be completed in one year,** but income maintenance and other vocational rehabilitation benefits would cease after one year. *Winters v. Indus. Comm'n*, 736 P.2d 1256 (Colo. App. 1986).



**A vocational rehabilitation "plan" which attempts to help a claimant start his own business** is contrary to the language and intent of this section. *Husson v. Babbit*, 728 P.2d 750 (Colo. App. 1986).

**Claimant withdrew from rehabilitation program voluntarily and without good cause.** Where claimant testified she thought she had left the rehabilitation program voluntarily because "it wasn't working out", where there was evidence that claimant was informed before termination of the areas and improvement necessary and made little effort to improve, and where the record revealed that for claimant's position no prior experience or training was necessary, there was ample evidence that claimant withdrew from the program voluntarily without good cause. *Churchill v. Sears Roebuck & Co.*, 720 P.2d 171 (Colo. App. 1986).

**Child care services were compensable to extent necessary to allow claimant to attend medical appointments and to allow her to rest.** *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997).

**Recovery of child care expenses allowed during period of vocational rehabilitation as a necessary service under former subsection (4).** *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988).

**Claim is allowed only for injury arising out of and in the course of employment.** A claim for medical expenses rendered to an injured employee at the instance of the employer or insurance carrier in cases where the injury is not caused by accident arising out of and in the course of employment may be enforced in an independent action, but cannot be allowed in a proceeding under the workmen's compensation act. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931); *Morey Mercantile Co. v. Flynt*, 97 Colo. 163, 47 P.2d 864 (1935).

**And an injury takes place when the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury.** *Crest Fence Co. v. Cec*, 175 Colo. 21, 485 P.2d 709 (1971).

**The provision of § 8-44-107 that compensation awarded against employer may be increased 50 percent, does not apply to an award for medical, surgical, nursing, and hospital treatment.** *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925).

**Medical expense paid for a claimant under the workmen's compensation act is compensation within the meaning of the act.** *Morey Mercantile Co. v. Flynt*, 97 Colo. 163, 47 P.2d 864 (1935), citing *Indus. Comm'n v. Globe Indem. Co.*, 74 Colo. 52, 218 P. 910 (1923); *Indus. Comm'n v. Lockard*, 89 Colo. 428, 3 P.2d 416 (1931).

**And an employer is required to pay medical expenses only in cases in which he would be**

charged with the duty of paying other compensation. *Morey Mercantile Co. v. Flynt*, 97 Colo. 163, 47 P.2d 864 (1935), citing *Indus. Comm'n v. Globe Indem. Co.*, 74 Colo. 52, 218 P. 910 (1923).

**But if an injury is compensable, the employer has an absolute duty to provide medical and kindred relief at the employer's own expense.** It cannot be made to depend upon any requirement of payment of medical assessments by the employee; such a requirement, in case of compensable injury, would be unlawful. *Frank v. Indus. Comm'n*, 96 Colo. 364, 43 P.2d 158 (1935).

**Employer's duty to provide future medical treatment.** The fact that an employee had reached maximum medical improvement would not prohibit an award requiring an employer to provide future medical treatment reasonably necessary to relieve the claimant from the effects of an industrial injury. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Milco Const. v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

However, there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to accomplish the statutory purpose. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Milco Const. v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

Where the administrative law judge failed to determine whether a physician's report constituted substantial evidence that future knee replacement surgery would be reasonably necessary, the Industrial Claims Appeals Office had no authority to conclude that such report did constitute such evidence. *Milco Const. v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

In the absence of a recommendation for treatment that has a reasonable prospect for improving claimant's condition, the claimant may be found to be at maximum medical improvement. *Gonzales v. Indus. Claim Appeals Office*, 905 P.2d 16 (Colo. App. 1995).

**Workers' compensation insurer not liable to reimburse no-fault automobile insurer for any medical expenses covered by director's fee schedule to the extent any fee listed in the schedule is exceeded.** Law requires that parties undertake comparison of each expenditure for medical or other services covered by the schedule with the scheduled fee. *Employers Fire Ins. v. Lumbermens Mut.*, 964 P.2d 591 (Colo. App. 1998).

**Claimant has no right to receive medical care from a particular medical provider or to receive a particular type of treatment.** *Colo. Comp. Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994).

**Treatment contemplated by the act includes all treatment, including legally recognized nonmedical treatment, reasonably nec-**

essary to relieve claimant from effects of an industrial injury. *Suetrack v. Indus. Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995).

**Treatment to "relieve the employee from the effects of the injury" under subsection (1).** If the evidence establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate so that the claimant will suffer a greater disability than sustained thus far, such treatment, irrespective of its nature, must be viewed as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition. *Milco Const. v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

**Transportation expenses incidental to medical treatment.** Claimant entitled to transportation expenses incidental to authorized medical treatment. *Sigman Meat v. Indus. Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988).

**Expenses of exploratory operation disclosing disease precipitated by accident.** Where claimant slipped and fell in course of employment, and the accident precipitated symptoms of a kidney disease, which was disclosed during an exploratory operation, resulting in removal of one kidney, regardless of any aggravation of claimant's preexisting condition, he was entitled to recover the amounts he expended for surgical and hospital treatment which was deemed by competent physicians reasonably necessary to relieve him from the effects of the accident. *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949).

**The mandate of this section is clear that in "all cases" a prosthetic device be furnished** as may be reasonably required as a replacement where an employee has suffered a loss of a member or part of his body. *Arkin v. Indus. Comm'n*, 145 Colo. 463, 358 P.2d 879 (1961).

**Whether a hot tub was equipment reasonably necessary at the time of injury is applied** in *City and County of Denver v. Indus. Comm'n*, 682 P.2d 513 (Colo. App. 1984).

**Housekeeping services may be compensable** if it can be demonstrated that such services are incident to any medically necessary attendant care services and are central to a claimant's physical injury. *Valdez v. Gas Stop*, 857 P.2d 544 (Colo. App. 1993).

**Panel did not err in determining that child care services did not constitute a compensable medical benefit** under subsection (1)(a). *Kuziel v. Pet Fair, Inc.*, 931 P.2d 521 (Colo. App. 1996).

**Medical prescription alone is insufficient to support a claim for compensation for housekeeping services** where claimant testified that she was unable to perform only certain household duties and was able to continue to work and attend a vocational education program. *Valdez v. Gas Stop*, 857 P.2d 544 (Colo. App. 1993).

**Housekeeping services provided by attendant compensable.** Facts were sufficient to support the ALJ's finding that the attendant care services were necessary assistance, were reasonable, and were compensable under subsection (1)(a). *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. App. 1990).

**Housekeeping services are not compensable under this section** unless the services either enable the claimant to obtain medical care or treatment or, alternatively, are relatively minor in comparison to the medical care and treatment. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995).

**This section requires an employer to compensate an employee's spouse who provides home care services to the employee**, if such services are more than ordinary household services and the injury is of a nature that requires an attendant to remain nearby or on call. The fact that a spouse performs household tasks when not actually providing specific services to the injured employee does not affect the nature of the home care services provided to the employee by the spouse. *Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992).

**Home health care services provided to claimant by claimant's wife** were compensable where authorized physician referred claimant to and for such services, but none were available in claimant's rural locale. *Suetrack v. Indus. Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995).

**Award to claimant for room and board** during the time when claimant, although discharged from the hospital, was required to remain in Denver for treatment, and during that period he was paying rent for an apartment at Granby, must be considered correct as being incident to secondary hospital services. *Indus. Comm'n v. Pacific Employers Ins. Co.*, 120 Colo. 373, 209 P.2d 908 (1949).

**But where no hospitalization was indicated** and claimant was not required to maintain two places of residence, but was living with his wife and going to the physician's office for treatments, an award for room and board was not proper. *Indus. Comm'n v. Pacific Employers Ins. Co.*, 120 Colo. 373, 209 P.2d 908 (1949).

**Snowblower is not an "apparatus" necessary to relieve the claimant from the effects of his injury.** *ABC Disposal Servs. v. Fortier*, 809 P.2d 1071 (Colo. App. 1990).

**Stair glider is not "apparatus" necessary** for the treatment of the claimant's injury or for therapeutic relief from the effects of the claimant's injury. *Cheyenne County Nursing Home v. Indus. Claim Appeals Office*, 892 P.2d 443 (Colo. App. 1995).

**Wheelchair-accessible van is not a medical aid reasonably necessary for treatment of claimant's injury.** Van does nothing to care for or remedy injury and does not provide therapeutic



tic medical relief from effects or symptoms of injury. *Bouge v. SDI Corp., Inc.*, 931 P.2d 477 (Colo. App. 1996).

**Employer must make such improvements or modifications to the claimant's residence as may be necessary** to allow the claimant access to, and the use of, those portions of the residence that provide for the claimant's health and medical necessities. *Cheyenne County Nursing Home v. Indus. Claim Appeals Office*, 892 P.2d 443 (Colo. App. 1995).

**Lawn care services held not medically necessary.** Unlike housekeeping services such as cooking, lawn care does not bear a direct relation to a person's physical needs. *Hillen v. Tool King*, 851 P.2d 289 (Colo. App. 1993).

**The benefit ceiling on prosthetic devices** does not deny claimant equal protection of the law and the statute is not unconstitutional. *Reynolds v. Indus. Claim Appeals Office*, 794 P.2d 1083 (Colo. App. 1990).

**Where not necessitated by anatomical change**, a finding that no replacement prosthesis would be awarded was correct. *Reynolds v. Indus. Claim Appeals Office*, 794 P.2d 1080 (Colo. App. 1990).

**The industrial commission may not disregard the provisions of this section**, and impose upon the employer or insurance carrier a burden greater than that fixed by statute. *John Thompson Grocery Stores Co. v. Indus. Comm'n*, 85 Colo. 576, 277 P. 789 (1929).

**Thus, industrial commission may not award compensation for permanent disability**

**when there is none.** The fact that an injured employee might have suffered a permanent disability equal to the loss of a leg at the knee, had he not had additional medical and surgical treatment after having exhausted the statutory amount furnished by the employer, did not justify the commission in awarding compensation for such a permanent disability when in fact there was no such result from the injury. *John Thompson Grocery Stores Co. v. Indus. Comm'n*, 85 Colo. 576, 277 P. 789 (1929).

**Order requiring employer to give bond is not unreasonable.** Order of the industrial commission requiring employer to give bond in the sum of \$1,500, to insure the payment of medical expense and awarded compensation, is not unreasonable under this section. *Kamp v. Disney*, 110 Colo. 518, 135 P.2d 1019 (1943).

**No "particular" or specific course of treatment is necessary** to warrant award for maintenance care. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

**But a showing of need for treatment is not met by simply proving that degenerative changes will occur.** Where it appears that no treatment could prevent or relieve degeneration, an award of ongoing medical benefits is inappropriate. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

**Burden is on claimant to prove entitlement to ongoing medical benefits by a preponderance of the evidence.** *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

**Applied in** *Robbolino v. Fischer-White Contractors*, 738 P.2d 70 (Colo. App. 1987).

**8-42-102. Basis of compensation - "wages" defined - average weekly wage - "at the time of injury" clarified.** (1) The average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments.

(2) Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of the injury, and in the following manner; except that any portion of such remuneration representing a per diem payment shall be excluded from the calculation unless such payment is considered wages for federal income tax purposes:

(a) Where the employee is being paid by the month for services under a contract of hire, the weekly wage shall be determined by multiplying the monthly wage or salary at the time of the accident by twelve and dividing by fifty-two.

(b) Where the employee is being paid by the week for services under a contract of hire, said weekly remuneration at the time of the injury shall be deemed to be the weekly wage for the purposes of articles 40 to 47 of this title.

(c) Where the employee is rendering service on a per diem basis, the weekly wage shall be determined by multiplying the daily wage by the number of days and fractions of days in the week during which the employee under a contract of hire was working at the time of the injury or would have worked if the injury had not intervened.

(d) Where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2).

(e) Where the employee is paid on a piecework, tonnage, commission, or basis other

than a monthly, weekly, daily, or hourly wage and where the employment is but casual and in the usual course of the trade, business, profession, or occupation of his employer, the total amount earned by the injured or killed employee in the twelve months preceding the injury shall be computed, which sum shall be divided by the number of pay periods the injured person was employed during the twelve months immediately preceding the injury, and the result thus ascertained shall be considered the average wage of said employee per pay period.

(f) Where the employee is being paid by the mile, the weekly wage shall be determined by multiplying the rate per mile by the average number of miles per day the employee drove in the service of the employer in the sixty working days immediately preceding the date of the injury, to arrive at a daily wage; then the weekly wage shall be determined from the said daily wage in the manner set forth in paragraph (c) of this subsection (2). If, on the date of the injury, the employee has worked for the employer less than sixty days, the average daily wage shall be based on the average miles driven per working day during such period.

(3) Where the foregoing methods of computing the average weekly wage of the employee, by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable earnings to be fairly computed thereunder or has been ill or has been self-employed or for any other reason, will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage of said employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's average weekly wage.

(4) Where an employee is a minor and the disability is temporary, the average weekly wage of such minor shall be determined by the division as in cases of disability of adults. Where the disability of such minor is permanent or if benefits under articles 40 to 47 of this title accrue because of the death of such minor, compensation to said minor or death benefits to said minor's dependents shall be paid at the maximum rate of compensation payable under said articles at the time of the determination of such permanency or of such death.

(5) (a) The general assembly hereby finds that the phrase "at the time of injury" in subsection (2) of this section refers to the date of the employee's accident. When subsection (2) of this section is used to determine a worker's average weekly wage, the wage on the date of the accident shall be used.

(b) Nothing in this subsection (5) alters the discretion of the division or the director to fairly determine a worker's average weekly wage in accordance with subsection (3) of this section.

**Source:** L. 90: Entire article R&RE, p. 486, § 1, effective July 1. L. 91: IP(2), (2)(c), and (2)(d) amended, p. 1304, § 11, effective July 1. L. 94: IP(2) amended and (2)(f) added, p. 1286, § 2, effective May 22. L. 2010: (5) added, (SB 10-187), ch. 310, p. 1457, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-47-101 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Construction of Term.
- III. Statutory Computation of Average Weekly Wage.
- IV. Computation.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The November Meeting and Debate", see 6 Dicta 11 (Dec. 1928). For article, "Labor and Employment Law", which discusses recent Tenth Circuit decisions dealing with stock option plans, see 64

Den. U.L. Rev. 280 (1987). For article, "Time, Equity and the Average Weekly Wage", see 23 Colo. Law. 1831 (1994).

**Annotator's note.** (1) Since § 8-42-102 is similar to § 8-47-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment



which specified that the division of labor, instead of the industrial commission, was responsible for establishing the basis of compensation.

**Compensation formula constitutional.** The compensation formula established in this section violates neither due process nor equal protection. *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982).

**The evident purpose of this section** is to give the dependents what they have lost. Roughly and in general that is about one-half the income of their supporter for the last 12 months, yet often that would not be so and for that reason there is the qualification in subsection (4). *Frink Dairy Co. v. Indus. Comm'n*, 78 Colo. 71, 239 P. 727 (1925).

**Subsection (4) which provides for compensation at maximum rate for minors who have been permanently disabled applies to cases of either partial or total disability.** *Mills v. Guido's*, 800 P.2d 1370 (Colo. App. 1990); *De Giacomo v. Indus. Claim Appeals Office*, 817 P.2d 552 (Colo. App. 1991).

**However, where statutory scheme contained no "maximum rate of compensation", minor was entitled to compensation at standardized rate** under § 8-2-110 (1)(b). *De Giacomo v. Indus. Claim Appeals Office*, 817 P.2d 552 (Colo. App. 1991) (decided prior to 1991 repeal of § 8-42-110).

**"Maximum rate of compensation payable under these articles",** for purposes of computing permanent partial disability award under subsection (4), did not mean the maximum weekly rate prescribed in § 8-42-105 for temporary total disability. *De Giacomo v. Indus. Claim Appeals Office*, 817 P.2d 552 (Colo. App. 1991) (decided prior to 1991 amendment of § 8-42-105).

**Maximum benefits to a minor under subsection (4) are not mandated until a "determination of such permanency" is made** regardless of whether a party can prove a minor will suffer some degree of permanent damage. *Hussion v. Indus. Claim Appeals Office*, 991 P.2d 346 (Colo. App. 1999).

**Time used for computation of benefits under subsection (4) is time of determination of permanency of injury, not time of injury itself.** *De Giacomo v. Indus. Claim Appeals Office*, 817 P.2d 552 (Colo. App. 1991).

A minor claimant with a scheduled injury is entitled to the same benefits as an adult with the same scheduled injury and not entitled to benefits based on a whole person impairment. *Torres v. Canam Indus., Inc.*, 942 P.2d 1384 (Colo. App. 1997).

**The "time of injury" means the "time of disablement", not the date of the accident.** The statutory language in the definitions section, § 8-40-201, maintains a distinction between the terms "accident" and "injury", with an "accident" occurring at a discrete event and "injury"

as the disability resulting from that discrete event. Accordingly, if the average weekly wage is tied to the "time of the injury", and the "injury" includes the "disability resulting from accident", then the "time of injury" necessarily includes the time of disablement, not only the time of the precipitating accident. *Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), overruled in *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

**The "time of injury" does not include the time of disablement.** *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010) (overruling *Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008)).

**"Time of the injury" means time employee was disabled, not time of last injurious exposure to disease agent** listed in § 8-41-304. Worker who was last exposed to asbestos dust in 1977 and developed cancer in 1983 was entitled to benefits based on his 1983 earnings. *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991).

In cases of occupational disease, "time of injury" is generally held to be the time of last exposure or onset of disability. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

**Under provision that authorized director to establish fee schedule for cost containment purposes,** rule that restricted nature of treatment was improper. *Riley Family Trust v. Hood*, 874 P.2d 503 (Colo. App. 1994) (decided under former § 8-49-101 as it existed prior to 1990 repeal).

**In determining compensation for permanently disabled minors,** the compensation scheme specified in this section takes precedence over the general compensation scheme for adults under § 8-42-107 (8)(d). *Horton v. Golden Animal Hosp.*, 879 P.2d 459 (Colo. App. 1994).

**But provisions of 1991 repeal and reenactment of workers' compensation statutes apply only in cases where the injuries occurred on or after July 1, 1991.** *Golden Animal Hosp. v. Horton*, 897 P.2d 833 (Colo. 1995).

**Applied in** *Kalmon v. Indus. Comm'n*, 41 Colo. App. 259, 583 P.2d 946 (1978).

## II. CONSTRUCTION OF TERM.

**The term "wages" is construed to mean the "money rate"** at which the services are recompensed under the contract of hire in force at the time of the accident. *State Comp. Ins. Fund v. Lyttle*, 151 Colo. 590, 380 P.2d 62 (1963).

**Tips and gratuities are not proper elements of wages under this section.** *Indus. Comm'n v. Lindvay*, 94 Colo. 531, 31 P. 2d 495 (1934).

**Tips are to be considered in computing average weekly wages.** *In re Petrafeck v. Indus. Comm'n*, 191 Colo. 566, 554 P.2d 1097 (1976).

**Compensation for cultivation of vegetables**

at so much per acre held to be "wages". *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 74 Colo. 201, 219 P. 1078 (1923).

**Rate not affected by wages attributable to truck furnished by employee.** In determining an employee's weekly wages, a portion of the hourly rate of compensation previously paid by the employer may not be allocated to "maintenance or overhead" of a truck furnished by the employee, rather than the employer, thus reducing the final award. *Filippone v. Indus. Comm'n*, 41 Colo. App. 322, 590 P.2d 977 (1978).

**The value of group health insurance and supplemental life insurance** provided by claimant's employer should be included in determining the "wages" of claimant. *Murphy v. Ampex Corp.*, 703 P.2d 632 (Colo. App. 1985).

**Wages to be received subsequent to the date of injury** may be included in determining wages under this section since there was an implied contract in force at the time of injury authorizing the payment of such wages. *Lenco Leasing Co. v. O'Dell*, 704 P.2d 329 (Colo. App. 1985).

**Average weekly wage does not include employer contributions for nonvested retirement benefits.** *Russell v. Colo. Div. of Employment*, 786 P.2d 483 (Colo. App. 1989).

**Net cost to the employee of replacing health insurance or similar benefits should be added to the average weekly wage** for purposes of calculating temporary disability benefits. *State Compensation Insurance Authority v. Smith*, 768 P.2d 1256 (Colo. App. 1988).

**The term gratuity does not include a bonus given as compensation for working** and which is subject to income taxes and FICA and, therefore, should be included as wages when computing a claimant's average weekly wage. *Simmonds v. Eastman Kodak Co.*, 781 P.2d 140 (Colo. App. 1989).

**Reasonable value of lodging** at the time of the injury is a question of fact and will vary depending on the available evidence and the accompanying circumstances. *Western Cultural Res. Mgt. v. Krull*, 782 P.2d 870 (Colo. App. 1989).

**Applied in Casa Bonita Restaurant v. Indus. Comm'n**, 677 P.2d 344 (Colo. App. 1983).

### III. STATUTORY COMPUTATION OF AVERAGE WEEKLY WAGE.

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Colorado Workers' Compensation Law", see 30 Colo. Law. 69 (April 2001).

**What constitutes a week.** While for some, perhaps for most, purposes a week means a calendar week, extending from midnight Saturday until midnight the following Saturday, it does not mean that for all purposes. For example, if a man, hired at so much a week, com-

mences work at the beginning of the working day on Wednesday and continues during all the working days until the end of the working day on Tuesday of the next calendar week, the money he earns would be one week's wage, not two weeks' wages. In re *Tyson*, 13 Colo. 482, 22 P. 810 (1889); *Mora v. People*, 19 Colo. 255, 35 P. 179 (1893); *Danielson v. Indus. Comm'n*, 96 Colo. 522, 44 P.2d 1011 (1935).

**The fact that "shall" is used in subsection (3) does not mean that the industrial commission must comply with subsection (3).** *Williams Bros. v. Grimm*, 88 Colo. 416, 297 P. 1003 (1931).

**Basis of award of benefits to member of family unit employed to perform services.** Where the family unit, of which workmen's compensation claimant was a member, was employed to perform services and where these services which claimant was performing at the time of her injury were to be recompensated at a particular rate per month, the claimant's award of benefits should be based on that rate of compensation even though all such compensation was paid to the family unit. *Booher v. Las Animas County Sch. Dist. R-88*, 30 Colo. App. 233, 491 P.2d 104 (1971).

**Wages may be on the basis of so much per day or week**, or on the basis of tonnage, or upon acreage, or sugar content of beets, where the employment is to care for growing crops. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 74 Colo. 201, 219 P. 1078 (1923).

**Tips as wages.** From the standpoint of both the employer and the employee, tips are an integral part of the contract of hire and comprise a substantial portion of the employee's average weekly wage. In re *Petrafeck v. Indus. Comm'n*, 191 Colo. 566, 554 P.2d 1097 (1976).

**Where employment is casual** within the meaning and intent of the workmen's compensation act, it is not regular, periodic or certain in nature. *Berkeley Constr. Co. v. Fransua*, 162 Colo. 296, 425 P.2d 801 (1967).

**And when the only compensable wage is for casual piecework** under the statute which provides the formula to be used in determining the daily wage for compensation in such a case, the claimant is entitled only to minimum benefits. *Pittman Motors, Inc. v. Indus. Comm'n*, 156 Colo. 218, 399 P.2d 784 (1964).

**During the portion of the year an employee is attending he is "in business for himself"** within the meaning of that phrase as used in subsection (4) of this section. *Lindner Packing & Provision Co. v. Indus. Comm'n*, 99 Colo. 143, 60 P.2d 924 (1936).

**Computation where employee works for himself a part of the time.** Where an employee works for himself a part of the time, his average weekly wage, under this section, is to be determined by dividing the amount earned by him for the year immediately preceding his accident and



while working for his employer, by the number of weeks he was engaged in such employment. *Imperial Coal Co. v. Holland*, 98 Colo. 448, 56 P.2d 30 (1936).

**Average weekly wage must be computed** based on the employee's compensation rate in force at the time of injury. Where hearing officer had awarded claimant-employee benefits based on hourly rate paid employee-claimant by previous employer, it was not an abuse of discretion to reverse hearing officer's determination and recompute benefits based on hourly wage paid by employer at the time of injury. *Dugan v. Indus. Comm'n*, 690 P.2d 267 (Colo. App. 1984).

**Average weekly wage includes both the employer's and employee's contribution to group health insurance premiums.** *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001).

Claimant is not required to present proof that he or she actually purchased replacement coverage. The statute merely seeks to ensure that the claimant will have funds available to make the purchase. *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001).

**Actual purchase of health insurance not required in order for cost of benefits to be included in calculating claimant's average weekly wage.** *Avalanche Indus. v. Indus. Claim Appeals Office*, 166 P.3d 147 (Colo. App. 2007), *aff'd*, 198 P.3d 589 (Colo. 2008).

**Although average weekly wage generally is determined from the employee's wage at the time of injury**, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

**Calculation of the average weekly wage based upon wage earned when maximum medical improvement was reached was not an abuse of discretion** when the claimant's average weekly wage at a new job was substantially higher than the wage at the time of injury and the alternate computation more fairly compensated the claimant for his future loss of earnings. *Pizza Hut v. Indus. Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

**The federal Employee Retirement Income Security Act of 1974 (ERISA) does not preempt former § 8-47-101 (1) and (2), as effective in May 1989**, to the extent those subsections required that the value of ERISA-plan benefits be included in calculating an employee's average weekly wage for workers' compensation purposes. *Hewlett-Packard Co. v. Diringer*, 42 F. Supp.2d 1038 (D. Colo. 1999).

**Applied in** *Danielson v. Indus. Comm'n*, 96 Colo. 522, 44 P.2d 1011 (1935); *United Util. &*

*Specialties Corp. v. Indus. Comm'n*, 160 Colo. 518, 418 P.2d 896 (1966).

#### IV. COMPUTATION.

**Where the adoption of subsection (3) would penalize claimant, the wage should be determined by subsection (4).** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 74 Colo. 201, 219 P. 1078 (1923); *Indus. Comm'n v. Employers' Mut. Ins. Co.*, 76 Colo. 145, 230 P. 114 (1924); *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 85 Colo. 588, 277 P. 777 (1929); *Williams Bros. v. Grimm*, 88 Colo. 416, 297 P. 1003 (1931); *St. Mary's Church v. Indus. Comm'n*, 735 P.2d 902 (Colo. App. 1986), *cert. denied*, 753 P.2d 769 (Colo. 1988).

**Part-time work.** Since claimant was a part-time employee, the application of subsection (3) would result in his receiving more in benefits than the maximum wages he had been paid prior to his injury. Therefore, the circumstances of the case call for the application of subsection (4). *Western Sizzlin' Steak House v. Axton*, 701 P.2d 96 (Colo. App. 1984).

**For facts which justify an award under subsection (4)**, see *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 85 Colo. 374, 275 P. 939 (1929); *St. Mary's Church v. Indus. Comm'n*, 735 P.2d 902 (Colo. App. 1986), *cert. denied*, 753 P.2d 769 (Colo. 1988).

**For facts which do not justify an award under subsection (4) (now subsection (3))**, see *R.J.S. Painting v. Indus. Comm'n*, 732 P.2d 239 (Colo. App. 1986).

**If industrial commission does not follow subsection (3), it should state why and find facts which justify its course.** *Frink Dairy Co. v. Indus. Comm'n*, 78 Colo. 71, 239 P. 727 (1925).

**Where average weekly wage is less than minimum indemnity allowable, the minimum will be awarded.** *Roeder v. Indus. Comm'n*, 97 Colo. 133, 46 P.2d 898 (1935).

**And if employment is without salary**, it has the effect of reducing the amount of compensation which an injured employee is entitled to receive to the minimum benefits provided by the workmen's compensation law. *Lyttle v. State Comp. Ins. Fund*, 137 Colo. 212, 322 P.2d 1049 (1958); *Pittman Motors, Inc. v. Indus. Comm'n*, 156 Colo. 218, 399 P.2d 784 (1964).

**A person's earnings from other work, wholly unrelated to his uncompensated service**, cannot be used as the basis for computing an award of compensation under the terms of the workmen's compensation law. *Lyttle v. State Comp. Ins. Fund*, 137 Colo. 212, 322 P.2d 1049 (1958).

**Judgment may reduce award where evidence does not justify award under any method of computation.** *Indus. Comm'n v.*

Employers' Mut. Ins. Co., 76 Colo. 145, 230 P. 114 (1935).

**When an employee is paid on a piecework basis**, the average wage is generally determined by computing the average amount earned per pay period over the year preceding the injury. When this method will not render a fair computation of wages, the administrative law judge (ALJ) may use some other method to determine a fair average weekly wage. Drywall Prods. v. Constuble, 832 P.2d 957 (Colo. App. 1991).

**The average wage is generally determined** by computing the average amount earned per pay period over the year preceding the injury when an employee is paid on a piecework basis; except that, when this method will not render a fair computation of wages, the ALJ is empowered to use some other method to determine a fair average weekly wage. Drywall Prods. v. Constuble, 832 P.2d 957 (Colo. App. 1991); Vigil v. Indus. Claim Appeals Office, 841 P.2d 335 (Colo. App. 1992), *aff'd* in part and *rev'd* in part on other grounds, 856 P.2d 850 (Colo. 1993).

**Administrative law judge's determination to use an alternate method to compute claimant's average weekly wage rather than by the piecework method set forth in subsection (2)(e)** was supported by substantial evidence and could not be disturbed on review where claimant's contract contemplated 10 to 12 hours per day for 5 days per week on a piecework basis and claimant had worked on a piecework basis for a short period of time prior to injury. Drywall Prods. v. Constuble, 832 P.2d 957 (Colo. App. 1991).

**Administrative law judge did not abuse his broad discretion of authority in determining that claimant's average weekly wage should be calculated based upon her wages nearly five years after her injury** because the determination reflected an increase in wages that claimant would have continued to receive if not for the industrial injury she sustained while working for the former employer when the injury was sustained. Avalanche Indus. v. Indus. Claim Appeals Office, 166 P.3d 147 (Colo. App. 2007), *aff'd*, 198 P.3d 589 (Colo. 2008).

**While calculation of a claimant's average weekly wage is generally tied to the time of injury**, the discretionary exception allows an ALJ to base the average weekly wage on a salary that a claimant was actually earning when forced to stop working. Avalanche Indus. v. Clark, 198 P.3d 589 (Colo. 2008).

**The discretionary exception allows an ALJ to compute an employee's average weekly wage based on compensation received at a subsequent employer**, provided the ALJ does not abuse his or her discretion. Benchmark/Elite, Inc. v. Simpson, 232 P.3d 777 (Colo. 2010).

**Administrative law judge did not abuse his discretion when he determined the claimant's average weekly wage included the cost of COBRA insurance**, even when the claimant did not actually purchase the Consolidated Omnibus Budget Reconciliation Act (COBRA) health insurance after she was unable to work. Avalanche Indus. v. Clark, 198 P.3d 589 (Colo. 2008).

**For purposes of calculating disability benefits**, employment contract covered both hours during which wages and tips were received and hours during which only tips were received but employee remained under direction and control of employer. Romero v. U-LET-US Skycap Servs. Inc., 740 P.2d 1004 (Colo. App. 1987).

**Expense reimbursement of four cents per mile was not considered wages** for federal income tax purposes and therefore could not be considered wages for purposes of computing a claimant's average weekly wage. Ernie Baylog, Inc. v. Indus. Claim Appeals Office, 923 P.2d 361 (Colo. App. 1996).

**Reasonable depreciation deducted from a self-employed workers' compensation claimant's gross earnings as reported on his federal income tax return should be included** in the calculation of his post-injury average weekly wage for determining the amount of temporary partial disability benefits to which he is entitled. Elliott v. El Paso County, 860 P.2d 1365 (Colo. 1993).

**Workers' compensation claimant bears the burden of establishing the reasonableness of depreciation deductions included in calculating temporary partial disability benefits** because the claimant bears the burden of showing the statutory entitlement to compensation by a preponderance of the evidence. Elliott v. El Paso County, 860 P.2d 1365 (Colo. 1993).

**Concurrent employment**. Where an injury impairs a claimant's ability to earn from concurrent employments, a "fair" computation of the average weekly wage may warrant inclusion of all such wages. Jefferson County Pub. Sch. v. Dragoo, 765 P.2d 636 (Colo. App. 1988); Broadmoor Ins. Co. v. Indus. Claim Appeals Office, 939 P.2d 460 (Colo. App. 1996).

**The phrase "at the time of the determination of such permanency,"** as used in subsection (4), refers to the time of the treating physician's determination of maximum medical improvement, not the date of hearing or adjudication on the issue of permanent impairment benefits. The date that the administrative docket can accommodate a hearing bears no relation to the claimant's physical condition. Golden Animal Hosp. v. Horton, 897 P.2d 833 (Colo. 1995).

**Purpose of the minors' statute now codified in subsection (4)** is to eliminate the disparity of benefits between adult workers and minor workers, who frequently work part-time and at substantially lower wages. Golden Animal Hosp. v. Horton, 897 P.2d 833 (Colo. 1995).



**Conclusion that an injured minor remains entitled to the benefit of the higher end "age factor"** listed in § 8-42-107 as well as computation of benefits at the maximum temporary disability rate, is not inconsistent with the legislative intent of this section or § 8-42-107. *Arkansas Valley Seeds, Inc. v. Indus. Claim Appeals Office*, 972 P.2d 695 (Colo. App. 1998).

**Minor with scheduled disability is not entitled to aggregate amount of benefits allowed**

**by statute as provided by subsection (4).** Since § 8-42-107 (6) provides for a fixed rate of compensation for all scheduled disabilities, there is no disparity between the benefits paid to minors and to adults. *Williams v. Indus. Claim Appeals Office*, 932 P.2d 869 (Colo. App. 1997).

**Applied in** *Robbolino v. Fischer-White Contractors*, 738 P.2d 70 (Colo. App. 1987).

**8-42-103. Disability indemnity payable as wages - period of disability.** (1) If the injury or occupational disease causes disability, a disability indemnity shall be payable as wages pursuant to section 8-42-105 (2) (a) subject to the following limitations:

(a) If the period of disability does not last longer than three days from the day the employee leaves work as a result of the injury, no disability indemnity shall be recoverable except the disbursement provided in articles 40 to 47 of this title for medical, surgical, nursing, and hospital services, apparatus, and supplies, nor in any case unless the division has actual knowledge of the injury or is notified thereof within the period specified in said articles.

(b) If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work.

(c) (I) In cases where it is determined that periodic disability benefits granted by the federal "Old-Age, Survivors, and Disability Insurance Amendments of 1965", Pub.L. 89-97, are payable to an individual and the individual's dependents, the aggregate benefits payable for temporary total disability, temporary partial disability, and permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to one-half the federal periodic benefits; but, if the federal "Old-Age, Survivors, and Disability Insurance Amendments of 1965", Pub.L. 89-97, is amended to provide for a reduction of an individual's disability benefits thereunder because of compensation benefits payable under articles 40 to 47 of this title, the reduction of compensation benefits provided in said articles shall be decreased by an amount equal to the federal reduction. Upon request of the insurer or employer, the employee shall apply for such federal periodic disability benefits and respond to requests from the insurer or employer as to the status of such application. Failure to comply with this section constitutes cause for suspension of benefits.

(II) In cases where it is determined that periodic benefits granted by the federal old-age, survivors, and disability insurance act or employer-paid retirement benefits are payable to an individual and the individual's dependents, the aggregate benefits payable for permanent total disability pursuant to this section shall be reduced, but not below zero:

(A) By an amount equal as nearly as practical to one-half such federal benefits; except that this reduction for the periodic benefits granted by the federal old-age, survivors, and disability insurance act shall not exceed the reduction specified in subparagraph (I) of this paragraph (c) for the periodic disability benefits payable to an individual;

(B) By an amount determined as a percentage of the employer-paid retirement benefits, said percentage to be determined by a weighted average of the employer's contributions during the period of covered employment divided by the total contributions during the period of covered employment; except that in permanent total disability cases all contributions made by the employer pursuant to a collective bargaining agreement with the employee's representative shall be considered to have been made by the employee.

(II.5) In cases where an employer does not participate in federal old-age, survivors, and disability insurance, and it is determined that employer-paid retirement benefits are payable to an individual and the individual's dependents, the aggregate benefits payable for permanent total disability pursuant to this section shall be reduced, but not below zero by an amount determined as a percentage of the employer-paid retirement benefits, said percentage to be determined by a weighted average of the employer's contributions during

the period of covered employment divided by the total contributions during the period of covered employment.

(III) Notwithstanding sub-subparagraph (A) of subparagraph (II) of this paragraph (c), if the federal "Old-Age, Survivors, and Disability Insurance Amendments of 1965", Pub.L. 89-97, is amended to provide for a reduction of an individual's periodic benefits thereunder because of compensation benefits payable under articles 40 to 47 of this title, the reduction of compensation benefits provided in said articles shall be decreased by an amount equal to the federal reduction.

(IV) The provisions of subparagraphs (II) and (III) of this paragraph (c) shall apply only if the injury on which the award for permanent total disability was based occurred after the claimant reached forty-five years of age.

(d) (I) In cases where it is determined that periodic disability benefits are payable to an employee under a pension or disability plan financed in whole or in part by the employer, hereinafter called "employer pension or disability plan", the aggregate benefits payable for temporary total disability, temporary partial disability, and permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to the employer pension or disability plan benefits, with the following limitations:

(A) Where the employee has contributed to the employer pension or disability plan, benefits shall be reduced under this section only in an amount proportional to the employer's percentage of total contributions to the employer pension or disability plan.

(B) Where the employer pension or disability plan provides by its terms that benefits are precluded thereunder in whole or in part if benefits are awarded under articles 40 to 47 of this title, the reduction provided in this paragraph (d) shall not be applicable to the extent of the amount so precluded.

(II) Upon request of the insurer or employer, the employee shall apply for such periodic disability benefits and respond to requests from the insurer or employer as to the status of such application. Failure to comply with this section shall be cause for suspension of benefits.

(III) The provisions of this paragraph (d) shall apply to a disability pension paid pursuant to article 30.5 or 31 of title 31, C.R.S.; except that said reduction shall not reduce the combined weekly disability benefits below a sum equal to one hundred percent of the state average weekly wage as defined in section 8-47-106 and applicable to the year in which the weekly disability benefits are being paid.

(IV) If the disability benefits awarded pursuant to articles 40 to 47 of this title are paid in a lump sum pursuant to section 8-43-406, the weekly benefit attributed to such workers' compensation benefits, for the purpose of calculating the combined weekly disability benefit specified in subparagraph (III) of this paragraph (d), shall be calculated by assuming that the employee is receiving the weekly disability benefits payments such employee would have received had such weekly disability payments not been reduced and paid as a lump sum.

(e) In cases where it is determined that periodic disability benefits are payable to an individual and said individual's dependents pursuant to a workers' compensation act of another state or of the federal government, the aggregate benefits payable for temporary total disability, temporary partial disability, permanent partial disability, and permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal to the benefits payable pursuant to such other workers' compensation act.

(f) In cases where it is determined that unemployment compensation benefits are payable to an employee, the aggregate benefits payable for permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to such unemployment compensation benefits. In cases where it is determined that unemployment insurance benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received, unless the unemployment insurance amount has already been reduced by the temporary disability benefit amount and except that temporary total disability shall not be reduced by unemployment insurance benefits received pursuant to section 8-73-112.



(g) In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

**Source:** **L. 90:** Entire article R&RE, p. 487, § 1 effective July 1; (1)(d)(IV) amended, p. 1844, § 30, effective July 1. **L. 92:** IP(1) amended, p. 1824, § 1, effective April 29. **L. 94:** (1)(c)(II) amended and (1)(c)(II.5) added, p. 2001, § 3, effective July 1. **L. 96:** (1)(d)(III) amended, p. 940, § 2, effective May 23. **L. 99:** (1)(g) added, p. 266, § 1, effective July 1. **L. 2000:** IP(1)(c)(II), (1)(c)(II.5), and (1)(c)(III) amended, p. 1762, § 1, effective June 1. **L. 2010:** IP(1), (1)(c)(I), (1)(c)(III), and IP(1)(d)(I) amended, (SB 10-187), ch. 310, p. 1457, § 4, effective July 1.

**Editor's note:** This section is similar to former § 8-51-101 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 97 (June 2003). For article, "Termination of Undocumented Workers Under the Workers' Compensation Act", see 37 Colo. Law. 59 (March 2008).

**Annotator's note.** Since § 8-42-103 is similar to § 8-51-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Constitutionality of social security benefit offset.** Subsection (1)(c), providing for an offset of social security retirement benefits against workers' compensation benefits, does not violate equal protection under the state or federal constitutions. *Culver v. Ace Elec.*, 952 P.2d 1200 (Colo. App. 1997), *aff'd*, 971 P.2d 641 (Colo. 1999); *Stolworthy v. Clark*, 952 P.2d 1198 (Colo. App. 1997), *aff'd sub nom. Culver v. Ace Elec.*, 971 P.2d 641 (Colo. 1999).

Avoiding duplicative benefits serves a legitimate governmental interest, and imposing an offset is rationally related to that interest. *Culver v. Ace Elec.*, 952 P.2d 1200 (Colo. App. 1997), *aff'd*, 971 P.2d 641 (Colo. 1999).

**Other sections may limit rights granted by this section.** The general statement in subsection (1)(a) that, whenever an "injury or occupational disease causes disability, a disability indemnity shall be payable as wages" does not override the statutory time limits on reopening of claims under § 8-43-303. *Calvert v. Indus. Claim Appeals Office*, 155 P.3d 474 (Colo. App. 2006).

**The various provisions of subsection (1)(c) and (1)(d)(I) do not impinge on any of the rights guaranteed by either the state or federal constitution.** *Myers v. State*, 162 Colo. 435, 428 P.2d 83 (1967).

**Offset for SSDI benefits set forth in subsection (1)(c)(I) may be taken retroactively against compensation benefits received before**

the insurer has invoked the claim of an offset. Nothing in the statute indicates that an insurer's right of offset is subject to a time limitation. Imposing such a restriction would undermine the very purpose of the offset, which is to prevent a windfall of duplicative disability benefits regardless of whether such outcome occurs by mistake. *Jiminez v. Indus. Claim Appeals Office*, 51 P.3d 1090 (Colo. App. 2002).

**Mere happening of accident not cause for benefits.** Even though exposure to disease might be considered an accident under the workmen's compensation act, the mere happening of an accident does not give rise to a right to benefits. *City of Littleton v. Schum*, 38 Colo. App. 122, 553 P.2d 399 (1976).

**Benefits flow only to a workman who has suffered a disabling injury** as a result of the accident. *City of Littleton v. Schum*, 38 Colo. App. 122, 553 P.2d 399 (1976).

**When employer required to pay medical expenses.** An employer is required to pay medical expenses only in cases in which he would be charged with the duty of paying other compensation under the act. *City of Littleton v. Schum*, 38 Colo. App. 122, 553 P.2d 399 (1976).

**Benefits under this section are based on the loss or impairment of the earning power of the workman.** They protect against an actual loss of earnings which must be shown to have been occasioned during the period of time for which the claim for benefits is made. An award for disability, either permanent or temporary presupposes the actual inability of the workman to earn as much, because of the injury, as he was able to earn prior thereto. *Ice v. Indus. Comm'n*, 120 Colo. 144, 207 P.2d 963 (1949).

Benefits are based upon loss or impairment of the earning power of the workman and are designed for protection against actual loss of earnings as a result of the injury. *City of Littleton v. Schum*, 38 Colo. App. 122, 553 P.2d 399 (1976); *Monfort of Colo. v. Husson*, 725 P.2d 67 (Colo. App. 1986); *Ray v. Indus. Claim Appeals Office*, 920 P.2d 868 (Colo. App. 1996).

"Disability" means industrial disability or loss of earning capacity. The term "disability" as used in the workmen's compensation act means industrial disability or loss of earning capacity, and not mere functional disability. *World of Sleep, Inc. v. Davis*, 34 Colo. App. 279, 527 P.2d 890 (1974), rev'd on other grounds, 188 Colo. 443, 536 P.2d 34 (1975).

As are **medical impairment benefits awarded under § 8-42-107(8)**. Such benefits are a form of permanent partial disability benefits designed to compensate for loss of earning capacity, and there is no basis for distinguishing between such benefits and the benefits referenced in subsection (1)(c)(I) of this section. *Ray v. Indus. Claim Appeals Office*, 920 P.2d 868 (Colo. App. 1996).

**Admission of liability for "closed" period not permitted.** By filing an admission of liability, an insurer has, in effect, admitted that the claimant has sustained the burden of proving entitlement to temporary disability benefits. Thereafter, the insurer is bound by that admission and must pay accordingly. The insurer may not unilaterally terminate benefits without complying with other statutory and regulatory provisions governing the termination of such benefits. *Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

**Subsection (1)(a) and § 8-42-105(1) require a claimant to establish a causal connection** between a work-related injury and a subsequent wage loss in order to obtain temporary total disability benefits. *Lindner Chevrolet v. Indus. Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995).

**To establish eligibility for temporary disability benefits** the employee need not prove that the work-related injury was the sole cause of the wage loss; if the claimant establishes that his or her work-related injury contributed in some degree to a temporary wage loss, the claimant is eligible for temporary disability benefits. *Lindner Chevrolet v. Indus. Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995).

**It is highly unlikely that the general assembly intended to deny completely temporary disability benefits where an employee was terminated for negligently causing a work injury** in light of § 8-42-112 (1), which requires a 50% reduction in benefits if an employee is injured because of willfully violating a safety rule. The term "responsible" does not refer to an employee's injury or injury-producing activity, therefore the termination statutes do not apply where an employee is terminated because of the employee's injury or injury-producing activity. *Colo. Springs Disposal v. Indus. Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002).

**Neither this section nor § 8-42-105 requires claimant to provide a medical opinion restricting her from regular employment as a**

**condition of receiving temporary total disability benefits.** The administrative law judge appropriately awarded TTD benefits based on claimant's evidence, including notes of her personal physician, that she had suffered a wage loss as a result of her injury. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

**"Dependents", as used in subsection (1)(c), is governed by state law.** *Dietiker v. Indus. Claim Appeals Office*, 867 P.2d 171 (Colo. App. 1993).

A claimant's first wife is not a dependent for the purposes of subsection (1)(c) where the claimant has no legal obligation to support the wife after their divorce. An insurer is not entitled to an offset against the claimant's workers' compensation benefits for federal SSDI benefits received by the first wife. *Dietiker v. Indus. Claim Appeals Office*, 867 P.2d 171 (Colo. App. 1993).

An insurer is entitled to an offset against a claimant's workers' compensation benefits for federal SSDI benefits received by the claimant's wife from the date of their marriage. The amount of the offset, however, is based on the amount the dependent would have received at the time of the initial SSDI award to the claimant. *Dietiker v. Indus. Claim Appeals Office*, 867 P.2d 171 (Colo. App. 1993).

Legally adopted child under eighteen years of age is a dependent within the meaning of subsection (1)(c). An insurer is entitled to an offset against a claimant's workers' compensation benefits for federal SSDI benefits received by the claimant's legally adopted child from the date of the adoption. The amount of the offset, however, is based on the amount the dependent would have received at the time of the initial SSDI award to the claimant. *Dietiker v. Indus. Claim Appeals Office*, 867 P.2d 171 (Colo. App. 1993).

**Use of the word "practical" in subsection (1)(d) reflects that the general assembly recognized that in some instances it would not be feasible to calculate the employer's exact contribution to the claimant's pension.** *Walker v. City and County of Denver*, 870 P.2d 1269 (Colo. App. 1994); *Johnson v. Indus. Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

**Disabled employee has duty to apply for social security benefits.** Consistent with the proposition that an injured person has a duty to mitigate his damages, a disabled employee when eligible has a duty to apply for social security disability benefits, not only to benefit himself but also to benefit his employer who is bound by law to provide him with workmen's compensation benefits. *Hurtado v. C F & I Steel Corp.*, 168 Colo. 37, 449 P.2d 819 (1969); *Arellano v. Dir., Div. of Labor*, 42 Colo. App. 149, 590 P.2d 987 (1979).

**And employer may determine the payability of federal benefits and may reduce**



**workmen's compensation.** When an employee who is receiving workmen's compensation disability benefits becomes eligible for further disability benefits under the social security act, and such employee fails to make application for such additional benefits, the employer paying the compensation may initially determine the payability of such federal disability benefits and may reduce the workmen's compensation disability payments in accordance with this section. *Hurtado v. C F & I Steel Corp.*, 168 Colo. 37, 449 P.2d 819 (1969); *Arellano v. Dir., Div. of Labor*, 42 Colo. App. 149, 590 P.2d 987 (1979).

**Subsections (1)(c) and (1)(d)(I) apply to the situation where a person, who is receiving benefits under workmen's compensation, is thereafter granted a disability annuity.** *Yeargain v. State*, 162 Colo. 447, 428 P.2d 89 (1967).

**For an injured employee should not be permitted to receive so-called "double" disability benefits; i.e., both workmen's compensation benefits and disability annuity at the expense of the employer.** *Myers v. State*, 162 Colo. 435, 428 P.2d 83 (1967).

**Rationale behind the setoff provisions is to prevent duplication of benefits at the employer's expense.** In re *Dailey v. Indus. Comm'n*, 651 P.2d 1223 (Colo. App. 1982), rev'd on other grounds, 680 P.2d 231 (Colo. 1984).

**Intent of offset provision is to prevent employee from receiving double disability benefits which are both financed by the employer.** *Scriven v. Indus. Comm'n*, 736 P.2d 414 (Colo. App. 1987); *Sparling v. Colo. Dept. of Hwys.*, 812 P.2d 686 (Colo. App. 1990); *Walker v. City & County of Denver*, 870 P.2d 1269 (Colo. App. 1994).

Subsection (1)(e) was designed to prevent an injured worker from receiving duplicative benefits for the same injury. *Circle K Corp. v. Indus. Claim Appeals Office*, 809 P.2d 1116 (Colo. App. 1991).

**Only pension benefits to which the employer has contributed are available to create an offset.** Conversely, benefits attributable to claimant's contributions are not subject to the offset. *Spanish Peaks Mental Health v. Huffaker*, 928 P.2d 741 (Colo. App. 1996) (decided prior to 1990 repeal and reenactment).

**No requirement that social security benefits and workers' compensation benefits both are paid because of a work-related injury.** Nor does the plain language of subsection (1)(c)(I) admit of an interpretation that limits its application to cases in which the claimant has a valid reason not to accept SSDI or does not benefit from a determination that SSDI is payable. *Ihnen v. Western Forge*, 936 P.2d 634 (Colo. App. 1997).

**Offset for social security retirement benefits can be taken regardless of a claimant's receipt of, or entitlement to, social security**

**disability benefits.** The receipt of, or entitlement to, disability benefits affects only the limitation on the amount of the offset for retirement benefits in subsection (1)(c)(II) but not the applicability of the retirement offset itself. *Culver v. Ace Elec.*, 952 P.2d 1200 (Colo. App. 1997), aff'd, 971 P.2d 641 (Colo. 1999).

A claimant's failure to qualify for social security disability benefits affects only the provision limiting the amount of the offset in subsection (1)(c)(II) not the applicability of the offset itself. *Stolworthy v. Clark*, 952 P.2d 1198 (Colo. App. 1997), aff'd sub nom. *Culver v. Ace Elec.*, 971 P.2d 641 (Colo. 1999).

The term "payable" in subsection (1)(c)(II) should be construed to mean that a claimant is entitled to benefits, not whether he or she actually applied for and received them. *Culver v. Ace Elec.*, 952 P.2d 1200 (Colo. App. 1997), aff'd, 971 P.2d 641 (Colo. 1999).

**Offset for social security disability benefits is taken after, not before, application of maximum benefit provisions of § 8-42-105.** To do otherwise would ignore the word "payable" in subsection (1)(c). *Yates v. Sinton Dairy*, 883 P.2d 562 (Colo. App. 1994).

**Offset for social security disability benefits is taken from the aggregate total of the workers' compensation benefits payable,** not from each benefit separately. Where an employee is receiving PPD benefits for one injury and TTD benefits for another, the offset applies only once. *U.S. West Commc'ns, Inc. v. Indus. Claim Appeals Office*, 978 P.2d 154 (Colo. App. 1999).

**Offset for social security disability insurance benefits taken against permanent partial disability benefits is calculated** by converting the overall aggregate amount of permanent partial disability benefits to its weekly equivalent to determine the number of weeks of eligibility. The number of weeks is multiplied by the weekly social security offset to yield the total offset. *Armijo v. Indus. Claim Appeals Office*, 989 P.3d 198 (Colo. App. 1999).

**Benefits not offset by social security cost of living increases.** State workmen's compensation benefits may not be offset by the amount of federal cost of living increases. *Engelbrecht v. Hartford Acc. & Indem. Co.*, 680 P.2d 231 (Colo. 1984).

Holding that state workers' compensation benefits may not be offset by the amount of federal cost of living increases is to be applied retroactively. *Marinez v. Indus. Comm'n*, 746 P.2d 552 (Colo. 1987); *Ward v. Azotea Contractors*, 748 P.2d 338 (Colo. 1987).

Purpose and effect of not offsetting benefits by social security cost of living increases is furthered by retroactive application since injured workers who had been deprived of one-half the increase provided under federal law would have that inequity redressed. *Marinez v. Indus. Comm'n*, 746 P.2d 552 (Colo. 1987);

Harrison v. Indus. Comm'n, 750 P.2d 65 (Colo. 1988); Fraker v. Indus. Comm'n, 750 P.2d 67 (Colo. 1988).

**Even though employer did not pay social security taxes,** employer is allowed an offset against workers' compensation benefits for social security benefits paid to a claimant. *Sampson v. Weld County Sch. Dist.*, 786 P.2d 488 (Colo. App. 1989).

**Where insurer makes an offset for social security disability benefits pursuant to subsection (1)(c),** the insurer is not required to file a petition to modify. *Gregory v. Crown Transp.*, 776 P.2d 1163 (Colo. App. 1989), cert. denied, 785 P.2d 916 (Colo. 1989).

**The phrase "individual and his dependents" in subsection (1)(e) refers to the deceased workman and his dependents** and thus, award of death benefits without an offset for social security benefits received by the deceased's nondependent stepchildren was proper. *Acme Glass v. Indus. Comm'n*, 682 P.2d 521 (Colo. App. 1984).

**Offset provision applies to multi-employer plans as well as to single employer plans.** *Scriven v. Indus. Comm'n*, 736 P.2d 414 (Colo. App. 1987).

**Offset provision applies to both vested and nonvested retirement benefits.** *Nye v. Indus. Claim Appeals Office*, 883 P.2d 607 (Colo. App. 1994).

**Workers' compensation insurer is entitled to offset against future disability benefits paid to the claimant one-half of the amount of social security disability benefits received by the claimant before right of offset was invoked.** This section allows the commission to reduce future benefits to the claimant to offset the social security disability benefits already paid to the claimant. *Johnson v. Indus. Comm'n*, 761 P.2d 1140 (Colo. 1988).

**City, a self-insured employer, was entitled to offset claimant's pension benefits under this section,** even though the City made no actual contributions to his pension for period of time, where the evidence was undisputed that the City was required by statute to make, and did make, substantial amortized retroactive contributions to its pension plan since becoming affiliated with the Police and Fire Pension Association in 1981. *Walker v. City & County of Denver*, 870 P.2d 1269 (Colo. App. 1994).

**Benefits cannot be offset by amounts withheld from claimant's lump sum disability benefits and paid directly to claimant's attorney** as fees earned in appealing the initial denial of the disability benefits. *St. Vincent's Hosp. v. Alires*, 778 P.2d 277 (Colo. App. 1989).

**Payments made under a "pension plan"** may not be offset against a workers' compensation award since these two payment types are mutually exclusive: The former payment type is provided for payments of injuries not arising out

of the course of employment; the latter payment is for injuries arising out of employment. *Halliburton Serv. v. Miller*, 720 P.2d 571 (Colo. 1986).

**Fact that pension plan is a negotiated employment benefit does not change its character as being employer financed** and, therefore, workers' compensation benefits are subject to offset by amount of disability benefits. *Scriven v. Indus. Comm'n*, 736 P.2d 414 (Colo. App. 1987).

**To determine the amount by which a state employee's workers' compensation benefits must be offset by PERA benefits,** the portion of the employee's PERA benefits attributable to employer's contribution to the pension program are subtracted from workers' compensation benefits. *Indus. Comm'n v. Edlund*, 759 P.2d 7 (Colo. 1988).

Purpose of subsection (1)(e) is to prevent double recovery by an employee. If an offset is determined by net PERA benefits, rather than PERA benefits before federal and state taxes are deducted, the employer would in effect be required to pay an employee's taxes. *Colo. Dept. of Hwys. v. Sparling*, 821 P.2d 780 (Colo. 1991).

"Total pension benefits", as used in subsection (1)(e) means gross benefits, before federal and state taxes are withheld from disability pension benefits payable to an employee pursuant to an employer's pension plan. Taxes shall not be deducted before calculating the offset of such periodic disability benefits from the aggregate benefits payable pursuant to such subsection. *Colo. Dept. of Hwys. v. Sparling*, 821 P.2d 780 (Colo. 1991).

**Offset calculated pursuant to this section properly included amounts withheld at option of claimant from claimant's PERA disability payments** for health and life insurance coverages as such deducted insurance premiums are "payable to" claimant even though not actually received. *Sparling v. Colo. Dept. of Hwys.*, 812 P.2d 686 (Colo. App. 1990).

**Calculation of employer's total contributions to PERA** includes its contributions to the cost-of-living stabilization fund and contributions for unfunded liabilities. *Johnson v. Indus. Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

This section does not make a distinction between PERA disability retirement contributions and service retirement contributions. *Johnson v. Indus. Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

**Offset properly excluded taxes mandatorily deducted from claimant's PERA disability benefits** as such amounts are not "payable to" nor paid to claimant. *Sparling v. Colo. Dept. of Hwys.*, 812 P.2d 686 (Colo. App. 1990).

**The offset afforded by this section should continue so long as PERA disability benefits continue,** and should not automatically termi-



nate based upon claimant achieving 65 years of age where statutes provide and testimony before ALJ indicated that part of the PERA disability retirement benefit payable to the claimant was directly attributable to the fact that she was permanently disabled and that such disability benefit would, after age 65, be paid for the rest of her life regardless of her recovery or her work status, subject to certain limitations. *State Penitentiary v. Toothaker*, 832 P.2d 1009 (Colo. App. 1991).

**The offset under subsection (1)(d) is an offset against pension benefits** and, if for some reason, the claimant's pension benefits are reduced or terminated and are no longer "payable" to the claimant, the offset under subsection (1)(d) will become inapplicable and claimant's weekly workers' compensation benefit will be restored to its pre-offset level. *Walker v. City & County of Denver*, 870 P.2d 1269 (Colo. App. 1994).

**Pension payments from the firemen's pension fund were properly offset against the claimant's benefits for permanent partial disability** even though the employer's contributions to the plan were in the form of revenues derived from an ad valorem tax. *Keelan v. City & County of Denver*, 868 P.2d 1173 (Colo. App. 1994).

**Attorney fees were properly deducted before calculation of the offset**, so that the claimant and the Colorado Compensation Insurance Authority each bore one-half of the fees. *Jones v. Indus. Claim Appeals Office*, 892 P.2d 425 (Colo. App. 1994).

**Denial of offset for veteran's disability benefits was proper** because veteran's disability benefits are not benefits pursuant to a "workers' compensation act" of another state or the federal government. *City and County of Denver v. Indus. Claim Appeals Office*, 892 P.2d 429 (Colo. App. 1994).

**Veteran's disability benefits are not included in section that provides for an offset for benefits payable to an employee under the provisions of a pension or disability plan financed in whole or in part by the employer.** *City and County of Denver v. Indus. Claim Appeals Office*, 892 P.2d 429 (Colo. App. 1994).

**The introductory portion to paragraph (d) of subsection (1) and subparagraph (I) of paragraph (d) must be construed together.** *Bailey v. Lakewood Fire Prot. Dist.*, 44 Colo. App. 463, 618 P.2d 716 (1980).

**Workmen's compensation benefits are reduced when employer has disability pension plan for employees.** A reduction in the workmen's compensation benefits otherwise payable to an injured employee is required where the employer, who has himself already paid the cost of workmen's compensation insurance, has also purchased, in whole or in part, a disability pension or annuity plan for his employee. *Myers v.*

*State*, 162 Colo. 435, 428 P.2d 83 (1967); *Jefferson County Pub. Sch. v. Sago*, 786 P.2d 486 (Colo. App. 1989).

**And the phrase "pension plan" is used in the broad, generic sense**, and if there are to be exceptions, these have to be provided for in a clear and unmistakable manner. *Myers v. State*, 162 Colo. 435, 428 P.2d 83 (1967).

**Sickness and disability insurance plan does not constitute a pension plan** under subsection (1)(d). *Miller v. Halliburton Servs.*, 689 P.2d 662 (Colo. App. 1984), *aff'd*, 720 P.2d 571 (Colo. 1986).

**Plain meaning of subsection (1)** requires only that the deduction in benefits paid the claimant be an amount equal "as near as practical" to the employer's proportional contributions to the pension plan. *Bailey v. Lakewood Fire Prot. Dist.*, 44 Colo. App. 463, 618 P.2d 716 (1980).

**Offset inapplicable.** If the pension plan provides for a reduction equal to the amount of workmen's compensation benefits, the offset in subsection (1)(d) is inapplicable. *Masdin v. Gardner-Denver-Cooper Indus., Inc.*, 689 P.2d 714 (Colo. App. 1984).

**Income maintenance benefits are not included in listing of benefits to be offset** by any disability annuity payments; to extend the statute to include such benefits would not only be tantamount to indulging in judicial legislation but would ignore the express statutory language. *State Comp. Ins. Fund v. Velasquez*, 628 P.2d 190 (Colo. App. 1981).

**Offset provision in subsection (1)(f) found unconstitutional as applied**, because it deprived claimant and others similarly situated of their full entitlement to workers' compensation benefits where their employers choose to contest. Here claimant had applied for unemployment insurance benefits before the conclusion of her temporary total disability benefits and, thus, before reaching maximum medical improvement. *Axelson v. Pace Membership Warehouse*, 923 P.2d 322 (Colo. App. 1996).

**Award for medical expenses held erroneous.** An award of compensation for medical expenses incurred for inoculations claimant secured after his exposure to infectious hepatitis was erroneous because (1) infectious hepatitis was not an occupational disease as defined in former article 60 of this title, and (2) mere exposure to a disease does not warrant an award of benefits. *City of Littleton v. Schum*, 38 Colo. App. 122, 553 P.2d 399 (1976).

**It is error for the appellate court to specify in an order of remand the amount of the average weekly wage** derived in accordance with this section before the administrative law judge has been given the opportunity to exercise its discretion under this section. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

**The failure of the administrative law judge to determine the average weekly wage for a second injury in accordance with subsection (4) is an abuse of discretion and is not supported by applicable law.** Where a claimant suffers serious disability from an initial injury and must return to work in a much lower-paying job, and subsequently suffers a second injury under the same employer, such that the claimant becomes permanently and totally disabled as a result of the combination of the injuries and substantial compensation in the way of permanent partial disability benefits is precluded from the first injury, the average weekly wage is to be determined in accordance with this section. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

**The term "employment" in subsection (1)(g) is not ambiguous and encompasses both modified and regular employment.** *Colo. Springs Disposal v. Indus. Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002).

**Where faultless employee is terminated while still temporarily disabled, the resulting wage loss must be attributable to the injury,** and an employer must pay temporary disability benefits for any resulting wage loss. *Monfort of Colo. v. Husson*, 725 P.2d 67 (Colo. App. 1986).

**When an employee experiences a worsening of a condition or the development of a disability after termination of employment that is a result of an on-the-job injury, sub-**

section (1)(g) does not apply to terminate employee disability benefits. *Grisbaum v. Indus. Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005).

**Section 2-4-108 (1) covers computation of time periods under this section.** Thus, the date of the claimant's injury should be excluded from the computation of the three-day waiting period. *Ralston Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991).

**Medical impairment benefits are a form of permanent partial disability within the context of subsection (1)(d).** *Durocher v. Indus. Claim Appeals Office*, 905 P.2d 4 (Colo. App. 1995), *aff'd* on other grounds sub nom. *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996).

**Previously existing disability incurred during active military service** is not a "permanent partial industrial disability" within the meaning of the statute. Therefore there is no liability to the fund for a prior partial military service connected disability. *City and County of Denver v. Indus. Claim Appeals Office*, 892 P.2d 429 (Colo. App. 1994).

**Applied in Consolidated Coal & Coke Co. v. Todoroff**, 97 Colo. 125, 47 P.2d 404 (1935); *City of Thornton v. Teeter*, 37 Colo. App. 427, 548 P.2d 133 (1976); *Romero v. Indus. Comm'n*, 632 P.2d 1052 (Colo. App. 1981); *Valdez v. United Parcel Serv.*, 728 P.2d 340 (Colo. App. 1986).

**8-42-104. Effect of previous injury or compensation.** (1) The fact that an employee has suffered a previous disability or impairment or received compensation therefor shall not preclude compensation for a later injury or for death, but, in determining compensation benefits payable for the later injury or death, the employee's average weekly earnings at the time of the later injury shall be used in determining the compensation payable to the employee or such employee's dependents. Notwithstanding any other provision of articles 40 to 47 of this title, no claimant may receive concurrent permanent total disability awards from injuries occurring in this state or any other state.

(2) (Deleted by amendment, L. 2008, p. 1676, § 2, effective July 1, 2008.)

(3) An employee's temporary total disability, temporary partial disability, or medical benefits shall not be reduced based on a previous injury.

(4) An employee's recovery of permanent total disability shall not be reduced when the disability is the result of work-related injury or work-related injury combined with genetic, congenital, or similar conditions; except that this subsection (4) shall not apply to reductions in recovery or apportionments allowed pursuant to the Colorado supreme court's decision in the case denominated *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

(5) In cases of permanent medical impairment, the employee's award or settlement shall be reduced:

(a) When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the "Workers' Compensation Act of Colorado" or a similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.

(b) When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling. The percentage of the nonwork-related



permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted from the permanent medical impairment rating for the subsequent compensable injury.

(6) Nothing in this section shall be construed to preclude employers or insurers from seeking contribution or reimbursement, as permitted by law, from other employers or insurers for benefits paid to or for an injured employee as long as the employee's benefits are not reduced or otherwise affected by such contribution or reimbursement.

**Source:** L. 90: Entire article R&RE, p. 490, § 1, effective July 1. L. 91: (1) amended, p. 1304, § 12, effective July 1. L. 99: Entire section amended, p. 410, § 1, effective July 1. L. 2008: (2) amended and (3) to (6) added, p. 1676, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-47-102 as it existed prior to 1990.

### ANNOTATION

**Law reviews.** For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "A Curious Journey: Apportionment in Workers' Compensation Today", see 38 Colo. Law. 69 (March 2009).

**Annotator's note.** (1) Since § 8-42-104 is similar to § 8-47-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which empowered the director of the division of labor to enforce and administer the workmen's compensation act.

**Section recognizes right to compensation for second injury.** This section recognizes that even though an employee has suffered a previous disability and even received compensation therefor, he is nonetheless entitled to also receive compensation for a subsequent or later injury sustained in a second industrial accident. *Empire Oldsmobile, Inc. v. McLain*, 151 Colo. 510, 379 P.2d 402 (1963); *Colo. Fuel & Iron Corp. v. Rhodes*, 166 Colo. 82, 441 P.2d 652 (1968).

**An employer takes an employee as he finds him,** and if an injury is significant in that there is a direct causal relationship between the precipitating event and the resulting disability, an industrial injury is still compensable if it has caused a dormant pre-existing condition to become disabling. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986); *Lindner Chevrolet v. Indus. Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995).

**This section addresses apportionment when a claimant has suffered multiple industrial disabilities** and, contrary to petitioners'

assertion, the general assembly has accorded employers the protection of apportionment only for prior industrial disabilities and has not extended the apportionment to prior non-industrial disabilities. *Lindner Chevrolet v. Indus. Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995).

This section applies to all previous disabilities except when § 8-46-101 (1), governing the subsequent injury fund's liability for previous industrial disabilities, is applicable. *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999).

**This section provides no statutory direction for the apportionment of liability between an employer and a claimant** whose disability resulted from a preexisting medical condition and a subsequent work-related injury. Under the full responsibility rule, an employer is generally liable for the entire disability that results from a compensable accident. *Res. One, LLC v. Indus. Claim Appeals Office*, 148 P.3d 287 (Colo. App. 2006).

**No apportionment where employee has fully recovered from past disability.** Apportionment under this section is appropriate only when a prior disability, as defined in the AMA Guides, is a contributing factor to a subsequent industrial injury. *Askew v. Indus. Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996); *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999).

**Benefits payable to a disabled employee for a later injury** shall be based on the employee's average weekly wage at the time of the later injury. *Platte Valley Lumber v. Indus. Claim Appeals Office*, 870 P.2d 634 (Colo. App. 1994).

**This section spells out just how the percentage of disability for the subsequent injury shall be determined,** namely, by computing the percentage of entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury. *Colo. Fuel & Iron Corp. v. Rhodes*, 166 Colo. 82, 441 P.2d 652 (1968).

**Basis for compensation of later injury is earning capacity at time of that injury.** Where

a claimant has suffered a previous disability, a court in determining average earnings, as a basis for compensation for his later injury, has the right and duty to fix such amount as would reasonably represent his earning capacity at the time of the later injury in the employment in which he was then working. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *Colo. Fuel & Iron Corp. v. Rhodes*, 166 Colo. 82, 441 P.2d 652 (1968).

**Allocation of a percentage of disability to previous injuries cannot be on an arbitrary basis** of guesswork or assumption. *Matthews v. Indus. Comm'n*, 144 Colo. 146, 355 P.2d 300 (1960); *Empire Oldsmobile, Inc. v. McLain*, 151 Colo. 510, 379 P.2d 402 (1963); *Parrish v. Indus. Comm'n*, 151 Colo. 538, 379 P.2d 384 (1963).

**Inquiry is limited to the claimant's ability to earn a wage at the same or other employment** in inquiry to apportion injuries to employee with permanent total disabilities. *Colo. Mental Health Inst. v. Austill*, 940 P.2d 1125 (Colo. App. 1997).

**Apportionment pursuant to this section not limited to apportioning liability between employers without reducing benefits to the claimant.** *Colo. Mental Health Inst. v. Austill*, 940 P.2d 1125 (Colo. App. 1997).

**Disabilities caused by accident and those caused by occupational disease are treated the same for apportionment purposes** under this section. *Colo. Mental Health Inst. v. Austill*, 940 P.2d 1125 (Colo. App. 1997).

**The allocation of disability as required by this section must be based on evidence.** *City & County of Denver v. Moore*, 31 Colo. App. 310, 504 P.2d 367 (1972).

**And where the medical opinion upon which the industrial commission based its award is definite and unequivocal, the allocation of disability between a preexisting condition and an industrial accident is proper if supported by that kind of competent evidence.** *Holmstrom v. Pub. Serv. Co.*, 169 Colo. 439, 458 P.2d 77 (1969).

**Full benefits even if fully recovered from prior injury.** A claimant who has suffered a prior injury for which he had been compensated on a permanent basis and from which he had fully recovered as a working unit at the time of his employment by present employer, is entitled to full benefits provided by articles 42 to 66 of this title. *Empire Oldsmobile, Inc. v. McLain*, 151 Colo. 510, 379 P.2d 402 (1963); *Powers v. William Van Genderen Co.*, 153 Colo. 561, 387 P.2d 285 (1963).

**But where claimant had suffered a prior injury and the medical evidence was in agreement as to the percentage of disability to be allocated to recent injury, an award in excess of such percentage was without support in the evidence.** *Indus. Comm'n v. Navajo Freight Lines*, 149 Colo. 86, 367 P.2d 894 (1962).

**Where an employer hires a workman who by reason of a preexisting condition or a prior injury is to some extent disabled, he takes such employee with such handicap.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**This section governs all apportionment of disability awards except** when a previous disability impacts upon a present disability, in which case § 8-46-101, the subsequent injury fund statute, applies. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

**Subsection (2)(c) applies only to apportionment of permanent partial and permanent total disability benefits.** *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

**The effects of a prior industrial injury cannot constitute a "previous disability" unless a claimant has attained maximum medical improvement for the prior injury before the date of the subsequent injury.** *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999).

**A partially disabled person who receives an injury which totally disables him is entitled to compensation without apportionment.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**For this section does not provide for apportionment between injuries sustained.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *United Airlines v. Indus. Claim Appeals Office*, 993 P.2d 1152 (Colo. 2000).

**And in the absence of an apportionment statute, the general rule is that the employer becomes liable for the entire disability resulting from a compensable accident.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *United Airlines v. Indus. Claim Appeals Office*, 993 P.2d 1152 (Colo. 2000).

**The full responsibility rule does not bar apportionment under this section** where there is no SIF liability for non-industrial injuries. *Waddell v. Indus. Claim Appeals Office*, 964 P.2d 552 (Colo. App. 1998).

**The difference between a total permanent disability order and an apportionment of compensation between one injury and a prior one is that in the former the payments continue for life, and in the latter the payments would, in all probability, be terminable sometime before his death.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**Apportionment may be had for a prior disability, but not for a latent preexisting condition.** And an impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Baldwin Const. v. Indus. Claim Appeals Office*, 937 P.2d 895 (Colo. App. 1997).



**Apportionment based on preexisting impairment is not proper unless the impairment was independently disabling at the time of the industrial injury.** Thus, if a claimant's condition has improved to the extent that a disability is no longer present when the later injury occurs, that prior disability cannot be considered a contributing factor. *Pub. Serv. Co. of Colo. v. Indus. Claim Appeals Office*, 40 P.3d 68 (Colo. App. 2001).

**Apportionment of medical impairment constitutes a pure medical determination** and is not based on pre-existing impairment as formerly permitted if the impairment was independently disabling at the time of the injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

**Under the AMA Guides, a preexisting condition was not a previous disability and therefore not subject to apportionment** when prior to injury at work the condition or impairment was asymptomatic and did not hinder claimant's capacity to meet any demands. *Askew v. Indus. Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996); *Lambert & Sons, Inc. v. Indus. Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998).

**"Apportionable" disability does not include congenital conditions that are not affected by circumstances subsequent to birth.** Further, the general assembly recognized that individual claimants are born with different physical and mental aptitudes, and therefore, with a baseline access to the labor market, which is limited. An apportionable "disability" arises

when the claimant's baseline access to the labor market is reduced by injuries, illness, or the aging process. *Absolute Employment Servs., Inc. v. Indus. Claim Appeals Office*, 997 P.2d 1229 (Colo. App. 1999).

**In case of death of employee intoxicated at time of injury**, subsection (1)(c) does not operate to reduce the \$15,000 employer is required to contribute to the subsequent injury fund pursuant to § 8-51-106 (1)(b) (now § 8-46-102) because this amount is a tax imposed upon the employer for the purpose of funding the subsequent injury fund and not a benefit to the claimant or his dependents. *Portofino Apts. v. Indus. Claim Appeals Office*, 789 P.2d 1117 (Colo. App. 1990).

**Requirement that average weekly earnings at time of later injury be used to compute compensation payable for a later injury or death** are subject to provisions of § 8-42-102 (3) allowing variation from general rule if a fair computation of wages can not be obtained. *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992), *aff'd* in part and *rev'd* in part on other grounds, 856 P.2d 850 (Colo. 1993).

Even though subsection (2) references "disability", the term is used in the context of a "previous disability", and concerns the effects of an injury as they were termed prior to amendments to the Workers' Compensation Act. Under the amended version of the Act, "medical impairment" simply describes "permanent disability". *Thornton v. Replogle*, 888 P.2d 782 (Colo. 1995).

**8-42-105. Temporary total disability.** (1) In case of temporary total disability of more than three regular working days' duration, the employee shall receive sixty-six and two-thirds percent of said employee's average weekly wages so long as such disability is total, not to exceed a maximum of ninety-one percent of the state average weekly wage per week. Except where vocational rehabilitation is offered and accepted as provided in section 8-42-111 (3), temporary total disability payments shall cease upon the occurrence of any of the events enumerated in subsection (3) of this section. If vocational rehabilitation is offered and accepted, any party may at any time terminate vocational rehabilitation upon fourteen days' written notice to the other parties and the director. For purposes of this section, termination of vocational rehabilitation shall be the same as if vocational rehabilitation had never been offered and accepted, and the employer or insurance carrier shall not be entitled to recover any temporary total disability benefits paid during the period that vocational rehabilitation was provided.

(2) (a) The first installment of compensation shall be paid no later than the date that liability for the claim is admitted by the insurance carrier or self-insured employer. If the insurance carrier or self-insured employer denies liability for the claim, the claimant may request an expedited hearing on the issue of compensability if the application is filed within forty-five days after the date of mailing of the notice of contest. The director shall set any such expedited matter for hearing within forty days after the date of the application, when the issue is liability for the disease or injury. The time schedule for such an expedited hearing is subject to the extensions set forth in section 8-43-209. If a claimant elects not to request an expedited hearing pursuant to this paragraph (a), the time schedule for hearing the matter shall be as set forth in section 8-43-209. Compensation shall be paid at least once every two weeks, except where the director determines that payment in installments should be made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules.

(b) Temporary disability compensation is not due and payable for any period of time for which the insurer or self-insured employer has requested from the employee's attending physician verification of the employee's inability to work resulting from the claimed injury or disease and the physician cannot verify the employee's inability to work, unless the employee has been unable to receive treatment for reasons beyond the employee's control. Failure of the physician to submit such verification, through no fault of the employee, shall not affect the payment of temporary disability compensation under this section.

(c) If an employee fails to appear at an appointment with the employee's attending physician, the insurer or self-insured employer shall notify the employee by certified mail that temporary disability benefits may be suspended after the employee fails to appear at a rescheduled appointment. If the employee fails to appear at a rescheduled appointment, the insurer or self-insured employer may, without a prior hearing, suspend payment of temporary disability benefits to the employee until the employee appears at a subsequent rescheduled appointment.

(d) If the insurer or self-insured employer has requested and failed to receive from the employee's attending physician verification of the employee's inability to work resulting from the claimed injury or disease, medical services provided by the attending physician are not compensable until the attending physician submits such verification.

(3) Temporary total disability benefits shall continue until the first occurrence of any one of the following:

- (a) The employee reaches maximum medical improvement;
- (b) The employee returns to regular or modified employment;
- (c) The attending physician gives the employee a written release to return to regular employment; or

(d) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

(II) In the case of employment by a temporary help contracting firm, once the employee has received one written offer of modified employment meeting the requirements of subparagraph (III) of this paragraph (d), the employee shall be deemed to be on notice that modified employment is available. Subsequent offers of modified employment need not be in writing so long as the job requirements of such modified employment are within the restrictions given the employee by the employee's attending physician and the employee is allowed a period of at least twenty-four hours, not including any part of a Saturday, Sunday, or legal holiday, within which to respond to any such offer.

(III) A written offer of modified employment under subparagraph (II) of this paragraph (d) shall clearly state:

- (A) That future offers of employment need not be in writing;
- (B) The policy of the temporary help contracting firm regarding how and when employees are expected to learn of such future offers; and
- (C) That benefits under this section will be terminated if an employee fails to respond to an offer of modified employment.

(4) (a) In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

(b) The claimant's refusal to accept an offer of modified employment under either of the following conditions does not constitute responsibility for termination:

(I) The offer of modified employment would require the claimant to travel a distance of greater than fifty miles one way more than the claimant's preinjury commute; or

(II) An administrative law judge determines that the claimant's rejection of the offer of modified employment was reasonable considering the totality of the claimant's circumstances, including accounting for:

- (A) The consequences of the industrial injury;
- (B) The financial hardship that would be imposed on the claimant in order to accept the offer of modified employment; or

(C) Any other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer of modified employment.



(c) The circumstances described in paragraph (b) of this subsection (4) are not exhaustive.

**Source:** **L. 90:** Entire article R&RE, p. 490, § 1, effective July 1. **L. 91:** Entire section amended, p. 1304, § 13, effective July 1. **L. 92:** (2)(a) amended, p. 1824, § 2, effective April 29. **L. 96:** (3) amended, p. 827, § 2, effective July 1. **L. 99:** (4) added, p. 266, § 2, effective July 1. **L. 2009:** (2)(a) amended, (SB 09-070), ch. 49, p. 175, § 1, effective August 5. **L. 2010:** (4) amended, (SB 10-187), ch. 310, p. 1458, § 5, effective July 1.

**Editor's note:** This section is similar to former § 8-51-102 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For article, "One Year Review of Torts", see 40 Den. L. Ctr. J. 160 (1963). For article, "Time, Equity and the Average Weekly Wage", see 23 Colo. Law. 1831 (1994). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 97 (June 2003). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 83 (April 2004). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 117 (November 2004). For article, "The Road to Longmont Toyota: Starting and Stopping Temporary Disability Benefits", see 34 Colo. Law. 87 (June 2005). For article, "Termination of Undocumented Workers Under the Workers' Compensation Act", see 37 Colo. Law. 59 (March 2008).

**Annotator's note.** Since § 8-42-105 is similar to § 8-51-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Benefits based on claimant's average weekly wage.** State Comp. Ins. Fund v. Lyttle, 151 Colo. 590, 380 P.2d 62 (1963).

**An award under this section is mandatory** if three conditions are met: (1) The injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days' duration. PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo. 1995).

**Admission of liability for "closed" period not permitted.** By filing an admission of liability, an insurer has, in effect, admitted that the claimant has sustained the burden of proving entitlement to temporary disability benefits. Thereafter, the insurer is bound by that admission and must pay accordingly. The insurer may not unilaterally terminate benefits without complying with this section and with rules governing the termination of such benefits. Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Office, 18 P.3d 790 (Colo. App. 2000).

**Subsection (1) and § 8-42-103(1)(a) require a claimant to establish a causal connection** between a work-related injury and a subsequent wage loss in order to obtain temporary total disability benefits. Lindner Chevrolet v. Indus. Claim Appeals Office, 914 P.2d 496 (Colo. App. 1995); City of Colo. Springs v. Indus. Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997).

**A later injury to another part of the body, not resulting in additional wage loss,** does not entitle the claimant to a renewed award of benefits under this section. City of Colo. Springs v. Indus. Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997).

**To establish eligibility for temporary disability benefits** the employee need not prove that the work-related injury was the sole cause of the wage loss; if the claimant establishes that his or her work-related injury contributed in some degree to a temporary wage loss, the claimant is eligible for temporary disability benefits. Lindner Chevrolet v. Indus. Claim Appeals Office, 914 P.2d 496 (Colo. App. 1995).

**Employee does not have to prove that work-related injury was sole cause of wage loss** to establish eligibility for benefits. Horton v. Indus. Claim Appeals Office, 942 P.2d 1209 (Colo. App. 1996).

**Standard of "suitable gainful employment"** is inapplicable in determining eligibility for workmen's compensation benefits when the employee is temporarily disabled and vocational rehabilitation services remain open. Safeway Stores, Inc. v. Husson, 732 P.2d 1245 (Colo. App. 1986).

**Right to temporary disability benefits is measured** by the degree of wage loss attributable to an industrial injury, not by the degree of physical impairment nor willingness to seek employment. Denny's Restaurant, Inc. v. Husson, 746 P.2d 63 (Colo. App. 1987); Black Roofing Inc. v. West, 967 P.2d 195 (Colo. App. 1998).

**Neither this section nor § 8-42-103 requires claimant to provide a medical opinion restricting her from regular employment as a condition of receiving temporary total disability benefits.** The administrative law judge

appropriately awarded TTD benefits based on claimant's evidence, including notes of her personal physician, that she had suffered a wage loss as a result of her injury. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

**Release to work by attending physician precludes an award of temporary total disability benefits.** Unless there are conflicting opinions from attending physicians, an administrative law judge cannot disregard physician's opinion. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995); *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

**But an attending physician's report that has an internal conflict** is subject to interpretation by the administrative law judge. *Imperial Headware, Inc. v. Indus. Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000).

**Subsection (3) limits scope and frequency of disputes concerning duration of TTD benefits** by treating the attending physician's opinion as conclusive. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995).

**When an offer and acceptance of vocational rehabilitation occur**, the provisions of subsection (3) do not apply. As a result, when there is such an offer and acceptance, the attainment of maximum medical improvement is irrelevant to a claimant's right to temporary total disability benefits. *Larimer County v. Sinclair*, 939 P.2d 515 (Colo. App. 1997).

**Termination of temporary total disability benefits under any one of the conditions enumerated in this section is mandatory.** *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995); *Laurel Manor v. Indus. Claim Appeals Office*, 964 P.2d 589 (Colo. App. 1998).

**ALJ is required to terminate benefits when attending physician provides claimant with written release to work.** *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995).

**The term "attending physician" includes only those physicians who are authorized to provide treatment.** An attending physician must be one within the chain of authorization. *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

**The author of an effective release for return to employment must be the health care provider identified as the attending physician.** While there can be more than one attending physician, the statute does not provide for release by any attending physician. *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

**Court will not impute to the general assembly an intent that the opinion of the first physician treating a claimant concerning the resuming of full-time employment outweighs the opinion of the second physician who began treatment at a later time.** *Bestway Con-*

*crete v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

**A physician's status as the attending physician is a question fact that should be resolved by the ALJ.** *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997); *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

**Claimant was no longer entitled to temporary total disability benefits** for injury incurred in course of her employment when claimant was offered and refused suitable gainful employment that was approved by her physician, was within her physical limitations, and which paid an increased amount of wages since the wage loss suffered was due to rejection of the offered employment. *Safeway Stores, Inc. v. Husson*, 732 P.2d 1245 (Colo. App. 1986).

**For an attending physician's written release to be effective for the purpose of terminating temporary total disability benefits, the release must be delivered to the employee.** *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

**Industrial claim appeals panel did not terminate temporary total disability benefits prematurely by relying on the physician's release to regular employment as the termination date.** *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995).

**Disabling industrial injury suffered prior to July 1, 1987.** A worker who has been awarded temporary partial disability benefits and who has been directed to undergo a vocational rehabilitation evaluation is entitled to receive temporary partial disability benefits until the commencement of a vocational rehabilitation program or the entry of an administrative ruling that vocational rehabilitation is not necessary to render the worker fit for a remunerative occupation. *Allee v. Contractors, Inc.*, 783 P.2d 273 (Colo. 1989); *Gerber v. CAN-USA Construction, Inc.*, 783 P.2d 269 (Colo. 1989); *Phillips v. Indus. Claim Appeals Office*, 783 P.2d 271 (Colo. 1989); *Indus. Claim Appeals Office v. Mid-Continent Res., Inc.*, 783 P.2d 290 (Colo. 1989); *Arndt v. Elec. Metal Prods., Inc.*, 783 P.2d 290 (Colo. 1989); *Northeastern Junior Coll. v. Kenyon*, 783 P.2d 853 (Colo. 1989) (decided prior to 1987 repeal of subsections (4) and (5)).

**Temporary disability benefits may be suspended** if intervening events other than compensable injury are operative. Claimant need not reach maximum medical improvement. *Roe v. Indus. Comm'n*, 734 P.2d 138 (Colo. App. 1986).

**An intervening injury does not suspend temporary disability benefit payments**, even if such injury delays the attainment of maximum medical improvement. *Horton v. Indus. Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).



**Subsection (1) sets the rate for temporary total disability benefits.** *Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

**However, this section does not mandate a legal duty upon the employer to pay that rate without regard to any claimed offset prior to the administrative law judge's determination of benefits.** *Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

**Timing of temporary total disability payments.** The statutory language of subsection (2)(a) requires that temporary total disability payments be paid at least every two weeks from the date compensation first becomes payable. Nothing in this subsection suggests that the date for payment of compensation is to be adjusted based on the date the insurer issued the most recent benefits check. An employer's decision to pay some temporary total disability payments before completion of the two-week intervals does not alter the due dates for subsequent payments or accelerate the payment schedule. *Jones v. Indus. Claim Appeals Office*, 87 P.3d 259 (Colo. App. 2004).

**Subsection (2)(a) does not suggest that the date of the most recent check for payment of temporary total disability imposes a new baseline date for issuance of the next payment.** *Jones v. Indus. Claim Appeals Office*, 87 P.3d 259 (Colo. App. 2004).

**Subsection (2)(a) should not be interpreted to establish grounds to punish insurers who make payments before the two-week window expires or to accelerate the due date for the next payment if the insurer decides to make an early payment.** *Jones v. Indus. Claim Appeals Office*, 87 P.3d 259 (Colo. App. 2004).

**Under the plain language of subsection (2)(c), an employer that has admitted liability must automatically reinstate temporary disability benefits that were suspended for an injured employee's failure to appear at a rescheduled medical appointment when it is undisputed that the employer knew that the employee later appeared at a subsequent rescheduled medical appointment.** *Rocky Mtn. Cardiology v. Indus. Claim Appeals Office*, 94 P.3d 1182 (Colo. App. 2004).

**Term "suspend" as used in subsection (2)(c) means to stop temporarily and not to bar or exclude.** Where the employee misses a rescheduled appointment but appears at a subsequent rescheduled appointment, the benefits that were suspended become due and payable. *Sigala v. Atencio's Market*, 184 P.3d 40 (Colo. 2008).

**Grounds for termination of benefits in subsection (3) are exclusive.** The insurer may not unilaterally terminate benefits based on the claimant's return to school. Assertion of such a defense creates a factual question that can be resolved only after a hearing. *Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

**The word "wages", as used in the workmen's compensation act, is construed to mean "money rate at which the services are recompensed under the contract of hire in force at the time of the accident".** *Roeder v. Indus. Comm'n*, 97 Colo. 133, 46 P.2d 898 (1935); *Lyttle v. State Comp. Ins. Fund*, 137 Colo. 212, 322 P.2d 1049 (1958).

**And where employment is without salary, it has the effect of reducing the amount of compensation which an injured employee is entitled to receive to the minimum benefits provided by the workmen's compensation law.** *Lyttle v. State Comp. Ins. Fund*, 137 Colo. 212, 322 P.2d 1049 (1958).

**"Wages" includes health insurance and similar advantages received from the employer, for purposes of this section, and the net cost to the employee of replacing the benefit should be added to the average weekly wage.** *State Comp. Ins. Auth. v. Smith*, 768 P.2d 1256 (Colo. App. 1988).

**Average weekly wage includes both the employer's and employee's contribution to group health insurance premiums.** *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001).

**Claimant is not required to present proof that he or she actually purchased replacement coverage. The statute merely seeks to ensure that the claimant will have funds available to make the purchase.** *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001).

**The term "employment" in subsection (4) is not ambiguous and encompasses both modified and regular employment.** *Colo. Springs Disposal v. Indus. Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002).

**Subsection (4) bars temporary total disability wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss but not when the worsening of a prior work-related injury causes the wage loss.** *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

**If an injured employee loses his job because of economic factors, is not at fault for the layoff, and has reasonably sought new employment, the employee is entitled to temporary disability benefits.** *Lunsford v. Sawatsky*, 780 P.2d 76, (Colo. App. 1989); *City of Aurora v. Dorch*, 799 P.2d 461 (Colo. App. 1990).

**Claimant would be entitled to temporary total disability benefits, despite being terminated the same day as the injury for reasons unrelated to the injury, if the claimant was not at fault for the termination.** *PDM Molding, Inc. v. Stanberg*, 885 P.2d 280 (Colo. App. 1994).

**If claimant is at fault for termination for reasons unrelated to the injury, ALJ must consider the totality of the circumstances to determine whether the claimant's work-related**

injury is the cause of the claimant's inability to find work. *PDM Molding, Inc. v. Stanberg*, 885 P.2d 280 (Colo. App. 1994).

**Claimant who was not at fault for termination** from post injury employment during the period of temporary disability is entitled to have temporary total disability benefits resumed, as there is a causal link between the industrial injury and the subsequent wage loss. *Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993).

**Termination for fault not an automatic bar to receipt of benefits.** Notwithstanding termination for fault, if the work-related injury in fact contributed in some degree to the employee's wage loss during the period of disability, the employee is eligible for benefits under this section. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

The test for determining eligibility for such post-termination benefits is whether the work-related injury contributed in some degree to the subsequent wage loss. Once the claimant shows that the subsequent wage loss was related to the industrial injury, temporary total disability benefits can be denied or terminated only if one of the four statutory criteria set forth in subsection (3) is satisfied. *Laurel Manor v. Indus. Claim Appeals Office*, 964 P.2d 589 (Colo. App. 1998).

**When an employee experiences a worsening of a condition or the development of a disability after termination of employment that is a result of an on-the-job injury**, subsection (4) does not apply to terminate employee disability benefits. *Grisbaum v. Indus. Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005).

**Claimant who did not challenge a determination that she had reached maximum medical improvement of her work-related injury may obtain temporary total disability benefits** where she has experienced a worsening of her original injury. *Loofbourrow v. Indus. Claim Appeals Office*, \_\_ P.3d \_\_ (Colo. App. 2011).

**It is highly unlikely that the general assembly intended to deny completely temporary disability benefits where an employee was terminated for negligently causing a work injury** in light of § 8-42-112 (1), which requires a 50% reduction in benefits if an employee is injured because of willfully violating a safety rule. The term "responsible" does not refer to an employee's injury or injury-producing activity, therefore the termination statutes do not apply where an employee is terminated because of the employee's injury or injury-producing activity. *Colo. Springs Disposal v. Indus. Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002).

**Seasonal employment does not preclude an award of temporary disability payments.** If the record establishes that claimant's industrial

disability contributed directly to her post-injury wage loss, the award of temporary disability benefits was proper. *City of Aurora v. Dortch*, 799 P.2d 461 (Colo. App. 1990).

**Evidence that claimant was actively seeking employment** during time period for which benefits were sought was insufficient basis upon which to disallow benefits, where claimant's physician testified to claimant's disability. *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

**Reopening case for new award of temporary total disability.** Claimant entitled to reopening of case for a determination of temporary total disability and award of benefits therefor, where claimant underwent additional surgery after an initial award of permanent partial disability and the surgery left him totally incapacitated for a period of time. *Loucks v. Safeway Stores*, 757 P.2d 639 (Colo. App. 1988).

**This section does not contemplate unilateral termination of benefits by insurer.** *Collins v. Indus. Comm'n*, 676 P.2d 1270 (Colo. App. 1984); *Colo. Compensation Ins. Auth. v. Indus. Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

**Payment of temporary disability benefits continues until an event enumerated in subsection (3) occurs.** *Horton v. Indus. Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

**Benefits properly continued during employee's employment as a salesman compensated solely by commission when record supported administrative law judge's findings that employee's injuries prevented him from earning any commissions** and that there had been no return to regular employment. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

**Claimant erroneously awarded temporary total disability benefits where, by signing document containing written list of duties prepared by facility director, she accepted offer of modified employment, but failed to appear for work after the offer had been extended.** Consequently, claimant's failure to commence the work offered occurred prior to her termination. Thus, the termination of temporary total disability benefits was warranted before claimant sustained the wage loss for which she seeks benefits. *Laurel Manor v. Indus. Claim Appeals Office*, 964 P.2d 589 (Colo. App. 1998).

**A claimant must begin modified employment for eligibility for temporary total disability benefits.** *Liberty Heights v. Indus. Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001).

**Department of labor and employment rules governing the termination of temporary disability benefits are not inconsistent with this section.** *Monfort Transp. v. Indus. Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997).



**Temporary disability benefits paid on account of vocational rehabilitation** are included in the calculation of the benefit cap pursuant to § 8-42-107.5. *Grogan v. Lutheran Med. Center, Inc.*, 950 P.2d 690 (Colo. App. 1997).

**Applied** in *Booher v. Las Animas County Sch. Dist.* R-88, 30 Colo. App. 233, 491 P.2d 104 (1971); *Filippone v. Indus. Comm'n*, 41 Colo. App. 322, 590 P.2d 977 (1978); *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982).

**8-42-106. Temporary partial disability.** (1) In case of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between said employee's average weekly wage at the time of the injury and said employee's average weekly wage during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week.

(2) Temporary partial disability payments shall continue until the first occurrence of either one of the following:

(a) The employee reaches maximum medical improvement; or

(b) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

(II) In the case of employment by a temporary help contracting firm, once the employee has received one written offer of modified employment meeting the requirements of subparagraph (III) of this paragraph (b), the employee shall be deemed to be on notice that modified employment is available. Subsequent offers of modified employment need not be in writing so long as the job requirements of such modified employment are within the restrictions given the employee by the employee's attending physician and the employee is allowed a period of at least twenty-four hours, not including any part of a Saturday, Sunday, or legal holiday, within which to respond to any such offer.

(III) A written offer of modified employment under subparagraph (II) of this paragraph (b) shall clearly state:

(A) That future offers of employment need not be in writing;

(B) The policy of the temporary help contracting firm regarding how and when employees are expected to learn of such future offers; and

(C) That benefits under this section will be terminated if an employee fails to respond to an offer of modified employment.

**Source:** **L. 90:** Entire article R&RE, p. 491, § 1, effective July 1. **L. 91:** Entire section amended, p. 1306, § 14, effective July 1. **L. 96:** Entire section amended, p. 828, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-51-103 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** (1) Since § 8-42-106 is similar to § 8-51-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) The case included in the annotations to this section which refers to the industrial commission was decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to enforce and administer the workmen's compensation act.

**"Earning capacity" relates to money rate at which services are recompensed.** Although language of this section varies from that of §§ 8-51-102, 8-51-108, and 8-51-109, dealing

with general disability, it is apparent that the general assembly intended that the same base be used for determining compensation throughout the act, and the term "earning capacity" as used in this section must be related to the money rate at which the services were recompensed under the contract of hire at the time of the accident. *State Comp. Ins. Fund v. Lyttle*, 151 Colo. 590, 380 P.2d 62 (1963).

**Standard of "suitable gainful employment"** is inapplicable in determining eligibility for workers' compensation benefits when the employee is temporarily disabled and vocational rehabilitation services remain open. *Safeway Stores, Inc. v. Husson*, 732 P.2d 1245 (Colo. App. 1986).

**But where a claimant earned no salary and therefore had a money rate of nothing at time**

of accident, and since this section does not provide a minimum compensation rate for temporary partial disability, the amount of compensation to which claimant is entitled is, and remains, zero. *State Comp. Ins. Fund v. Lyttle*, 151 Colo. 590, 380 P.2d 62 (1963).

**And neither the industrial commission nor the court may supplement this section by adding thereto a minimum rate provision.** *State Comp. Ins. Fund v. Lyttle*, 151 Colo. 590, 380 P.2d 62 (1963).

**Compensation benefits for a temporary partial disability** are designed to be a partial substitute for lost wages or impaired earning capacity arising from a compensable injury. *Safeway Stores, Inc. v. Husson*, 732 P.2d 1245 (Colo. App. 1986).

**"Wages" includes health insurance and similar advantages received from the employer, for purposes of this section, and net cost to the employee of replacing the benefit should be added to the average weekly wage.** *State Compensation Insurance Authority v. Smith*, 768 P.2d 1256 (Colo. App. 1988).

**Average weekly wage includes both the employer's and employee's contribution to group health insurance premiums.** *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001).

Claimant is not required to present proof that he or she actually purchased replacement coverage. The statute merely seeks to ensure that the claimant will have funds available to make the purchase. *Humane Soc'y of Pikes Peak Region v. Indus. Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001).

**Reasonable depreciation deducted from a self-employed workers' compensation claimant's gross earnings as reported on his federal income tax return should be included in the calculation of his post-injury average weekly wage for determining the amount of temporary partial disability benefits to which he is entitled.** *Elliott v. El Paso County*, 860 P.2d 1365 (Colo. 1993).

**Workers' compensation claimant bears the burden of establishing the reasonableness of depreciation deductions included in calculating temporary partial disability benefits** because the claimant bears the burden of showing the statutory entitlement to compensation by a preponderance of the evidence. *Elliott v. El Paso County*, 860 P.2d 1365 (Colo. 1993).

**Under this statute, disability is measured in terms of diminished earning capacity** and not the ability or inability of claimant to work a given number of hours. *Ski Depot Rentals, Inc. v. Lynch*, 714 P.2d 516 (Colo. App. 1985).

**The term "earning capacity" means the loss of the ability to earn, not simply lost wages.** Accordingly, while in some instances loss of earning capacity can be computed simply by subtracting post-injury earnings from the av-

erage weekly wage at the time of the injury, in other instances a comparative wage approach will not accurately reflect the impairment of earning capacity attributable to the injury. *Hendricks v. Indus. Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990).

Where the claimant had received a wage increase after the accident, but was unable to work the same number of hours as prior to the accident, the ALJ reasonably calculated claimant's diminished earning capacity by considering the percentage decrease in hours worked. *Univ. Park Holiday Inn v. Brien*, 868 P.2d 1164 (Colo. App. 1994).

**If a simple calculation between pre-injury and post-injury wages would distort the loss of earning capacity attributable to the injury,** then the claimant's post-injury wages must reflect the wage level in effect at the time of injury. *Hendricks v. Indus. Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990).

**An injured employee was entitled to receive temporary partial disability benefits after attainment of maximum medical improvement** and until the employee either commences a vocational rehabilitation program or an administrative order is entered which provides that vocational rehabilitation is not necessary, if the employee was awarded temporary partial disability and ordered to undergo a vocational rehabilitation evaluation. *Allee v. Contractors, Inc.*, 783 P.2d 273 (Colo. 1989).

**The date of maximum medical improvement for purposes of ending a claimant's temporary disability** is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular accident. Maximum medical improvement is not divisible and cannot be parceled out among various components of a multi-faceted industrial injury. *Paint Connection v. Indus. Claim Appeals Office*, 240 P.3d 439 (Colo. App. 2010).

**Disabling industrial injury suffered prior to July 1, 1987.** A worker who has been awarded temporary partial disability benefits and who has been directed to undergo a vocational rehabilitation evaluation is entitled to receive temporary partial disability benefits until the commencement of a vocational rehabilitation program or the entry of an administrative ruling that vocational rehabilitation is not necessary to render the worker fit for a remunerative occupation. *Allee v. Contractors, Inc.*, 783 P.2d 273 (Colo. 1989); *Gerber v. CAN-USA Construction, Inc.*, 783 P.2d 269 (Colo. 1989); *Phillips v. Indus. Claim Appeals Office*, 783 P.2d 271 (Colo. 1989); *Indus. Claim Appeals Office v. Mid-Continent Res., Inc.*, 783 P.2d 290 (Colo. 1989); *Arndt v. Electronic Metal Prods., Inc.*, 783 P.2d 290 (Colo. 1989); *Northeastern Junior Coll. v. Kenyon*, 783 P.2d 853 (Colo. 1989).



(decided prior to 1987 repeal of subsections (4) and (5)).

The term "public", as used in this section, means accessible to or shared by all members of the community. *Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986).

**Disfigurement award for scar on abdominal area was proper** as the abdominal area is a part of the body normally exposed to public

view. *Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986).

**Temporary partial disability benefits can be denied only** if one of the statutory conditions is satisfied if the injury contributed in part to the wage loss. *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997).

**Applied** in *Sterling Colo. Beef v. Baca*, 699 P.2d 1347 (Colo. App. 1985).

**8-42-107. Permanent partial disability benefits - schedule - medical impairment benefits - how determined.** (1) **Benefits available.** (a) When an injury results in permanent medical impairment, and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.

(b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

(2) **Scheduled injuries.** In case an injury results in a loss set forth in the following schedule, the injured employee, in addition to compensation to be paid for temporary disability, shall receive compensation for the period as specified:

(a)	The loss of an arm at the shoulder	208 weeks
(a.5)	The loss of an arm above the hand including the wrist	208 weeks
(b)	(Deleted by amendment, L. 94, p. 2002, § 4, effective July 1, 1994.)	
(c)	The loss of a hand below the wrist	104 weeks
(d)	The loss of a thumb and the metacarpal bone thereof	50 weeks
(e)	The loss of a thumb at the proximal joint	35 weeks
(f)	The loss of a thumb at the second or distal joint	18 weeks
(g)	The loss of an index finger and the metacarpal bone thereof	26 weeks
(h)	The loss of an index finger at the proximal joint	18 weeks
(i)	Loss of an index finger at the second joint	13 weeks
(j)	Loss of an index finger at the distal joint	9 weeks
(k)	Loss of a second finger and the metacarpal bone thereof	18 weeks
(l)	Loss of a middle finger at the proximal joint	13 weeks
(m)	Loss of a middle finger at the second joint	9 weeks
(n)	Loss of a middle finger at the distal joint	5 weeks
(o)	Loss of a third or ring finger and the metacarpal bone thereof	11 weeks
(p)	Loss of a ring finger at the proximal joint	7 weeks
(q)	Loss of a ring finger at the second joint	7 weeks
(r)	Loss of a ring finger at the distal joint	4 weeks
(s)	Loss of a little finger and the metacarpal bone thereof	13 weeks
(t)	Loss of a little finger at the proximal joint	9 weeks
(u)	Loss of a little finger at the second joint	9 weeks
(v)	Loss of a little finger at the distal joint	4 weeks
(w)	Loss of a leg at the hip joint or so near thereto as to preclude the use of an artificial limb	208 weeks
(w.5)	The loss of a leg above the foot including the ankle	208 weeks
(x)	(Deleted by amendment, L. 94, p. 2002, § 4, effective July 1, 1994.)	
(y)	The loss of a foot below the ankle	104 weeks
(z)	The loss of a great toe with the metatarsal bone thereof	26 weeks
(aa)	The loss of a great toe at the proximal joint	18 weeks
(bb)	The loss of a great toe at the second or distal joint	9 weeks
(cc)	The loss of any other toe with the metatarsal bone thereof	11 weeks
(dd)	The loss of any other toe at the proximal joint	4 weeks
(ee)	The loss of any other toe at the second or distal joint	4 weeks
(ff)	The loss of a tooth	6 weeks

(gg) Total blindness of one eye	104 weeks
(hh) Total deafness of both ears	139 weeks
(ii) Total deafness of one ear	35 weeks
(jj) Where worker prior to injury has suffered a total loss of hearing in one ear, and as a result of the accident loses total hearing in remaining ear	139 weeks

(3) Temporary disability terminates as to injuries coming under any provision of this section upon the occurrence of any of the events enumerated in section 8-42-105 (3).

(4) For the purpose of this schedule, permanent and complete paralysis of any member as the proximate result of accidental injury shall be deemed equivalent to the loss thereof.

(5) If amputation is made between any two joints mentioned in this schedule, except amputation between the knee and the hip joint, the resulting loss shall be estimated as if the amputation had been made at the joint nearest thereto. If any portion of the bone of the distal joint of any finger, thumb, or toe is amputated, the amount paid therefor shall be the amount allowed for amputation at said distal joint.

(6) (a) The amounts specified in subsections (1) to (5) of this section shall be at the compensation rate of one hundred seventy-six dollars per week.

(b) On July 1, 2000, and on each succeeding July 1 thereafter, the compensation rate established in this subsection (6) shall be modified for claims arising on and after such date by the same percentage increase or decrease as the state average weekly wage as determined by the director when the director establishes the state average weekly wage pursuant to section 8-47-106.

(7) (a) When an injured employee sustains two or more injuries coming under this schedule, the disabilities specified in subsections (1) to (5) of this section shall be added, and the injured employee shall receive the sum total thereof; except that, where the injury results in the loss or partial loss of use of the index finger and thumb of the same hand or of more than two digits of any one hand or foot, the disability, in the discretion of the director, may be compensated on the basis of the partial loss of use of said hand or foot, measured respectively from the wrist or ankle.

(b) (I) The general assembly finds, determines, and declares that the rating organization that studied the impact of the changes in Senate Bill 91-218, enacted at the first regular session of the fifty-eighth general assembly, assumed that scheduled injuries would remain on the schedule and nonscheduled injuries would be compensated as medical impairment benefits. Therefore, the general assembly finds, determines, and declares that the purpose of changing the provisions of subparagraph (II) of this paragraph (b), as amended by House Bill 99-1157, enacted at the first regular session of the sixty-second general assembly, is to clarify that scheduled injuries shall be compensated as provided on the schedule and nonscheduled injuries shall be compensated as medical impairment benefits, and that, when an injured worker sustains both scheduled and nonscheduled injuries, the losses shall be compensated on the schedule for scheduled injuries and the nonscheduled injuries shall be compensated as medical impairment benefits. The general assembly further determines and declares that mental or emotional stress shall be compensated pursuant to section 8-41-301 (2) and shall not be combined with a scheduled or a nonscheduled injury.

(II) Except as provided in subsection (8) of this section, where an injury causes the loss of, loss of use of, or partial loss of use of any member specified in the foregoing schedule, the amount of permanent partial disability shall be the proportionate share of the amount stated in the above schedule for the total loss of a member, and such amount shall be in addition to compensation for temporary disability. Where an injury causes a loss set forth in the schedule in subsection (2) of this section and a loss set forth for medical impairment benefits in subsection (8) of this section, the loss set forth in the schedule found in said subsection (2) shall be compensated solely on the basis of such schedule and the loss set forth in said subsection (8) shall be compensated solely on the basis for such medical impairment benefits specified in said subsection (8).

(III) Mental or emotional stress shall be compensated pursuant to section 8-41-301 (2) and shall not be combined with a scheduled or a nonscheduled injury, except for the purposes of calculating a claimant's impairment rating to determine the applicable cap for benefits pursuant to section 8-42-107.5.



**(8) Medical impairment benefits - determination of MMI for scheduled and nonscheduled injuries.** (a) When an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8). The procedures for determination of maximum medical improvement set forth in paragraph (b) of this subsection (8) shall be available in cases of injuries set forth in the schedule in subsection (2) of this section and also in cases of injuries that are not set forth in said schedule.

(b) (I) An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201 (11.5).

(II) If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2; except that, if an authorized treating physician has not determined that the employee has reached maximum medical improvement, the employer or insurer may only request the selection of an independent medical examiner if all of the following conditions are met:

(A) At least eighteen months have passed since the date of injury;

(B) A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement;

(C) Such authorized treating physician has not determined that the employee has reached maximum medical improvement; and

(D) A physician other than such authorized treating physician has determined that the employee has reached maximum medical improvement.

(III) The finding of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) shall be overcome only by clear and convincing evidence. A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division.

(b.5) When an authorized treating physician providing primary care who is not accredited under the level II accreditation program pursuant to section 8-42-101 (3.5) makes a determination that an employee has reached maximum medical improvement, the following procedures shall apply:

(I) (A) If the employee is not a state resident upon reaching maximum medical improvement, such physician shall, within twenty days after the determination of maximum medical improvement, determine whether the employee has sustained any permanent impairment. If the employee has sustained any permanent impairment, such physician shall conduct such tests as are required by the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment" to determine such employee's medical impairment rating and shall transmit to the self-insured employer or insurer all test results and all relevant medical information.

(B) However, if the employee chooses not to have the authorized treating physician perform such tests, or if the information is not transmitted in a timely manner, the self-insured employer or insurer shall arrange and pay for the employee to return to Colorado for examination, testing, and rating, at the expense of the self-insured employer or insurer. If the employee refuses to return to Colorado for examination, no permanent disability benefits shall be awarded.

(C) The self-insured employer or insurer shall, within twenty days after receipt of the medical information described in sub-subparagraph (A) of this subparagraph (I), appoint a level II accredited physician to determine the employee's medical impairment rating. If the employee was treated by an authorized level II accredited physician in Colorado for the same injury for which a medical impairment rating is being sought, the self-insured employer or insurer shall request such physician to determine the claimant's medical impairment rating. At the same time as such rating is transmitted to the self-insured employer or insurer, the level II physician shall transmit a copy of the same to the authorized treating physician and the employee.

(D) If the employee, insurer, or self-insured employer disputes a medical impairment rating, including a finding that there is no medical impairment, made pursuant to sub-

subparagraph (A) of this subparagraph (I), the parties to the dispute may select an independent medical examiner in accordance with section 8-42-107.2 to review the rating. The cost of such independent medical examination shall be borne by the requesting party. The finding of such independent medical examiner shall be overcome only by clear and convincing evidence. Any review by an independent medical examiner shall be based on the employee's written medical records only, without further examination, unless a party to the dispute requests that such review include a physical examination by the independent medical examiner. Except when the provisions of section 8-42-107.2 (5) (b) apply, the party requesting a physical examination shall pay all additional costs, including, if applicable, the reasonable cost of returning the employee to Colorado.

(II) If the employee is a state resident, such physician shall, within twenty days after the determination of maximum medical improvement, determine whether the employee has sustained any permanent impairment. If the employee has sustained any permanent impairment, such physician shall refer such employee to a level II accredited physician for a medical impairment rating, which shall be based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment". If the referral is not timely made by the authorized treating physician, the insurer or self-insured employer shall refer the employee to a level II accredited physician within forty days after the determination of maximum medical improvement. If the employee, insurer, or self-insured employer disputes the finding regarding permanent medical impairment, including a finding that there is no permanent medical impairment, the parties to the dispute may select an independent medical examiner in accordance with section 8-42-107.2. The finding of any such independent medical examiner shall be overcome only by clear and convincing evidence.

(c) When the injured employee's date of maximum medical improvement has been determined pursuant to paragraph (b) of this subsection (8), and there is a determination that permanent medical impairment has resulted from the injury, the authorized treating physician shall determine a medical impairment rating as a percentage of the whole person based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991. Except for a determination by the authorized treating physician providing primary care that no permanent medical impairment has resulted from the injury, any physician who determines a medical impairment rating shall have received accreditation under the level II accreditation program pursuant to section 8-42-101. For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. If either party disputes the authorized treating physician's finding of medical impairment, including a finding that there is no permanent medical impairment, the parties may select an independent medical examiner in accordance with section 8-42-107.2. The finding of such independent medical examiner shall be overcome only by clear and convincing evidence. A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division.

(c.5) When an injury results in the total loss or total loss of use of an arm at the shoulder, a forearm at the elbow, a hand at the wrist, a leg at the hip or so near thereto as to preclude the use of an artificial limb, the loss of a leg at or above the knee where the stump remains sufficient to permit the use of an artificial limb, a foot at the ankle, an eye, or a combination of any such losses, the benefits for such loss shall be determined pursuant to this subsection (8).

(d) Medical impairment benefits shall be determined by multiplying the medical impairment rating determined pursuant to paragraph (c) of this subsection (8) by the age factor determined pursuant to paragraph (e) of this subsection (8) and by four hundred weeks and shall be calculated at the temporary total disability rate specified in section 8-42-105. Up to ten thousand dollars of the total amount of any such award or scheduled award shall be automatically paid in a lump sum less the discount as calculated in section 8-43-406 upon the injured employee's written request to the employer or, if insured, to the employer's insurance carrier. The remaining periodic payments of any such award, after subtracting the total amount of the lump sum requested by the employee without subtracting



the discount calculated in section 8-43-406, shall be paid at the temporary total disability rate but not less than one hundred fifty dollars per week and not more than fifty percent of the state average weekly wage, beginning on the date of maximum medical improvement.

(e) The age factor for use in calculating medical impairment benefits pursuant to this subsection (8) is as follows:

AGE	FACTOR
20 or younger	1.80
21	1.78
22	1.76
23	1.74
24	1.72
25	1.70
26	1.68
27	1.66
28	1.64
29	1.62
30	1.60
31	1.58
32	1.56
33	1.54
34	1.52
35	1.50
36	1.48
37	1.46
38	1.44
39	1.42
40	1.40
41	1.38
42	1.36
43	1.34
44	1.32
45	1.30
46	1.28
47	1.26
48	1.24
49	1.22
50	1.20
51	1.18
52	1.16
53	1.14
54	1.12
55	1.10
56	1.08
57	1.06
58	1.04
59	1.02
60 or older	1.00

(f) In all claims in which an authorized treating physician recommends medical benefits after maximum medical improvement, and there is no contrary medical opinion in the record, the employer shall, in a final admission of liability, admit liability for related reasonable and necessary medical benefits by an authorized treating physician.

**Source:** **L. 90:** Entire article R&RE, p. 491, § 1, effective July 1. **L. 91:** Entire section amended, p. 1306, § 15, effective July 1. **L. 92:** (8)(d) amended, p. 1827, § 1, effective April 29; (7)(b) amended and (8)(c.5) added, p. 1833, §§ 1, 2, effective May 26. **L. 93:** (8)(c) amended, p. 365, § 1, effective April 12. **L. 94:** (2)(b), (2)(c), (2)(x), (2)(y), and

(7)(b) amended and (2)(a.5) and (2)(w.5) added, p. 2002, § 4, effective July 1. **L. 96:** (8)(b.5) added and (8)(c) amended, p. 269, § 2, effective April 8; (8)(a) and (8)(b) amended, p. 456, § 1, effective July 1. **L. 98:** IP(8)(b)(II), (8)(b)(III), (8)(b.5)(I)(D), (8)(b.5)(II), and (8)(c) amended, p. 1429, § 2, effective August 5. **L. 99:** (6) and (7) amended, p. 298, § 1, effective July 1. **L. 2003:** (8)(b.5)(I)(D), (8)(b.5)(II), and (8)(c) amended, p. 1711, § 1, effective August 6. **L. 2007:** (8)(d) amended, p. 1472, § 2, effective May 30. **L. 2009:** (7)(b)(III) amended, (SB 09-243), ch. 269, p. 1223, § 3, effective July 1. **L. 2010:** (2)(ff) amended, (SB 10-187), ch. 310, p. 1459, § 6, effective July 1. **L. 2011:** (8)(f) added, (SB 11-199), ch. 196, p. 759, § 1, effective May 23.

**Editor's note:** This section is similar to former §§ 8-51-104 and 8-51-108 as they existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Determination of Disability.
- III. Loss of Fingers or Limbs.
- IV. Loss of Sight.
- V. Determination of Compensation.
- VI. Maximum Medical Improvement.
- VII. Termination of Benefits.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "One Year Review of Colorado Law-1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "Time, Equity and the Average Weekly Wage", see 23 Colo. Law. 1831 (1994). For article, "Update on Colorado Appellate Decisions in Colorado Workers' Compensation Law", see 30 Colo. Law. 69 (April 2001). For article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 32 Colo. Law. 87 (March 2003). For article, "The Road to Longmont Toyota: Starting and Stopping Temporary Disability Benefits", see 34 Colo. Law. 87 (June 2005).

**Annotator's note.** (1) Since provisions in § 8-42-110 relating to the determination of permanent partial disability were moved to this section in 1991, relevant cases construing § 8-51-108, which included the provisions of § 8-42-110 prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, and relevant cases construing § 8-51-104 have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to determine disability and make awards or were decided prior the enactment of 1986 Senate Bill No. 12 which abolished said commission.

**This section does not violate constitutional guarantees of equal protection.** Difference in methods of calculating benefits for partial and total injuries is rationally related to the governmental interest in providing benefits efficiently and fairly, notwithstanding that the classification is not perfect and that inequality may result in individual cases. *Duran v. Indus. Claim Appeals Office*, 883 P.2d 477 (Colo. 1994); *Colo. AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

Application of the schedule of disabilities in this section to minors with scheduled injuries does not deny those minors the equal protection guarantees of the fourteenth amendment and article II, § 25, of the Colorado Constitution. *Torres v. Canam Indus., Inc.*, 942 P.2d 1384 (Colo. App. 1997).

**This section not void for vagueness and does not operate as a deprivation of due process.** The fact that there may be many examples of "loss of use" of a member does not equate to unconstitutional vagueness. The statute must necessarily be phrased in general terms in order to ensure applicability to varied circumstances. Fundamental fairness does not require a statute to enumerate examples or criteria in every instance. "Loss of use" is sufficiently precise to permit persons of common intelligence to understand its meaning. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997).

**This section is clear, definite and mandatory.** *Cresson Consol. Gold Mining & Milling Co. v. Indus. Comm'n*, 90 Colo. 353, 9 P.2d 295 (1932); *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**And a liberal construction does not clothe the industrial commission or a court with power to ignore its mandatory provisions.** *Thompson Stores Co. v. Indus. Comm'n*, 85 Colo. 576, 277 P. 789 (1929); *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 88 Colo. 573, 298 P. 955 (1931); *Cresson Consol. Gold Mining & Milling Co. v. Indus. Comm'n*, 90 Colo. 353, 9 P.2d 295 (1932); *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**This section not retroactive.** Provisions of 1991 repeal and reenactment of workers' com-



pensation statutes, including this section, apply only in cases where the injuries occurred on or after July 1, 1991. *Golden Animal Hosp. v. Horton*, 897 P.2d 833 (Colo. 1995).

**Claims for injuries sustained prior to July 1, 1991, are subject to the former reemployment statute where applicable.** The plain language of former § 8-42-110 required that the benefits of a claimant who is reemployed by an employer be based on the degree of medical impairment rather than an ALJ's determination of the claimant's industrial disability even though a higher award is the result of such calculation. *Turner v. City & County of Denver*, 867 P.2d 197 (Colo. App. 1993) (decided under former § 8-42-110).

**General assembly may deem injury compensable per se.** The provisions of the statutory scheme reflect the general assembly's conclusion that the scheduled injuries are of a kind which is so likely to result in loss of earning capacity that proof of such loss is unnecessary. *Matthews v. Indus. Comm'n*, 627 P.2d 1123 (Colo. App. 1980).

**When an employee is involved in a work-related accident that results in both a scheduled injury and a nonscheduled injury,** the scheduled injury must be converted to a whole person impairment rating and combined with the nonscheduled injury's whole person impairment rating in calculating permanent disability benefits. *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996); *Human Res. Co. v. Indus. Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999).

An injury must be ratable under the AMA Guides before it is compensable under subsection (8). Therefore, a functional impairment that rates at zero percent under the AMA Guides is not a compensable injury. *Morris v. Indus. Claim Appeals Office*, 942 P.2d 1343 (Colo. App. 1997).

**When a claimant sustains both a scheduled and a nonscheduled injury from the same industrial accident,** and the two are separately ratable impairments, subsection (7)(b)(II) precludes conversion of the scheduled disability rating to a whole person impairment rating. *Warthen v. Indus. Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004).

**The cumulative trauma disorder rating scheme set forth in department of labor & employment rule XIX(G)(2), 7 Code Colo. Regs. 1101-3,** which includes a provision directing the rating physician to convert each upper extremity impairment to a whole person rating when the impairment is bilateral, is applicable only where the claimant has suffered a functional impairment not found on the schedule of disabilities in subsection (2) of this section. To read rule XIX(G)(2) as requiring scheduled injuries related to cumulative trauma disorder to be rated as a whole person impairment in all

cases would make it inconsistent with subsection (1)(a), and such inconsistency would render the regulation void. *Kolar v. Indus. Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005).

**The compensation provided in this section is payable irrespective of one's ability to work and irrespective of his ability to earn.** *Great Am. Indem. Co. v. Indus. Comm'n*, 114 Colo. 91, 162 P.2d 413 (1945); *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**This section contains a schedule of specific injuries to which attach specific awards of compensation,** and any award of compensation as to an injury included in the schedule is limited and determined thereby. *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**And for a specific injury relating solely to the injured member claimant cannot have compensation for disability, either total or partial.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931); *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**The term "injury" refers to the manifestation in a part or parts of the body** which have been impaired or disabled as a result of the industrial accident. *Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366 (Colo. App. 1996).

**Whether claimant has suffered a functional impairment that is listed in the schedule of disabilities** is a factual question to be resolved by the administrative law judge. *Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366 (Colo. App. 1996); *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Kolar v. Indus. Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005).

**It is the situs of the functional impairment, not the situs of the initial harm,** that is the relevant inquiry. *Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366 (Colo. App. 1996); *Langton v. Rocky Mountain Health Care*, 937 P.2d 883 (Colo. App. 1996); *Kolar v. Indus. Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005).

Therefore, it was not improper for the panel to base an award that included disability to the shoulder on the proportionate loss to the use of the arm when the functional impairment occurred only in the arm. *Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366 (Colo. App. 1996).

**This section grants broad discretion to elect between scheduled or working unit award.** *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

**Therefore, the method of determining disability provided by § 8-51-108 cannot be used when the injury is one appearing in the schedule set forth in this section,** since by its

specific terms such injuries are excluded. *Cresson Consol. Gold Mining & Milling Co. v. Indus. Comm'n*, 90 Colo. 353, 9 P.2d 295 (1932); *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**Thus, to obtain compensation in addition to that scheduled for an injured member, claimant must show that some other part of his body is affected.** *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**Neither § 8-42-101 (3.7) nor the AMA Guides can be read as superseding or overriding the express legislative directive in subsection (1) regarding how benefits are to be calculated for employees who have sustained only scheduled injuries.** *Kolar v. Indus. Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005).

**"Disability", as used in this section, means disability to work.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 70 Colo. 228, 199 P. 482 (1921).

**The term "disability" is broader and more inclusive than the term "medical impairment" as used in subsection (3); a person can have a medical impairment but still not have a disability that adversely affects earning capacity.** *Boice v. Indus. Claim Appeals Office*, 800 P.2d 1339 (Colo. App. 1990).

**Medical impairment benefits are designed to compensate for lost earning capacity.** *Salazar v. Hi-Land Potato Co.*, 917 P.2d 326 (Colo. App. 1996).

**Construction of this section and § 8-51-108.** Where there is no evidence upon which an award for permanent partial disability may be made under § 8-51-108, an award may be properly entered under this section, where it is supported by findings based upon the evidence. *Winteroth v. Indus. Comm'n*, 93 Colo. 38, 22 P.2d 865 (1933).

The commission has discretionary power to compensate an injured employee for his disability under either the scheduled loss provisions of this section or under the permanent partial disability provisions of § 8-51-105, but not both. *World of Sleep, Inc. v. Davis*, 188 Colo. 443, 536 P.2d 34 (1975); *Collins v. Indus. Comm'n*, 676 P.2d 1270 (Colo. App. 1984).

While there is no direct prohibition in subsection (7) not to consider the factors of this section while awarding under § 8-51-108, the use of the disjunctive indicates a choice, not a fusion, of the sections to be applied. *World of Sleep, Inc. v. Davis*, 188 Colo. 443, 536 P.2d 34 (1975).

**Subsection (7) is not facially invalid for want of guidelines limiting the director's discretion.** *Martinez v. Indus. Comm'n*, 632 P.2d 1044 (Colo. App. 1981).

**Subsection (7) is to be limited to cases where the injury results in the loss of use or partial loss of use of another member.** *Great Am. Indem. Co. v. Indus. Comm'n*, 114 Colo. 91, 162 P.2d 413 (1945); *Indus. Comm'n v. General Acci-*

*dent, Fire & Life Assurance Corp.*, 71 Colo. 115, 204 P. 338 (1922).

**Subsection (7) gives the industrial commission the discretion to grant a percentage award under the schedule found in this section or to rate the claimant under the working unit disability provisions of § 8-51-108.** *Indus. Comm'n v. Seastone*, 167 Colo. 571, 448 P.2d 963 (1969); *Cosmopolitan W. Hotel v. Henry*, 172 Colo. 279, 472 P.2d 134 (1970); *Padillo v. F. H. Linneman Constr. Co.*, 29 Colo. App. 137, 479 P.2d 990 (1971).

**But if claimant has completely lost his hand he can be compensated only under the schedule, and no discretion would be vested in the commission under subsections (6) and (7).** *Indus. Comm'n v. Seastone*, 167 Colo. 571, 448 P.2d 963 (1969).

**Formula to determine amount of compensation under subsection (7).** Amount of compensation to be awarded under subsection (7) is found by applying the percentage of loss of use to the amount of compensation which the general assembly has precisely provided in a schedule set out in this section. *World of Sleep, Inc. v. Davis*, 188 Colo. 443, 536 P.2d 34 (1975).

**If an employee's disability is the result of an occupational disease, he cannot recover compensation therefor under former provisions of the workmen's compensation act.** *Hallenbeck v. Butler*, 101 Colo. 486, 74 P.2d 708 (1937).

**Although evidence was conflicting, where expert based finding of permanent partial loss of hearing on valid formula and the process used was not new or novel, such evidence was properly interpreted by the ALJ and award was properly based on the disability award schedule and not on the lower disability ratings proffered by the employer's experts.** *City of Aurora v. Vaughn*, 824 P.2d 825 (Colo. App. 1991).

**Only medical impairment considered.** Where the commission compensates an injured employee under this section, it may consider only medical impairment and is limited to a disability award based entirely on the comparative compensation formula expressed therein. *World of Sleep, Inc. v. Davis*, 188 Colo. 443, 536 P.2d 34 (1975); *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984).

**Under subsection (3), usual wage adjustments do not include expected union job classification upgrades.** Therefore, employee's delay in attaining journeyman mechanic status did not defeat the application of this section. *Fulton v. Soopers*, 823 P.2d 709 (Colo. 1992).

**Subsection (3) applies only to an employer who reemploys an injured employee "at the employee's preinjury rate of pay" and extends "the usual wage adjustments" to the employee, which, read as a whole and giving full meaning to the plain language thereof, are limited to the payment arrangements between the injured em-**



ployee and the employer who is liable for payment of disability benefits because the injury-producing work was performed for that employer. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993).

**Where hearing officer strictly followed medical opinion** in determining the degree of claimant's industrial disability, it was not harmless error for the hearing officer to have excluded counselor's testimony on the degree of industrial disability merely because it embraced an ultimate issue to be decided by the trier of fact. *Chambers v. CF & I Steel Corp.*, 757 P.2d 1171 (Colo. App. 1988).

**Continued medical treatment is not inconsistent with award of permanent partial disability.** Though worker may reach maximum medical improvement, continued medical treatment may be necessary to prevent deterioration in worker's physical condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988).

**A claimant's voluntary retirement does not necessarily preclude a permanent disability**, where claimant retired before discovering his disabling injury and where claimant established that his employability had been reduced by the injury. *State Comp. Ins. Authority v. Indus. Claim Appeals Office*, 786 P.2d 423 (Colo. App. 1989).

**Under subsection (3), reemployment or reinstatement of an employee at his preinjury rate of pay** when the usual wage adjustments, such as cost of living adjustments, are extended reduces the benefits that would otherwise be available to a claimant. Therefore, proof of subsection (3) is in the nature of an affirmative defense which limits the employer's liability. *Valley Tree Serv. v. Jimenez*, 787 P.2d 658 (Colo. App. 1990).

**The burden of proof is on the employer to present evidence to satisfy each of the conjunctive requirements of subsection (3).** The employer had the burden of presenting evidence to establish the statutory basis of subsection (3) which would limit claimant's award to permanent medical impairment or payment for a scheduled disability since there was no dispute that claimant's injury was work-related and the claimant met his burden of proving that he had suffered a loss in earning capacity by showing that his future efficiency and employability in the competitive labor market was reduced. The fact that proof of claimant's preinjury rate of pay occurred naturally as a result of the evidence presented by claimant to demonstrate the extent of his disability does not serve to shift the burden, which remains on the employer. *Valley Tree Serv. v. Jimenez*, 787 P.2d 658 (Colo. App. 1990).

Reemployment statute, former § 8-42-110, does not apply if employer does not meet the burden of proving that, after the employee reached MMI and claimed permanent partial

disability, the employer actually offered to re-employ employee and offer the usual wage adjustments. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993) (decided under law prior to 1991 repeal).

**The provisions of this section concern only permanent partial disability**, and are inapplicable in cases within the scope of § 8-51-106 (1)(a) (now § 8-46-101). *McGrath v. Indus. Comm'n*, 708 P.2d 1382 (Colo. App. 1985).

**Applied** in *Boulder Valley Coal Co. v. Shipka*, 94 Colo. 394, 30 P.2d 852 (1934); *Consolidated Coal & Coke Co. v. Todoroff*, 97 Colo. 125, 47 P.2d 404 (1935); *Indus. Comm'n v. Seastone*, 167 Colo. 571, 448 P.2d 963 (1969); *Cosmopolitan W. Hotel v. Henry*, 172 Colo. 279, 472 P.2d 134 (1970); *City of Thornton v. Teeter*, 37 Colo. App. 427, 548 P.2d 133 (1976); *Martinez v. Indus. Comm'n*, 632 P.2d 1044 (Colo. App. 1981); *Employers Mut. v. Eidson*, 646 P.2d 959 (Colo. App. 1982); *R & R Well Serv. Co. v. Indus. Comm'n*, 658 P.2d 1389 (Colo. App. 1983); *People v. Hurd*, 682 P.2d 515 (Colo. App. 1984); *Kohnen v. Safeway Stores, Inc.*, 761 P.2d 231 (Colo. App. 1988).

## II. DETERMINATION OF DISABILITY.

### Meaning of "disability" under this section.

The term "disability" is not restricted to such disability as impairs present earning power at a particular occupation, but embraces any loss of physical function which detracts from the former efficiency of the body or its members in the ordinary pursuits of life. *London Guarantee & Accident Co. v. Indus. Comm'n*, 70 Colo. 256, 199 P. 962 (1921); *Wiernan v. Tunnell*, 108 Colo. 544, 120 P.2d 638 (1941); *Simpson & Co. v. Wheeler*, 153 Colo. 480, 386 P.2d 976 (1963).

**How word "specifically" used.** The general assembly used the word "specifically" in this section to limit the exclusion clause to that portion of § 8-51-104 relating to loss of a member, not that portion relating to loss of use. *Leyden Lignite Co. v. Buddy*, 98 Colo. 452, 56 P.2d 52 (1936).

**The extent of a claimant's industrial impairment** is not necessarily restricted to medical considerations. *Chambers v. CF & I Steel Corp.*, 757 P.2d 1171 (Colo. App. 1988).

**Determination of medical impairment under subsection (1) was not an issue** and apportionment based on medical impairment not appropriate. *Lindner Chevrolet v. Indus. Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995).

**The extent and degree of permanent disability is determined on the basis of various interdependent factors that affect a claimant's capacity to be gainfully employed.** An ALJ's consideration of unavailable substantial vocational rehabilitation due to the Colorado compensation insurance authority's refusal to provide vocational rehabilitation to a claimant

beyond 52 weeks was proper in determining the claimant's ability to regain efficiency in the general labor market. *Pro. Fire Prot. v. Long*, 867 P.2d 175 (Colo. App. 1993).

**A division-sponsored independent medical evaluation (DIME) physician's finding concerning a claimant's impairment rating is binding on the parties unless overcome by clear and convincing evidence.** Whether the DIME physician's rating has been overcome is a question of fact for determination by the ALJ. Clear and convincing evidence will demonstrate that it is "highly probable" the DIME physician's rating is incorrect, and such evidence must be unmistakable and free from serious or substantial doubt. *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973 (Colo. App. 2004).

**Physician's "finding" is not limited to the initial report.** For purposes of subsection (8)(c), a division-sponsored independent medical evaluation (DIME) physician's "finding" consists not only of the initial report but also any subsequent opinion given by the physician. *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

**It is a question of fact for the administrative law judge (ALJ) to determine whether a party has overcome, by clear and convincing evidence, the opinion of a division-selected independent medical examiner physician as to an impairment rating.** The clear and convincing standard in subsection (8)(b) is satisfied by a showing that the truth of a contention is highly probable. The ALJ is the sole arbiter of conflicting medical evidence, and the ALJ's findings are binding on review if supported by substantial evidence and plausible inferences drawn from the record. *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

**"Clear and convincing" standard did not apply** where the independent medical examiner's opinion was not at issue, and employer had raised the separate issue of causation under § 8-41-301 before the IME was performed. Therefore the ALJ did not err in applying a preponderance standard in determining whether claimant had sustained a compensable injury. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

**For where accident aggravated preexisting condition**, see *Kamp v. Disney*, 112 Colo. 65, 145 P.2d 877 (1944).

**Where medical examinations come so close together as to indicate nothing more than disagreement concerning a present condition**, the industrial commission is justified in considering all the reports together, and does not have to consider the testimony given at the latest hearing, "the manifest weight of the evidence", nor is the commission bound to find, as a matter of law, that there was permanent partial disability under this section, since it clearly appeared that the medical testimony was in direct conflict

on question of sterility or loss of function of testicle. *Robinson v. Indus. Comm'n*, 112 Colo. 21, 144 P.2d 979 (1944).

**Degree of permanent partial disability** is determined according to claimant's actual condition and earning capacity regardless of who paid for claimant's vocational treatment. *Martin K. Eby Const. Co. v. Indus. Comm'n*, 710 P.2d 1164 (Colo. App. 1985).

**Determination of permanent disability.** Permanent disability generally cannot be determined until the authorized physicians treating a claimant for work-related injuries advise that they can do nothing further for the claimant. Evaluation for permanent disability cannot precede the determination that claimant's condition has stabilized. *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983).

**The method of determining disability provided by this section cannot be used when the injury is one appearing in §§ 8-51-104 to 8-51-107 inclusive**, because by its specific terms such injuries are excluded. *Arkin v. Indus. Comm'n*, 145 Colo. 463, 358 P.2d 879 (1961); *Hawkeye-Security Ins. Co. v. Tupper*, 152 Colo. 12, 380 P.2d 31 (1963).

**Scheduled and nonscheduled impairments are treated differently for purposes of determining permanent disability benefits.** Specifically, the procedures of subsection (8)(c), which state that the division-sponsored independent medical examination finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, are applicable only to nonscheduled impairments. *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

**Commission's discretion not abused in determining extent of disability.** The commission does not abuse its discretion when it determines that the percentage decrease in the claimant's wages is the proper measure of the extent of his disability. *Southwest Inv. Co. v. Indus. Comm'n*, 650 P.2d 1355 (Colo. App. 1982).

**But where there is no evidence relating claimant's circumstances to a reduction in wage level**, the commission may reject the referee's rating and reach its own determination of the percentage of disability. *Gilliatt v. Indus. Comm'n*, 680 P.2d 1310 (Colo. App. 1983).

**Impairment of earning capacity.** Under this section the extent or degree of disability is not to be determined solely by the claimant's impaired earning capacity as it relates to the kind of labor in which he was employed when injured. It is obvious that such factor, while pertinent and important, must be considered with all other elements. *Byouk v. Indus. Comm'n*, 106 Colo. 430, 105 P.2d 1087 (1940).

**Impaired earning capacity one of many factors.** While impaired earning capacity, as it relates to the kind of work in which a claimant



was employed when he became disabled, is a pertinent factor which the commission must consider when evidence relative thereto is submitted, it is but one of many factors to be considered under the mandate of subsection (1)(b). *Evans v. Aurora Elevator Co.*, 631 P.2d 1201 (Colo. App. 1981).

Impaired earning capacity is only one factor to be taken into consideration under subsection (1)(b). *Employers Mut. v. Eidson*, 646 P.2d 959 (Colo. App. 1982).

**Disability, to be compensable, must rest upon the actual impairment of the claimant as a working unit.** *Indus. Comm'n v. Vigil*, 150 Colo. 356, 373 P.2d 308 (1962).

**Insurer's refusal to pay claimant's unauthorized medical expenses does not entitle claimant to compensation for higher degree of permanent disability than that which she actually suffered.** *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

**Finding sufficient for award.** A finding of the industrial commission that claimant's disability amounts to "permanent partial disability equal to ten percent of permanent total disability", is sufficient upon which to base an award. *London Guarantee & Accident Co. v. Indus. Comm'n*, 70 Colo. 256, 199 P. 962 (1921).

**This section does not require a greater quantum of proof than that required in other matters in issue before the industrial commission.** *London Guarantee & Accident Co. v. Coffeen*, 96 Colo. 375, 42 P.2d 998 (1935).

**But sets forth the factors to be considered in translating "partial permanent disability" into terms of "general permanent disability".** It is clear that rather than laying down a rule as to the quantum of proof of which the claimant must bear the burden, this section intends to set forth the factors that the commission shall consider in translating what may be an obvious or manifest "partial permanent disability" into terms of "general permanent disability". *London Guarantee & Accident Co. v. Coffeen*, 96 Colo. 375, 42 P.2d 998 (1935).

**And "the manifest weight of evidence" is merely one of the factors to be considered along with the "general physical condition and mental training, ability, former employment and education of the injured employee".** *London Guarantee & Accident Co. v. Coffeen*, 96 Colo. 375, 42 P.2d 998 (1935).

**Meaning of "manifest weight of evidence".** The actual physical disability or injury that is manifest, apparent, evident to the mind, and clear to the commission after the weighing of the evidence of it, and determining the nature of such actual disability from the preponderance thereof, is the "manifest weight of evidence" to which reference is made in this section. *London Guarantee & Accident Co. v. Coffeen*, 96 Colo. 375, 42 P.2d 998 (1935).

**And the degree of disability cannot be measured by physical condition alone,** but the injured man's age, his industrial history, his mentality, his education, and the availability of that type of work which he can do must be taken into consideration. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *Simpson & Co. v. Wheeler*, 153 Colo. 480, 386 P.2d 976 (1963); *Steel Placers, Inc. v. Reese*, 169 Colo. 360, 455 P.2d 874 (1969).

**Issue of degree of permanent disability is to be decided according to actual facts and is not to be influenced by who did or who did not pay for claimant's medical treatment.** *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

**Estimates relating to anatomical loss of organs may be relevant to the referee's determination of a permanent disability award.** In certain circumstances, these estimates may function as guidelines in setting a reasonable percentage figure for permanent disability. *Dravo Corp. v. Indus. Comm'n*, 40 Colo. App. 57, 569 P.2d 345 (1977).

**Determination of life expectancy.** After the industrial commission has determined the percentage of general permanent disability in a workmen's compensation case, it is then authorized to determine from a "recognized expectancy table" the life expectancy of the claimant. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 148 Colo. 557, 367 P.2d 597 (1961).

**Life expectancy table must be used in form it appears at time of use.** And where no other evidence relating to expectancy has been presented and where the general assembly itself has designated the "recognized" table, then that table must be used in the form in which it appears at the time of its use. *Indus. Comm'n v. Big Six Coal Co.*, 72 Colo. 377, 211 P. 361 (1922); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 148 Colo. 557, 367 P.2d 597 (1961).

**And the commission may without formal introduction by either party make use of the expectancy table or of other "recognized expectancy tables" in a workmen's compensation case.** *Indus. Comm'n v. Big Six Coal Co.*, 72 Colo. 377, 211 P. 361 (1922); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 148 Colo. 557, 367 P.2d 597 (1961).

**For the presumption exists that in making an award the commission considers and gives due weight to all of the factors therein enumerated.** *Byouk v. Indus. Comm'n*, 106 Colo. 430, 105 P.2d 1087 (1940); *Nat'l Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *Holmstrom v. Pub. Serv. Co.*, 169 Colo. 439, 458 P.2d 77 (1969).

A presumption exists that the referee considered and gave due weight to all factors enumerated in this section in making an award. *Dravo*

Corp. v. Indus. Comm'n, 40 Colo. App. 57, 569 P.2d 345 (1977).

**Aid life expectancy is a proper element for consideration.** Inasmuch as this section provides a maximum amount which a claimant may receive for permanent partial disability, his life expectancy is at least a proper element for consideration to assist in determining whether he is entitled to the full maximum allowance or a lesser sum. *Kamp v. Disney*, 112 Colo. 65, 145 P.2d 877 (1944).

**Neurotic mental disability is as real as any other disability** and, in the absence of evidence of malingering, is as much a personal injury. *Casa Bonita Restaurant v. Indus. Comm'n*, 624 P.2d 1340 (Colo. App. 1981).

**Burden of proof is upon claimant to establish his right to benefits.** *Matthews v. Indus. Comm'n*, 627 P.2d 1123 (Colo. App. 1980).

**Evidence of degree of functional disability is admissible** as relating to the "general physical condition" of the injured employee. *Byouk v. Indus. Comm'n*, 106 Colo. 430, 105 P.2d 1087 (1940).

**Commission entitled to look to claimant's mental ability.** The industrial commission had the right to look beyond claimant's physical impairments to her mental ability, including mental impairment, in determining the issue of permanent total disability. *Casa Bonita Restaurant v. Indus. Comm'n*, 624 P.2d 1340 (Colo. App. 1981).

**The industrial commission is vested with the widest possible discretion**, with the exercise of which the courts will not interfere, in determining the extent or degree of disability. *Byouk v. Indus. Comm'n*, 106 Colo. 430, 105 P.2d 1087 (1940); *Kamp v. Disney*, 112 Colo. 65, 145 P.2d 877 (1944); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *Tillman v. Capitol Hill Transf. & Storage Co.*, 165 Colo. 514, 440 P.2d 152 (1968); *New Jersey Zinc Co. v. Indus. Comm'n*, 165 Colo. 482, 440 P.2d 284 (1968).

**Commission's determination consistent with evidence may not be disturbed on appeal.** Where the commission's determination that a claimant has failed to meet his burden is consistent with the evidence of record, that determination may not be disturbed on appeal. *Matthews v. Indus. Comm'n*, 627 P.2d 1123 (Colo. App. 1980).

**Commission is vested with widest possible discretion** in determining the extent of an injured worker's disability. *Evans v. Aurora Elevator Co.*, 631 P.2d 1201 (Colo. App. 1981); *Gilliatt v. Indus. Comm'n*, 680 P.2d 1310 (Colo. App. 1983); *City & County of Denver v. Indus. Comm'n*, 682 P.2d 513 (Colo. App. 1984).

**Evidence not sufficient to sustain determination that claimant sustained a one-percent permanent partial disability.** *Puffer Mercan-*

*tile Co. v. Arellano*, 190 Colo. 138, 546 P.2d 481 (1975).

**Award not inconsistent with ineligibility for vocational rehabilitation benefits.** The commission's finding that a claimant is not eligible for vocational rehabilitation benefits is not inconsistent with its award for permanent partial disability benefits. *Southwest Inv. Co. v. Indus. Comm'n*, 650 P.2d 1355 (Colo. App. 1982).

**Hearing on admission of liability is required only when requested by the claimant.** Failure to request a hearing to contest an admission is a waiver of the claimant's right to have statutory factors and pre-injury and post-injury factors considered. *In re Brunetti v. Indus. Comm'n*, 670 P.2d 1246 (Colo. App. 1983).

**Timely invocation of former subsection (3)(a).** Where an employer continues to employ the injured employee and indicates its intent to elect the five percent rule if unsuccessful in contesting an award, the employer has timely invoked the provisions of subsection (3)(a)(now repealed). *Arellano v. Dir., Div. of Labor*, 42 Colo. App. 149, 590 P.2d 987 (1979).

### III. LOSS OF FINGERS OR LIMBS.

**Determination of disability from loss of fingers.** Where an employee sustained a loss of his right thumb, index and middle fingers and a partial loss of use of the hand, under subsection (7), the industrial commission has the power to fix the disability on the basis of a partial loss of the use of the hand, under subsection (7), the industrial commission has the power to fix the disability on the basis of a partial loss of the use of the hand, rather than on the loss of the fingers. *Indus. Comm'n v. Gen. Accident, Fire & Life Assurance Corp.*, 71 Colo. 115, 204 P. 338 (1922).

**But double compensation is not allowed.** The industrial commission may not allow for loss of fingers and add compensation for the loss or partial loss of use of the hand. *Indus. Comm'n v. Gen. Accident, Fire & Life Assurance Corp.*, 71 Colo. 115, 204 P. 338 (1922).

**Compensation for an amputation is limited to the specific amount provided in the statutory schedules for such permanent disability.** *Martinez v. Indus. Comm'n*, 32 Colo. App. 270, 511 P.2d 921 (1973).

**And employee who suffers amputation cannot receive additional compensation for disability measured as a working unit.** *Martinez v. Indus. Comm'n*, 32 Colo. App. 270, 511 P.2d 921 (1973).

**Employee not limited to recovery for loss of use of hands.** An employee who was afflicted with deep and extensive adhesions due to burns, and whose arms were bound to his sides, is not limited to recovery for loss of the use of his hands under this section. *Rio Grande Motor*



Way v. De Merschman, 100 Colo. 421, 68 P.2d 446 (1937).

**Section differentiates between loss of leg at hip and loss at or above knee.** This section, which prescribes the measure of damages for loss of, or loss of use of, a bodily member, differentiates between the loss of a leg at the hip joint or so near thereto as to preclude the use of a prosthesis and loss of a leg at or above the knee which remains sufficient to permit the use of a prosthesis. *Horizon Land Corp. v. Indus. Comm'n*, 34 Colo. App. 178, 524 P.2d 638 (1974).

**Subsection (4) has no reference to the specifications for loss of an arm.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 78 Colo. 501, 242 P. 988 (1926).

**Award for loss of leg may be amended where artificial limb is later used.** *Lindsay v. Indus. Comm'n*, 77 Colo. 424, 236 P. 1005 (1925).

**Claimant award of permanent partial disability benefits based upon a scheduled impairment under this section rather than a whole person impairment was appropriate.** The ALJ applied the proper legal standard in determining the claimant's impairment was within the scheduled impairment category for "the loss of an arm at the shoulder". The treating physicians found no impairment beyond the shoulder, and the injury principally affects claimant's arm movements. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997).

**Applied in** *Downing v. Gen. Iron Works Co.*, 120 Colo. 104, 207 P.2d 525 (1949).

#### IV. LOSS OF SIGHT.

**Under subsection (7) the question is one of percent of disability, not of blindness.** In case of disability under the schedule in this section, the ratio of the award to the maximum should be the ratio of the proved disability to total disability. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 70 Colo. 228, 199 P. 482 (1921).

**Subsection (7) specifically authorizes an award for partial permanent disability caused by permanent impairment of vision** and provides an identical method of computing the amount thereof irrespective of whether the employee before the accident had the sight of one or both eyes. For example, if an employee with perfect vision in both eyes loses 50% of the sight of one and suffers 50% disability as a result thereof, he is entitled to compensation for 50% of 104 or 52 weeks. If he becomes blind in one eye and later suffers 50% partial permanent impairment of vision of the remaining one, he is entitled to the same amount of compensation as in the first instance, namely, 50% of 104 or 52 weeks. *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 88 Colo. 573, 298 P. 955 (1931).

**And this section applies if there is anything short of total loss of vision.** *Platt-Rogers v. Indus. Comm'n*, 101 Colo. 458, 74 P.2d 673 (1937).

**Thus, only when compensation for permanent partial disability is awarded is this section applicable;** and only if there is no loss of vision in a remaining eye may this section be applied when compensation is sought for an enucleated eye. *Jewell Collieries Corp. v. Kenda*, 110 Colo. 394, 134 P.2d 206 (1943).

**An employee who suffers enucleation of a sightless eye, is entitled to permanent disability compensation only for the facial disfigurement caused thereby.** *London Guarantee & Accident Co. v. Indus. Comm'n*, 76 Colo. 155, 230 P. 598 (1924).

**Enucleation of eye in which vision was impaired.** Where vision in workman's eye was impaired prior to accident necessitating enucleation the industrial commission could not, upon the theory that the enucleated eye was "industrially blind" prior to the accident, deduct 104 weeks allowed for "total blindness of one eye" from the allowance for "the loss of an eye by enucleation" of 139 weeks, and award to claimant the difference, namely, 35 weeks, "for and on account of the enucleation of the left eye". To translate the phrase "total blindness" into "industrial blindness" would be the usurpation of legislative functions. *Downs v. Indus. Comm'n*, 109 Colo. 12, 121 P.2d 489 (1942).

**Award for total blindness is correct where the vision remaining is of no value for working.** The industrial commission awarded employee full compensation under this section for total blindness of the right eye. It is agreed that he lost but ninety percent of the eye's sight and retained ten percent. The commission made a finding of "almost complete loss of vision" in the injured eye, and "That the amount of vision now remaining is of no value from a working standpoint". Under such finding the award was right. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 70 Colo. 228, 199 P. 482 (1921); *Indus. Comm'n v. Johnson*, 64 Colo. 461, 172 P. 422 (1918).

**Despite small percentage of remaining vision, director may find there is loss of vision.** The fact that an employee may have five, eight or even ten percent of vision remaining in an injured eye, does not preclude a finding by the industrial commission of total loss of vision in that eye, the amount of vision remaining being of no value from a working standpoint. *Platt-Rogers v. Indus. Comm'n*, 101 Colo. 458, 74 P.2d 673 (1937).

**The effect of glasses in correcting vision should not be considered** in connection with the awarding of the statutory allowance for blindness of an eye. *Great Am. Indem. Co. v. Indus. Comm'n*, 114 Colo. 91, 162 P.2d 413 (1945).

**Industrial claim appeals panel did not err in its conclusion that injury be compensated as a scheduled injury under this section** by refusing to treat "loss of visual acuity" differently from "blindness" for purposes of a scheduled injury. *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995).

**Cosmetic deformity of the face impairs an individual's function and may be calculated as a non-scheduled injury and added to the individual's scheduled whole person impairment rating under this section** notwithstanding the additional remedy for cosmetic disfigurement available under § 8-42-108. Accordingly, cosmetic deformity of the eye as it affects the functioning of the face is rated under section 9.2 of the AMA Guides and benefits are calculated for a whole person impairment under this section. *Gonzales v. Advanced Component Sys.*, 949 P.2d 569 (Colo. 1997).

**A mental impairment rating due to mental or emotional stress cannot be combined with the physical impairment rating** for purposes of exceeding the benefit cap applicable to an impairment rating of 25 percent or less pursuant to § 8-42-107.5. *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301 (Colo. App. 2005), *aff'd*, 134 P.3d 407 (Colo. 2006).

**Applied in** *Rogers, Inc. v. Fishman*, 154 Colo. 122, 388 P.2d 755 (1964).

## V. DETERMINATION OF COMPENSATION.

**This statute provides compensation for the actual degree of permanent partial disability.** *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

**Basis of concept of compensable general permanent disability.** The concept of a compensable general permanent disability is not based upon one's present functional disability, but rather on the injury's impact upon one's earning capacity, present or future. *Dravo Corp. v. Indus. Comm'n*, 40 Colo. App. 57, 569 P.2d 345 (1977).

**An employee shall be deemed to be permanently partially disabled from the time he is so declared by the industrial commission,** and his age at that time is the criterion which furnishes the basis upon which his life expectancy should be computed. *Wiernan v. Tunnell*, 108 Colo. 544, 120 P.2d 638 (1941).

**And time at which disability is to be determined is within discretion of industrial commission.** Since there is no provision in the workmen's compensation act, which specifies the time at which disability is to be determined; this problem is left to the sound discretion of the commission. *Wilson v. Sinclair*, 109 Colo. 592, 128 P.2d 996 (1942).

**In determining compensation for permanently disabled minors,** the compensation

scheme specified in § 8-42-102 takes precedence over the general compensation scheme for adults under this section. *Horton v. Golden Animal Hosp.*, 879 P.2d 459 (Colo. App. 1994).

**The maximum rate payable for medical impairment benefits for a permanently disabled minor** is the maximum rate of temporary total disability allowed by § 8-42-105. *Arkansas Valley Seeds, Inc. v. Indus. Claim Appeals Office*, 972 P.2d 695 (Colo. App. 1998).

**Conclusion that an injured minor remains entitled to the benefit of the higher end "age factor"** listed in this section as well as computation of benefits at the maximum temporary disability rate, is not inconsistent with the legislative intent of this section or § 8-42-102. *Arkansas Valley Seeds, Inc. v. Indus. Claim Appeals Office*, 972 P.2d 695 (Colo. App. 1998).

**Minor with scheduled disability is not entitled to aggregate amount of benefits allowed by statute as provided by § 8-42-102 (4).** Since subsection (6) provides for a fixed rate of compensation for all scheduled disabilities, there is no disparity between the benefits paid to minors and to adults. *Williams v. Indus. Claim Appeals Office*, 932 P.2d 869 (Colo. App. 1997).

**This section establishes a standard rate for computation of benefits,** without reference to the average weekly wage and its inherent disparity of treatment between adults and minors. *De Giacomo v. Indus. Claim Appeals Office*, 817 P.2d 552 (Colo. App. 1991).

**For purposes of the benefits provided employers by subsection (3),** the relevant rate of pay is the amount paid by the reemploying employer to the injured employee prior to the injury, without regard to income from other self-employment previously enjoyed by the employee prior to the injury. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993) (decided under law as it existed prior to the 1991 repeal of this section).

**Post-injury earnings one factor to consider in determining a percentage disability figure.** *Vail Assocs., Inc. v. West*, 661 P.2d 1187 (Colo. App. 1982), *aff'd*, 692 P.2d 1111 (Colo. 1984); *Smith v. Indus. Comm'n*, 735 P.2d 921 (Colo. App. 1986).

It was not error to consider the amount by which claimant's efforts subsequent to termination of employment increased his rental income where claimant spent a substantial amount of time managing and maintaining rental properties in order to maximize his rental income. *Smith v. Indus. Comm'n*, 735 P.2d 921 (Colo. App. 1986).

**The term "loss of earning capacity" as contemplated by this section means the loss of the ability to earn, not simply lost wages.** A workers' actual earnings following an industrial accident or occupational disease are relevant but not presumptive evidence of the workers' earning capacity. Nor is a claimant's loss of earnings



due to injury or occupational disease dispositive of the amount of the claimant's entitlement to permanent partial disability benefits. Instead, such matters are merely individual factors to be considered in determining the existence of impaired earning capacity. *Hobbs v. Indus. Claim Appeals Office*, 804 P.2d 210 (Colo. App. 1990).

**Loss of earning capacity is basis for benefits, however denominated.** The purpose of the "medical impairment benefits" under subsection (8) is substantially the same as the purpose of the "permanent partial disability benefits" referenced in § 8-42-103 (1)(c)(I), i.e., to compensate for loss of earning capacity. *Ray v. Indus. Claim Appeals Office*, 920 P.2d 868 (Colo. App. 1996).

**Benefits under subsection (8) are subject to offset pursuant to § 8-42-103.** *Ray v. Indus. Claim Appeals Office*, 920 P.2d 868 (Colo. App. 1996).

**Subsection (8) requires that payment of medical impairment benefits be based upon the temporary total disability rate that workers compensation claimant would have received if claimant had been temporarily and totally disabled for more than three working days, even if claimant had not lost any wages and had not actually received temporary disability benefits.** *Broadmoor Ins. Co. v. Indus. Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1996).

**Simply because this section limits the inquiry in determining disability to measurable medical impairment does not mean that awards made thereunder are unrelated to lost earning capacity.** *Waymire v. Indus. Claim Appeals Office*, 924 P.2d 1168 (Colo. App. 1996).

Medical impairment benefits awarded under this section are a form of permanent partial disability benefits designed to compensate for lost earning capacity. Consequently, such benefits compensate for the same loss of future earning capacity as permanent total disability benefits. It is therefore improper to award contemporaneous medical impairment and total disability benefits. *Waymire v. Indus. Claim Appeals Office*, 924 P.2d 1168 (Colo. App. 1996).

**Award for permanent partial disability cannot be made after death of employee.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931).

**Actual post-injury earnings do not always reflect worker's true earning capacity** subsequent to his injury. *Evans v. Aurora Elevator Co.*, 631 P.2d 1201 (Colo. App. 1981); *Employers Mut. v. Eidson*, 646 P.2d 959 (Colo. App. 1982); *Ampex Corp. v. Indus. Comm'n*, 699 P.2d 980 (Colo. App. 1985).

**Award may be appropriate even with greater post-injury earnings.** A permanent partial disability award may be appropriate even where post-injury earnings are greater than pre-injury earnings. *Employers Mut. v. Eidson*, 646 P.2d 959 (Colo. App. 1982); *Ampex Corp. v.*

*Indus. Comm'n*, 699 P.2d 980 (Colo. App. 1985).

Where a claimant produces evidence that his disability precludes him from pursuing his chosen occupation and excludes him from potentially available jobs, he is entitled to a disability award, even where he has obtained new employment at a higher salary. *Vail Assocs. v. West*, 661 P.2d 1187 (Colo. App. 1982), *aff'd*, 692 P.2d 1111 (Colo. 1984).

Although a rule which treats evidence of a post-injury increase in earnings as giving rise to a rebuttable presumption of earning capacity commensurate with actual earnings has been applied in several jurisdictions, the court declines to adopt it and adheres to the existing rule which allows the commission to consider post-injury earnings as one factor among several in ascertaining permanent partial disability. *Vail Assocs., Inc. v. West*, 692 P.2d 1111 (Colo. 1984).

**Application of percentage as a working unit.** Percentage as a working unit is not applied to the amount of compensation paid for the loss of the member, but is applied to the total sum which the workman would receive over his expected lifetime if he were permanently disabled. *World of Sleep, Inc. v. Davis*, 188 Colo. 443, 536 P.2d 34 (1975).

**Reopening case for change in extent of disability.** Under the proviso of this section at any time during the period for which compensation for permanent partial disability has been awarded, the industrial commission, upon petition of a party in interest, is required to reopen a case upon showing the disability of such injured employee has undergone a change in extent or degree since the entry of the award. *Byouk v. Indus. Comm'n*, 106 Colo. 430, 105 P.2d 1087 (1940).

In view of prior cases, the beneficial purposes of the act, and the language of this section and § 8-53-113, the conclusion is inescapable that the general assembly has given the director authority to reopen a case within requisite time limitations regardless of how the case was resolved. *Padilla v. Indus. Comm'n*, 696 P.2d 273 (Colo. 1985) (decided prior to 1985 amendment to subsection (2)).

Denial of petition to reopen claim for additional award of permanent disability benefits and/or vocational rehabilitation was not abuse of discretion where claimant's condition of being unable to work had not changed since time of original award. *Loucks v. Safeway Stores*, 757 P.2d 639 (Colo. App. 1988).

**Second award for increased disability.** This section applies only when there has been a determination of total permanent or permanent partial disability, and when there is a supplemental or second award for increased permanent partial disability, it is to be based upon the employee's age as of the date when the supple-

mental award is entered. *Lefkaras v. Moffat Coal Co.*, 113 Colo. 416, 158 P.2d 386 (1945).

**Normal rate of pay**, as used in repealed subsection (3)(a), is determined by the total weekly earnings rather than the hourly rate of pay. *Miller v. Halliburton Servs.*, 689 P.2d 662 (Colo. App. 1984), *aff'd*, 720 P. 2d 571 (Colo. 1986).

## VI. MAXIMUM MEDICAL IMPROVEMENT.

**Procedures prescribed by subsection (8) do not result in any violation of procedural due process.** The general assembly sought to reduce litigation over maximum medical improvement (MMI) and degree of impairment for purposes of workers' compensation claims by providing that, if either party disputes the finding of the treating physician as to MMI or degree of impairment, that party may require an independent medical examination (IME) be performed. If the parties cannot agree as to the physician to perform the IME, the director will select the physician, and that physician's opinion upon the issues involved can then be overcome only by clear and convincing evidence. These provisions are rationally related to the general assembly's goal of decreasing such litigation. *Colo. AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

**However, due process of law guarantees are violated by subsection (8) when a fee requirement requires an indigent worker to prepay a fee before he can obtain either administrative or judicial review of an adverse decision of the employer-selected treating physician.** *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003).

**Subsection (8)(b)(II), as amended in 1996, does not constitute retrospective legislation.** Subsection (8)(b)(II) establishes procedures for the determination of MMI and the allocation of the burden of proof. Because the statute effects a change that is procedural, it may be applied retroactively. *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

**The term "determination" in subsection (8)(b)(II) refers to a medical determination.** *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

**Subsection (8)(c) precludes an administrative law judge from considering causation or altering a treating physician's impairment rating when a statutory IME has not been performed.** *Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

**A claimant's agreement to accept the results of an IME as binding constitutes a waiver of procedural due process rights.** *Colo. AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

**The clear and convincing standard set forth in subsection (8) is satisfied by a showing**

that the truth of a contention is highly probable. *Askew v. Sears Roebuck & Co.*, 914 P.2d 416 (Colo. App. 1995), *rev'd* on other grounds, 927 P.2d 1333 (Colo. 1996).

**Nothing in this section or in division of labor regulation limits a DIME physician who has provider and advisor contracts with employer's insurance company from performing an independent medical examination absent any direct or substantial relationship with the treating physician.** Such a physician may be an "independent" medical examiner within the meaning of subsection (8)(c). *Benuishis v. Indus. Claim Appeals Office*, 195 P.3d 1142 (Colo. App. 2008).

**Whether DIME physician has a conflict of interest is a question of fact.** ALJ's findings regarding whether a DIME physician was laboring under an actual or apparent conflict of interest when performing claimant's independent medical examination will be upheld on appeal if supported by substantial evidence in the record. *Benuishis v. Indus. Claim Appeals Office*, 195 P.3d 1142 (Colo. App. 2008).

**Date of maximum improvement determined compensable actual disability.** Where claimant's permanent partial disability was two percent on the date of maximum improvement, this is the actual disability which she suffered and for which she is entitled to compensation. *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

**This section merely codified the already accepted practice of using "maximum medical improvement",** or substantially similar expressions of the same concept, to determine when temporary disability ends and permanent disability begins. *Golden Animal Hosp. v. Horton*, 897 P.2d 833 (Colo. 1995).

**Both MMI and need for further treatment to improve existing condition cannot exist together;** claimant is either in need of further treatment to improve his existing conditions, thus making permanent disability award premature, or his condition has stabilized and issue of permanent disability must be determined. *Grover v. Indus. Comm'n*, 739 P.2d 900 (Colo. App. 1987).

**Lump sum payments of PPD benefits less than \$10,000 are authorized by subsection (8)(d) and acceptance of a lump sum does not imply acceptance of employer's final admission of liability and does not constitute a settlement or waiver of the claimant's right to challenge the final admission of liability.** *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005).

**Panel did not err in concluding that a finding of MMI from the authorized treating physician was a prerequisite to either party seeking another physician's evaluation.** *Aren Design, Inc. v. Becerra*, 897 P.2d 902 (Colo. App. 1995).



**Denial of and reimbursement for TTD benefits received after a claimant is deemed to have reached MMI is permitted.** An independent medical examiner may be authorized to determine whether an employee has reached MMI. If the examiner finds that an employee has reached MMI, that employee is no longer eligible for TTD benefits, and the cost of any such benefits paid out to the employee after the finding of MMI may then be offset against the employee's permanent partial disability benefits. *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

**An IME is required prior to any hearing disputing the validity of the authorized physician's finding of MMI.** Because no IME was performed, to the extent claimant's request to change physicians was for purposes of obtaining treatment to further cure her injury, or to obtain reinstatement of temporary total disability benefits, the ALJ exceeded her jurisdiction and authority in granting the request. *Story v. Indus. Claims Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

**Absent a division-sponsored IME, an ALJ lacks jurisdiction to resolve a dispute concerning the validity of an authorized treating physician's finding of MMI.** *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002).

**But when the issue is not the finding of MMI itself, a division-sponsored IME is not a prerequisite.** A claimant who requested a change of physician based on alleged professional misconduct before being placed at MMI by that same physician was clearly not attempting to indirectly challenge the finding of MMI itself, therefore would not be required to undergo a division-sponsored IME. *Ames v. Indus. Claim Appeals Office*, 89 P.3d 477 (Colo. App. 2003).

**The general assembly expressly made the procedures used to determine MMI available in cases of scheduled and nonscheduled injuries.** *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

**Whether the division-sponsored IME physician correctly applied the AMA Guides and whether the rating itself has been overcome are questions of fact for determination by the ALJ and not questions of law.** *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

**Clear and convincing proof that an employee was not at MMI is not required** when the record, including the IME physician's report, supports an ALJ's finding that the report concluded that the employee was not at MMI. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

**Where the authorized treating physician issues conflicting opinions concerning MMI,** the ALJ may resolve the conflict without requir-

ing the claimant to obtain an IME. *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003).

**An IME physician's conclusion that a claimant's medical problems were components of claimant's overall impairment constitutes a part of the diagnostic assessment that comprises the IME process.** As such, the conclusion must be given presumptive effect and can be overcome only by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005).

Whether the division-sponsored IME physician's rating has been overcome is a question of fact for determination by the ALJ. *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003).

It is not incumbent on the claimant to timely request a follow-up division-sponsored IME to contest the authorized treating physician's second MMI determination if the claimant had previously requested a division-sponsored IME to contest the authorized treating physician's initial determination of MMI. *Stefanski v. Indus. Claim Appeals Office*, 128 P.3d 282 (Colo. App. 2005), *aff'd* on other grounds, 147 P.3d 5 (Colo. 2006).

**Once a claimant has successfully challenged a finding of MMI through the division independent medical examination process, that process remains open,** such that when the authorized treating physician makes a second finding of MMI, the employer or insurer may not file a final admission of liability to close the case until they return the claimant to the IME for a follow-up examination and determination of MMI. *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006); *Sanco Indus. v. Stefanski*, 147 P.3d 5 (Colo. 2006).

**Employee's death did not trigger the provisions of subsection (8)(b) regarding MMI as a matter of law.** The general assembly logically premised enactment of the IME procedure upon an assumption that the employee is alive to participate therein. Because employee was not at MMI when he died, the industrial claim appeals panel did not err in denying his dependents permanent partial disability benefits and penalties. *Dependents of Nunnally v. Wal-Mart Stores, Inc.*, 943 P.2d 26 (Colo. App. 1996).

## VII. TERMINATION OF BENEFITS.

**An award for initial permanent partial disability should terminate** on the commencement date of a permanent total award. *Kehm v. Cont'l Grain*, 756 P.2d 381 (Colo. App. 1987).

**Increased earnings.** An increase in post-injury earnings is not presumptive evidence that claimant has not suffered a permanent impairment to earning capacity, but burden is on claim-

ant to prove that such increase is not a true indication of the absence of impaired earning capacity. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

**8-42-107.2. Selection of independent medical examiner - procedure - time - disclosures regarding physician relationships with insurers, self-insured employers, or claimants - rules - applicability.** (1) This section governs the selection of an independent medical examiner, also referred to in this section as an "IME", to resolve disputes arising under section 8-42-107.

(2) (a) (I) Except as otherwise provided in subparagraph (II) of this paragraph (a), the time for selection of an IME commences as follows, depending on which party initiates the dispute:

(A) For the claimant, the time for selection of an IME commences with the date of mailing of a final admission of liability by the insurer or self-insured employer that includes an impairment rating issued in accordance with section 8-42-107.

(B) For the insurer or self-insured employer, the time for selection of an IME commences with the date on which the disputed finding or determination is mailed or physically delivered to the insurer or self-insured employer.

(II) If, as of the date on which the time for selection of an IME would otherwise commence, a medical condition is not yet ratable because of a provision in the medical treatment guidelines or in the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", the time for selection of an IME shall commence on the date on which an impairment rating is mailed or physically delivered.

(b) If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule, and shall propose one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME. Such notice and proposal is effective upon mailing via United States mail, first-class postage paid, addressed to the division and to the last-known address of each of the other parties. Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division.

(c) If the insurer or self-insured employer requests an IME and the examination is conducted before the insurer or self-insured employer admits liability pursuant to section 8-43-203 (2) (b), the claimant may not request a second independent medical examination on that issue but may appeal the IME's decision, as set forth in section 8-43-203 (2) (b) (II).

(3) (a) Upon receiving the requesting party's notice and proposal pursuant to subsection (2) of this section, the other parties have until the end of the thirtieth day after the date of mailing of such notice and proposal within which to negotiate and select an IME. If the parties agree on an IME on or before such thirtieth day, the requesting party shall promptly notify the IME in writing that he or she has been selected. If, within such time, the parties are unable to agree or the requesting party receives no response to the notice and proposal, the insurer or self-insured employer shall give written notice of such fact to the division within thirty days via United States mail, first-class postage paid. The division shall then, within ten days after receiving such written notice, select three physicians by a revolving selection process established by the division from the list of physicians maintained by the division. The division shall administer the list in such fashion as to ensure that the names of candidates to serve as IME in each pending case remain confidential until the IME is selected. The director of the division shall promulgate rules to implement the process of selecting a panel of three physicians from which the parties may select a physician to conduct a division independent medical examination. The selection of a physician panel shall be based on various factors, including, but not limited to, the designation by rule of the fields of specialization authorized to perform independent medical examinations for conditions listed under each medical treatment guideline and measures to prevent the



over-utilization of physicians or specialists. The requesting party shall have the opportunity to strike one of the three physicians from the list, followed by the opposing party who shall then be given the opportunity to strike one physician from the list. The remaining IME physician shall be designated by the division to conduct the IME. If one or neither party strikes a physician from the list, the division shall select the physician to conduct the IME from the remaining physicians on the list.

(b) Upon selection of the IME, the insurance carrier shall provide to the IME and all other parties a complete copy of all medical records in its possession pertaining to the subject injury, postmarked or hand-delivered within fourteen days prior to the independent medical examination. If the insurance carrier or its representative fails to timely submit such medical records, the claimant may request that the division cancel the independent medical examination or the claimant may submit all the medical records he or she has available within ten days prior to the independent medical examination, or as otherwise arranged by the division with the IME. If the claimant submits medical records, the defaulting party may supplement such records pursuant to rules of the division. This paragraph (b) shall not be construed to prohibit an independent medical examination from being rescheduled.

(c) Any supplemental medical records shall be prepared according to the rules of the division and shall be submitted to the IME and all other parties no later than seven days prior to the independent medical examination.

(d) (I) The IME shall neither contact any of the authorized treating physicians or any examining or reviewing physician nor request a claimant to undergo repeat testing when the testing results were valid and the IME has resolved any disparity in testing results.

(II) Subparagraph (I) of this paragraph (d), as enacted by Senate Bill 09-168, enacted in 2009, is declared to be procedural and was intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

(3.5) (a) Prior to making a determination to strike a physician from the list of IME physicians provided by the division in accordance with paragraph (a) of subsection (3) of this section, a party may request and shall be entitled to obtain and review a summary disclosure pertaining to any business, financial, employment, or advisory relationship between a listed physician, or any entity affiliated with the physician, and the insurer, self-insured employer, or claimant who is a party to the claim. The party shall not be required to make its determination to strike a physician from the list until he or she has received and has had a reasonable opportunity to review the summary disclosure.

(b) The director shall adopt rules as necessary to implement this subsection (3.5). At a minimum, the rules shall:

(I) Require physicians to disclose the requested business, financial, employment, or advisory relationship information in a summarized format;

(II) Detail the form and manner in which the summary disclosure is to be provided;

(III) Set parameters regarding the period within which a requesting party is allowed to review the summary disclosure prior to making a determination to strike a physician from the list; and

(IV) Prohibit a physician who fails to disclose the requested summarized information from conducting an independent medical examination until he or she complies with the request.

(4) Within thirty days after the date of the mailing of the IME's report, the insurer or self-insured employer shall either file its admission of liability pursuant to section 8-43-203 or request a hearing before the division contesting one or more of the IME's findings or determinations contained in such report.

(5) (a) Except as provided in paragraph (b) of this subsection (5), the requesting party shall advance the full cost of the independent medical examination to the IME at least ten days before the appointed time for the examination.

(b) A claimant who has established that he or she is indigent shall receive an independent medical examination without having to advance the cost to the independent medical examiner. The director of the division of workers' compensation shall promulgate rules to establish a procedure to determine indigence.

(6) This section was enacted by House Bill 98-1062, as enacted at the second regular session of the sixty-first general assembly, as a remedial statute and is procedural in nature.

The purpose of this section is to improve and simplify remedies already existing for the enforcement of rights and the redress of injuries under the workers' compensation laws of Colorado. This section effected procedures related to the selection of an IME and shall be applicable to all open cases with a date of injury on or after July 1, 1991, for which a division IME has not been requested, pursuant to section 8-42-107.

**Source:** **L. 98:** Entire section added, p. 1427, § 1, effective August 5. **L. 99:** (3) amended and (6) added, p. 254, § 1, effective September 1. **L. 2003:** (3) and (5) amended, p. 1712, § 2, effective August 6. **L. 2007:** (3)(a) amended, p. 1472, § 3, effective May 30. **L. 2009:** (3)(d) added, (SB 09-168), ch. 184, p. 806, § 1, effective August 5. **L. 2010:** (3)(d) amended, (SB 10-163), ch. 66, p. 231, § 1, effective March 31; (3.5) added, (SB 10-011), ch. 302, p. 1431, § 1, effective July 1.

#### ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 97 (June 2003). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 113 (October 2003).

**Once a claimant has successfully challenged a finding of maximum medical improvement (MMI) through the division independent medical examination (DIME) process, that process remains open,** such that when the authorized treating physician makes a second finding of MMI, the employer or insurer may not file a final admission of liability to close the case until they return the claimant to the IME for a follow-up examination and determination of MMI. *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006); *Sanco Indus. v. Stefanski*, 147 P.3d 5 (Colo. 2006).

**An employer is limited to the remedies provided in this section when an injured worker requests an IME pursuant to this section.** An employer's contention that its first admission to liability prior to the request for an IME pursuant to this section satisfies the requirement of subsection (4) is in error and does not relieve the employer from responding to the IME report pursuant to subsection (4). *City Market, Inc. v. Indus. Claims Appeal Office*, 68 P.3d 601 (Colo. App. 2003).

Failure of an employer to respond to an IME report pursuant to subsection (4) subjects an employer to penalties pursuant to § 8-43-304 (1). *City Market, Inc. v. Indus. Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

An employer is precluded from challenging the IME physician's finding that claimant was not at MMI, including the IME physician's finding regarding the cause of claimant's symptoms because employer failed either to admit or contest liability within 30 days of the IME physician's report. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005).

**Claimant does not waive right to request an IME by accepting a lump sum payment** because claimant's note requesting lump sum

payment contained no statement indicating that, by accepting the lump sum payment, she intended to surrender her rights to challenge the employer's final admission of liability. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005).

Further, there was no written agreement establishing a waiver, and the claimant in fact challenged the final admission of liability by filing an objection to it, together with a notice and proposal for the IME on the same date she received the lump sum payment. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005).

**The 30-day period for requesting a DIME does not begin to run for claimants who obtained and objected to a final admission of liability prior to the effective date of subsection (6) until such claimants receive notice of the 1999 amendment from the insurer or employer.** *Lobato v. Indus. Claim Appeals Office*, 105 P.3d 220 (Colo. App. 2005).

**Under the plain language of subsection (6),** a claimant is not required to file a notice and proposal to select another division-sponsored IME if he or she has previously requested a division-sponsored IME to contest an authorized treating physician's initial determination of maximum medical improvement. *Stefanski v. Indus. Claim Appeals Office*, 128 P.3d 282 (Colo. App. 2005), *aff'd* on other grounds, 147 P.3d 5 (Colo. 2006).

**When an employer requests an independent medical examination but then timely cancels the request pursuant to the department's rules after the treating physician reduced the original impairment rating,** the employer's final admission of liability based on the amended impairment rating is effective, and the original impairment rating is no longer at issue. *Montoya v. Indus. Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2008).

**Employer's failure to initiate the DIME process to challenge the authorized treating physician's findings does not make the physician's opinion that the claimant sustained a**



**work-related injury binding.** The statutory scheme grants no authority to the physician to determine causation as it pertains to compensability, therefore, the physician's findings and determinations are inconsequential if causation has not been proved. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

This section, when read in conjunction with § 8-42-107 (8), makes it clear that the statutes

contemplate a challenge through the DIME process only to determinations made by the authorized treating physician concerning MMI and impairment, therefore, this section is not unconstitutionally vague. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

**8-42-107.5. Limits on temporary disability payments and permanent partial disability payments.** No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments. For the purposes of this section, any mental impairment rating shall be combined with the physical impairment rating to establish a claimant's impairment rating for determining the applicable cap. For injuries sustained on and after January 1, 2012, the director shall adjust these limits on the amount of compensation for combined temporary disability payments and permanent partial disability payments on July 1, 2011, and each July 1 thereafter, by the percentage of adjustment made by the director to the state average weekly wage pursuant to section 8-47-106.

**Source:** L. 91: Entire section added, p. 1311, § 16, effective July 1. L. 2005: Entire section amended, p. 1505, § 1, effective January 1, 2006. L. 2009: Entire section amended, (SB 09-243), ch. 269, p. 1223, § 4, effective July 1. L. 2010: Entire section amended, (SB 10-187), ch. 310, p. 1459, § 7, effective January 1, 2011.

#### ANNOTATION

**Given that the general purpose of temporary and permanent benefits is to compensate for a present or future possible wage loss, there is no improper discrimination** that results from the placing of a limit upon the total benefits, both temporary and permanent, to be received. *Colo. AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

**Applicability of this section can only be determined if two conditions are met:** (1) The claimant reaches maximum medical improvement, and (2) the claimant's medical impairment rating is established. *Donald B. Murphy Contractors v. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995).

**Neither this section nor § 8-43-303 addresses the situation** of further temporary total disability benefits being awarded after the limit on combined temporary total and permanent partial benefits has been paid. But in view of underlying policies, in this situation the employer should be entitled to offset any permanent partial disability benefits paid against temporary total disability benefits. *Donald B. Murphy Contractors v. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995).

General assembly clearly intended to require employers to continue paying benefits' without application of the cap until such time as a claim-

ant reaches MMI. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005).

**Claimant is not entitled to additional temporary total disability benefits for the period between the date of the first determination of maximum medical improvement and the date the claimant returned to work** even though a second independent medical examination physician opined the claimant did not reach maximum medical improvement until a date following the claimant's return to work when both maximum medical improvement ratings were less than 25 percent. The possibility that events may have unfolded differently does not establish a right to an exemption from the \$60,000 cap resulting in an overpayment when the final rating was less than 25 percent. *Rogan v. Indus. Claim Appeals Office*, 91 P.3d 414 (Colo. App. 2003).

**In construing that § 8-41-301 (2)(b) meant that award for medical impairment benefits is limited but that award for temporary disability benefits is not**, the court noted that combined amount of temporary disability benefits and permanent partial disability benefits was limited by this section. *City of Thornton v. Replogle*, 873 P.2d 30 (Colo. App. 1993).

**The plain language of this section shows there is no exception**, for purposes of calculat-

ing the cap, for temporary disability benefits paid on account of vocational rehabilitation. *Grogan v. Lutheran Medical Center, Inc.*, 950 P.2d 690 (Colo. App. 1997).

**The mental impairment rating cannot be combined with the physical impairment rat-**

**ing** for purposes of exceeding the benefit cap applicable to an impairment rating of 25 percent or less. *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301 (Colo. App. 2005), *aff'd*, 134 P.3d 407 (Colo. 2006).

**8-42-107.6. Premium dividend for employing injured employees.** The commissioner of insurance shall include within the premium dividends specified in rules and regulations promulgated pursuant to section 10-4-408 (5), C.R.S., a premium dividend of up to ten percent if an employer reemploys injured employees at their preinjury wages including any wage increases to which such employees would have been entitled had the employee not been injured. The total amount of the premium dividend shall be determined on a pro rata basis, taking into account the total number of employees injured during the period of time the insurance policy was in effect and the total number of injured employees who have sustained permanent partial disability as a result of their injuries and who have been rehired by such employer.

**Source: L. 91:** Entire section added, p. 1311, § 17, effective July 1.

**8-42-108. Disfigurement - additional compensation.** (1) If an employee is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits provided in this article and except as provided in subsection (2) of this section, the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement.

(2) If an employee sustains any of the following disfigurements, the director may allow up to eight thousand dollars as compensation to the employee in addition to all other compensation benefits provided in this article other than compensation allowed under subsection (1) of this section:

- (a) Extensive facial scars or facial burn scars;
- (b) Extensive body scars or burn scars; or
- (c) Stumps due to loss or partial loss of limbs.

(3) The director shall adjust the limits on the amount of compensation for disfigurement specified in this section on July 1, 2008, and each July 1 thereafter by the percentage of adjustment made by the director to the state average weekly wage pursuant to section 8-47-106.

**Source: L. 90:** Entire article R&RE, p. 493, § 1, effective July 1. **L. 2007:** Entire section amended, p. 640, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-51-105 as it existed prior to 1990.

**Cross references:** For the legislative declaration contained in the 2007 act amending this section, see section 1 of chapter 174, Session Laws of Colorado 2007.

## ANNOTATION

**Law reviews.** For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980).

**Annotator's note.** Since § 8-42-108 is similar to § 8-51-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Remedy under this section is not exclusive** and an individual who suffers a cosmetic deformity to the face can receive benefits under both this section and § 8-42-107 because such a deformity can be classified as a functional medical impairment and rated accordingly. *Gonzales v. Advanced Component Sys.*, 949 P.2d 569 (Colo. 1997).

**The term "public"**, as used in this section, means accessible to or shared by all members of the community. *Twilight Jones Lounge v. Show-*



ers, 732 P.2d 1230 (Colo. App. 1986).

**A disfigurement is an observable impairment of the natural appearance of a person.** Arkin v. Indus. Comm'n, 145 Colo. 463, 358 P.2d 879 (1961).

**And the loss of three upper front teeth is a disfigurement for which the workmen's compensation act provides compensation.** Arkin v. Indus. Comm'n, 145 Colo. 463, 358 P.2d 879 (1961).

**Furthermore, a claimant's resort to an artificial device to mask the blemish does not alter the fact of disfigurement.** Arkin v. Indus. Comm'n, 145 Colo. 463, 358 P.2d 879 (1961).

**Disfigurement award for scar on abdominal area was proper** as the abdominal area is a part of the body normally exposed to public view. Twilight Jones Lounge v. Showers, 732 P.2d 1230 (Colo. App. 1986).

**Fingers are distal extensions of the upper limb; therefore, the stump of a partially am-**

**puted finger constitutes a disfigurement under this section.** Leffler v. Indus. Claim Appeals Office, 252 P.3d 50 (Colo. App. 2010).

**The earning capacity principle is of no great significance where disfigurement results from an injury.** The very meagerness of the ultimate award allowable for head or facial disfigurement compels the construction that the right to compensation for serious head or facial disfigurement is not dependent on diminution of earning capacity. Arkin v. Indus. Comm'n, 145 Colo. 463, 358 P.2d 879 (1961).

**The method of determining disability provided by § 8-51-108 cannot be used when the injury is one appearing in §§ 8-51-104 to 8-51-107 inclusive, because by its specific terms such injuries are excluded.** Hawkeye-Security Ins. Co. v. Tupper, 152 Colo. 12, 380 P.2d 31 (1963).

**8-42-109. Added compensation for additional injuries.** Where an injured employee sustains an injury covered by sections 8-42-107, 8-42-108, and 8-46-101 but in addition thereto receives other injuries which are sufficient in their nature to alone cause temporary total disability, said employee shall receive, in addition to the amounts specified in said schedule, compensation for temporary total disability as long as said disability is found to exist as a result of said other injuries.

**Source: L. 90:** Entire article R&RE, p. 493, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-51-109 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-42-109 is similar to § 8-51-109 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Applied** in Employers' Mut. Ins. Co v. Indus. Comm'n, 89 Colo. 475, 3 P.2d 1079 (1935); Indus. Comm'n v. Saffells, 150 Colo. 41, 371 P.2d 438 (1962).

#### **8-42-110. Permanent partial disability - how determined. (Repealed)**

**Source: L. 90:** Entire article R&RE, p. 493, § 1, effective July 1. **L. 91:** Entire section repealed, p. 1312, § 18, effective July 1.

**Editor's note:** (1) Before its repeal in 1991, this section was similar to former § 8-51-108 as it existed prior to 1990.

(2) The current provisions pertaining to the determination of permanent partial disability are contained in § 8-42-107.

**8-42-111. Award for permanent total disability.** (1) In cases of permanent total disability, the award shall be sixty-six and two-thirds percent of the average weekly wages of the injured employee and shall continue until death of such person so totally disabled but not in excess of the weekly maximum benefits specified in this article for injuries causing temporary total disability.

(2) (Deleted by amendment, L. 91, p. 1313, § 19, effective July 1, 1991.)

(3) A disabled employee capable of rehabilitation which would enable the employee to earn any wages in the same or other employment, who refuses an offer of employment by the same or other employer or an offer of vocational rehabilitation paid for by the employer shall not be awarded permanent total disability.

(4) For injuries occurring on and after July 1, 1991, and before July 1, 1994, the average weekly wage of injured employees used for computing compensation paid for awards pursuant to subsection (1) of this section shall be increased by two percent per year effective July 1 of each year, and such increased compensation shall be payable for the subsequent twelve months.

(5) Repealed.

**Source:** **L. 90:** Entire article R&RE, p. 494, § 1, effective July 1. **L. 91:** (2) and (3) amended and (4) and (5) added, p. 1313, § 19, effective July 1. **L. 94:** (4) and (5) amended, p. 2002, § 5, effective July 1. **L. 2009:** (5) repealed, (SB 09-070), ch. 49, p. 175, § 2, effective August 5.

**Editor's note:** This section is similar to former § 8-51-107 as it existed prior to 1990.

## ANNOTATION

**Law reviews.** For article, "Time, Equity and the Average Weekly Wage", see 23 Colo. Law. 1831 (1994). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Cases," see 25 Colo. Law. 67 (July 1996). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 117 (November 2004).

**Annotator's note.** (1) Since § 8-42-111 is similar to § 8-51-107 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with powers formerly exercised by the industrial commission or were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission.

**Subsection (5) is constitutionally arbitrary.** *Romero v. Indus. Claim Appeals Office*, 902 P.2d 896 (Colo. App. 1995), *aff'd*, 912 P.2d 62 (Colo. 1996).

**Rational relationship standard is proper standard to apply** in determining whether classifications created by statute based on age and degree of disability are valid under the state constitution. *Romero v. Indus. Claim Appeals Office*, 902 P.2d 896 (Colo. App. 1995), *aff'd*, 912 P.2d 62 (Colo. 1996).

**COLA provision in subsection (4) may be given effect** even though the age cap in subsection (4) was declared invalid. *Montezuma Well Serv., Inc. v. Indus. Claim Appeals Office*, 928 P.2d 796 (Colo. App. 1996).

**Average weekly wage, as computed under subsection (1), shall become the claimant's av-**

erage weekly wage for purposes of calculating compensation, as well as calculating the two percent COLA increase under subsection (4), in cases where the earned average weekly wage entitles a claimant to the maximum weekly compensation rate computed at the time of the injury. *Guido v. Indus. Claim Appeals Office*, 100 P.3d 575 (Colo. App. 2004).

**COLA adjustment is not subject to the maximum benefit cap;** the two provisions being in irreconcilable conflict, the latter-enacted provision must be given full effect. *Salazar v. Indus. Claim Appeals Office*, 10 P.3d 666 (Colo. App. 2000).

**Industrial commission was vested with wide discretion.** In determining the extent or degree of disability of an injured workman upon the facts of each case, it is axiomatic that the commission was vested with the widest possible discretion with the exercise of which the courts will not interfere. *Nat'l Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950).

**The administrative law judge has broad discretion in determining permanent total disability** and may consider the same statutory factors used in determining permanent partial disability, including the manifest weight of the evidence and the claimant's general physical condition. *Drywall Prod. v. Constable*, 832 P.2d 957 (Colo. App. 1991).

**Legislative intent.** Since this section provides that "the loss of both hands or both arms or both feet or both legs or both eyes or of any two thereof, shall prima facie constitute total and permanent disability", it is evident that the general assembly, in using the expression, did not have in mind a condition of helpless paralysis reducing bodily functions to the minimum essential for the maintenance of a mere spark of life. *New York Indem. Co. v. Indus. Comm'n*, 86 Colo. 364, 281 P. 740 (1929).



**Losses constituting total permanent disability.** Amputation of the right arm near the elbow and a 90 percent loss of the use of the left constitutes total permanent disability as that term is used in this section. *New York Indem. Co. v. Indus. Comm'n*, 86 Colo. 364, 281 P. 740 (1929).

**Where a claimant suffers permanent or temporary total disability, compensation is based upon a fixed percentage of his average weekly wage.** *State Comp. Ins. Fund v. Lyttle*, 151 Colo. 590, 380 P.2d 62 (1963).

**In situations covered by this statute, the subsequent employer is not liable** for the degree of permanent partial disability sustained by the subsequent injury; rather, the employer is liable for the portion of the permanent total disability that is attributable to the subsequent injury. *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987).

**Claimant not entitled to permanent total disability benefits where occupational injuries were not significant cause** of disability and claimant remained disabled because of nonoccupational factors. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986).

**Subsection (3) does not become applicable until there is a determination that a totally disabled claimant refused an employer's offer of vocational rehabilitation** and unless such an offer is made and the claimant refuses it, the claimant is entitled to full payment. *Drywall Prod. v. Constuble*, 832 P.2d 957 (Colo. App. 1991).

**But a claimant has the burden of establishing his right to compensation benefits.** *Indus. Comm'n v. Ewing*, 160 Colo. 503, 418 P.2d 296 (1966).

**Partial employment secured by employee himself is not within the proviso.** *New York Indem. Co. v. Indus. Comm'n*, 86 Colo. 364, 281 P. 740 (1929).

**For this promotes justice because if one be totally and permanently disabled he ought not be penalized for obtaining some trivial and unusual employment**, or have the door of hope and ambition slammed in his face by being forbidden, on pain of having a portion of his meager sustenance withheld, to make any effort to add thereto. One may be totally disabled for all practical purposes of competing for remunerative employment in any general field of human endeavor and yet be able to obtain occasional employment under rare conditions and at small remuneration. The claimant's status remains unaffected thereby unless the employment be specifically covered by the exception under this section. *New York Indem. Co. v. Indus. Comm'n*, 86 Colo. 364, 281 P. 740 (1929); *Rio Grande Motor Way v. De Merschman*, 100 Colo. 421, 68 P.2d 446 (1937); *Nat'l Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950);

*New Jersey Zinc Co. v. Indus. Comm'n*, 165 Colo. 482, 440 P.2d 284 (1968).

**But compensation benefits may be reduced where the employer offers his injured employee "suitable employment".** *Indus. Comm'n v. Ewing*, 160 Colo. 503, 418 P.2d 296 (1966).

**However, the employer has the burden of showing the "suitability" of any employment** which he offers or obtains for his permanently and totally disabled employee. *Indus. Comm'n v. Ewing*, 160 Colo. 503, 418 P.2d 296 (1966).

**And the fact that a "permanently and totally disabled" person may perform a given task does not necessarily mean that such employment is "suitable".** *Indus. Comm'n v. Ewing*, 160 Colo. 503, 418 P.2d 296 (1966).

**But where director finds employment "suitable" court may not review.** Where the director has found that the employment offered the claimant was suitable, and that it was work which he could perform, a district court may not review the findings made by the director and substitute its conclusions for those of the director. *Indus. Comm'n v. Ewing*, 174 Colo. 133, 482 P.2d 981 (1971).

**Functional disability of injured workman, compared with that of a normal man, does not control in fixing compensable status**, since the term "disability" means industrial disability of loss of earning capacity and not mere functional disability. *Byouk v. Indus. Comm'n*, 106 Colo. 430, 105 P.2d 1087 (1940).

**Classifications created by subsection (5) based on age and degree of disability** have no reasonable relationship to the purpose the statute is allegedly aimed at achieving, i.e., to prevent receipt of duplicative benefits and the section, therefore, violates equal protection requirements. *Romero v. Indus. Claim Appeals Office*, 902 P.2d 896 (Colo. App. 1995), *aff'd*, 912 P.2d 62 (Colo. 1996); *Colo. AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

**Unless an employer offers a claimant vocational rehabilitation and the claimant refuses it**, the claimant is entitled to full payment of permanent total disability benefits. *Drywall Prod. v. Constuble*, 832 P.2d 957 (Colo. App. 1991).

**Neurotic mental disability is as real as any other disability** and, in the absence of evidence of malingering, is as much a personal injury. *Casa Bonita Restaurant v. Indus. Comm'n*, 624 P.2d 1340 (Colo. App. 1981).

**Commission entitled to look to claimant's mental ability.** The industrial commission had the right to look beyond claimant's physical impairments to her mental ability, including mental impairment, in determining the issue of permanent total disability. *Casa Bonita Restaurant v. Indus. Comm'n*, 624 P.2d 1340 (Colo. App. 1981).

The effect of § 8-51-106 (now §§ 8-46-101 and 8-46-102) is to provide a scheme for apportioning the permanent total disability to which a claimant may be entitled under subsection (1) of this section. *McGrath v. Indus. Comm'n*, 708 P.2d 1382 (Colo. App. 1985); *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987).

**Percentage of disability from a previous injury need not be reduced from permanent total disability benefits.** Where injured worker suffered previous injuries that cumulatively resulted in permanent total disability, the appellate court did not err in not offsetting the percentage of disability attributable to the previous injuries. *United Airlines v. Indus. Claim Appeals Office*, 993 P.2d 1152 (Colo. 2000).

**Award for permanent disability held authorized.** *Wilson v. Sinclair*, 109 Colo. 592, 128 P.2d 996 (1942).

**Record fully supported award of permanent total disability benefits** where ALJ determined that claimant was unable to perform any work that he was capable of performing before his injury and the medical providers recommended vocational rehabilitation for claimant, which employer refused. *Drywall Prod. v. Constuble*, 832 P.2d 957 (Colo. App. 1991).

**Applied in Colo.** *Fuel & Iron Co. v. Indus. Comm'n*, 88 Colo. 573, 298 P. 955 (1931); *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982). *McGrath v. Indus. Comm'n*, 708 P.2d 1382 (Colo. App. 1985).

**8-42-112. Acts of employees reducing compensation.** (1) The compensation provided for in articles 40 to 47 of this title shall be reduced fifty percent:

(a) Where injury is caused by the willful failure of the employee to use safety devices provided by the employer;

(b) Where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee; or

(c) (Deleted by amendment, L. 99, p. 581, § 2, effective July 1, 1999.)

(d) Where the employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer. Notwithstanding any other provisions of articles 40 to 47 of this title, the provisions of this paragraph (d) shall apply in addition to any other penalty that may be imposed under section 8-43-402.

(2) In the event the claimant or dependent is receiving periodic disability benefits for which a reduction in Colorado workers' compensation benefits has been made pursuant to section 8-42-103, the fifty percent reduction provided for in subsection (1) of this section shall be computed according to the rate of benefits received by the claimant or dependent after, and not before, such other reduction has been made.

**Source:** L. 90: Entire article R&RE, p. 494, § 1, effective July 1. L. 91: (2) added, p. 1351, § 3, effective May 29. L. 99: (1) amended, p. 581, § 2, effective July 1; (1)(d) added, p. 406, § 1, effective September 1.

**Editor's note:** This section is similar to former § 8-52-104 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Violation of Safety Rules.
- III. Injury Resulting from Intoxication.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Enterprise Liability Theory of Torts", see 47 U. Colo. L. Rev. 153 (1976).

**Annotator's note.** (1) Since § 8-42-112 is similar to § 8-52-104 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that

provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred some of its powers, duties, and functions under this section to the director of the division of labor.

**Abolished defenses not affected.** This section has nothing to do with, and does not restore, the fellow servant rule, doctrine of assumption of risk or contributory negligence, abolished by other enactments. *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 232 P. 669 (1925).



**This section applies to claims based upon injuries, as well as to death claims.** *Indus. Comm'n v. Funk*, 68 Colo. 467, 191 P. 125 (1920); *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 232 P. 669 (1925); *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968); *Mohawk Rubber Co. v. Claimants in re Death of Cribbs*, 165 Colo. 526, 440 P.2d 785 (1968); *Conn v. Conn*, 167 Colo. 177, 446 P.2d 224 (1968).

**However, while workmen's compensation laws are construed liberally in favor of the workmen**, they are not to be so narrowly construed as to fasten full liability upon an employer when the worker becomes careless or indifferent in his conduct while acting within his employment. *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952).

**Deduction of federal death benefits.** Federal death benefits are to be deducted from the aggregate benefits payable for death under § 8-50-103 before the amount of compensation is reduced by 50 percent if the employee engaged in conduct proscribed by this section. *Cline v. Indus. Comm'n*, 43 Colo. App. 123, 599 P.2d 973 (1979).

**Applied** in *Deterts v. Times Publishing Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976).

## II. VIOLATION OF SAFETY RULES.

**This section applies only where the employer has adopted reasonable safety rules.** *Clayton Coal Co. v. De Santis*, 95 Colo. 332, 35 P.2d 492 (1934).

**And violation of a safety rule does not bar recovery**, but the amount of the recovery is based upon the circumstances under which a safety rule is violated. *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952).

**But a wilful violation, while not defeating compensation, does reduce it by 50 percent.** *Indus. Comm'n v. Funk*, 68 Colo. 467, 191 P. 125 (1920); *McCulloch v. Indus. Comm'n*, 109 Colo. 123, 123 P.2d 414 (1942); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702, (1959).

**And where compensation is increased 50 percent for failure of employer to carry insurance**, deduction for violation of the safety rule is to be made after the addition of the 50 percent for failure to insure. *McKune v. Indus. Comm'n*, 94 Colo. 523, 31 P.2d 322 (1934).

**The word "wilful" does not connote a bad purpose.** *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 232 P. 669 (1925).

**The word "wilful" in this section must be given a reasonable interpretation** in accord with the objective to be attained by this section. *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 171 P.2d 410 (1946).

**And the meaning of the word "wilful" is "with deliberate intent".** If the employee

knows of the rule and yet intentionally does the forbidden thing he has "wilfully failed to obey" the rule. *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 232 P. 669 (1925); *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 171 P.2d 410 (1946); *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968).

**Where failure to obey orders may have been the result of carelessness, negligence, forgetfulness, remissness, or oversight**, such failure would not necessarily be "wilful failure" because any of the causes might occur without a "deliberate intent" on the part of decedent and would not of itself establish a "wilful failure". *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 171 P.2d 410 (1946).

**But if the employee knows the rule, and yet intentionally does the forbidden thing, he has "wilfully failed to obey" the rule.** *McCulloch v. Indus. Comm'n*, 109 Colo. 123, 123 P.2d 414 (1942); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968).

**And it is not necessary for the employer to show that the employee, having the rule in mind, determined to break it**; it is enough to show that, knowing the rule, he intentionally performed the forbidden act. *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 232 P. 669 (1925); *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968).

**Since employee had a plausible purpose to explain why he violated a safety rule** by removing his rubber glove when working on high voltage lines, so that he could operate employer's faulty equipment, his award should not have been reduced by 50%. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

**However, the employer has the burden of establishing that employee's death was result of "wilful failure" to obey a reasonable rule.** *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 171 P.2d 410 (1946).

**It is generally held that oral warnings, prohibitions, and directions meet the safety requirement for the protection of both employer and employee** if given by someone generally in authority and known to be heard and understood by the employee. *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968).

**For warnings, numerously given, coupled with the presumption of common sense on the part of claimant obviated the necessity of the posting of a safety rule concerning the existing dangerous condition.** *McCullough v. Indus. Comm'n*, 109 Colo. 123, 123 Colo. 414 (1942); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968).

**And orally forbidding employees to use a bridge is sufficient to constitute a safety rule** under the provisions of this section. *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 232 P. 669 (1925). See *Indus. Comm'n v. Funk*, 68 Colo. 467, 191 P. 125 (1920).

**As is oral direction to wear safety goggles.** *McCulloch v. Indus. Comm'n*, 109 Colo. 123, 123 P.2d 414 (1942).

**So also is an order not to work under certain conditions.** *Indus. Comm'n v. Funk*, 68 Colo. 467, 191 P. 125 (1920).

**But casual conversation does not amount to adoption of rule.** *McNeil Coal Corp. v. Indus. Comm'n*, 105 Colo. 263, 96 P.2d 889 (1939).

**When republication of order unnecessary.** Where employees were forbidden to cross a bridge with teams, attempted repairs to the bridge by third party did not necessitate republishing the order. *Stockdale v. Indus. Comm'n*, 76 Colo. 494, 232 P. 669 (1925).

**But failure to bring existence of safety rule home to employee.** Where the existence of safety rule forbidding employees to jump on moving trucks or to ride on trucks had never been brought home to employee, it was held that where employee was crushed to death beneath moving truck he was attempting to jump on, the director was justified in declining to find that deceased had violated a reasonable safety rule which would have the effect of diminishing the award by one-half. *Pacific Employers Ins. Co. v. Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (1943).

**Violation of state statute is immaterial where employer has adopted no safety rule.** *Clayton Coal Co. v. De Santis*, 95 Colo. 332, 35 P.2d 492 (1934).

**The statute provides a penalty for misconduct of employees, not a defense for employers, but the penalty does not have to be applied to all aspects of recovery for the injured employee.** The intent of the statute is not to apportion negligence but to deter misconduct. *Wild West Radio v. Indus. Claim Appeals Office*, 886 P.2d 304 (Colo. App. 1994).

**The Workers' Compensation Act imposes penalties for misconduct such as intoxication that results in injuries but it does not disqualify the claimant from all benefits.** *Wild West Radio, Inc. v. Indus. Claim Appeals Office*, 905

P.2d 6 (Colo. App. 1995); *Ackerman v. Hilton's Mechanical Men*, 914 P.2d 524 (Colo. App. 1996).

As long as the ALJ's determination of whether an accident was caused by an employee's intoxication is supported by substantial evidence in the record, it is binding on review. *Ackerman v. Hilton's Mechanical Men*, 914 P.2d 524 (Colo. App. 1996).

### III. INJURY RESULTING FROM INTOXICATION.

**The intoxication of claimant must be a proximate cause of the injury for reduction in compensation.** *Stearns-Roger Mfg. Co. v. Casteel*, 128 Colo. 289, 261 P.2d 228 (1953).

**Where there is no evidence in the record to require a finding, as a matter of law, that intoxicants caused or contributed to the accident,** no one knows what caused the accident, the question of whether benefits should be reduced was properly for the trier of facts to determine. *J. C. Carlile Corp. v. Antaki*, 162 Colo. 376, 426 P.2d 549 (1967).

**The causal connection between the blood alcohol level of the decedent and the accident is a question of fact.** The court of appeals will not disturb the finding that his intoxication was not the proximate cause of the accident where there is no testimony that the decedent's driving ability was impaired. *Elec. Mut. Liab. Ins. Co. v. Indus. Comm'n*, 154 Colo. 491, 391 P.2d 677 (1964); *Tatum-Reese Dev. Corp. v. Indus. Comm'n*, 30 Colo. App. 149, 490 P.2d 94 (1971).

**Commission abused discretion in failing to rule intoxication-caused injury.** Where the following testimony was uncontroverted: That an autopsy was performed at which it was determined that the blood alcohol level in the deceased's body shortly after death was .225 percent; that in order to reach a blood alcohol level of .225 percent the deceased would have had to have consumed nine ounces of 100 proof liquor or nine 12-ounce cans of beer or some combination thereof; that such a quantity of alcohol in one's bloodstream would have "drastically impaired" one's motor reflexes involved in operating a vehicle; the commission abused its discretion in failing to rule that the injury resulted from the intoxication of the deceased. *Harrison W. Corp. v. Hicks' Claimants*, 185 Colo. 142, 522 P.2d 722 (1974).

**8-42-112.5. Limitation on payments - use of controlled substances.** (1) Nonmedical benefits otherwise payable to an injured worker are reduced fifty percent where the injury results from the presence in the worker's system, during working hours, of controlled substances, as defined in section 18-18-102 (5), C.R.S., that are not medically prescribed or of a blood alcohol level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. A duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. If the test



indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.

(2) As used in this section, "nonmedical benefits" means all benefits provided for in articles 40 to 47 of this title other than disbursements for medical, surgical, nursing, and hospital services, apparatus, and supplies.

**Source:** L. 99: Entire section added, p. 580, § 1, effective July 1. L. 2012: (1) amended, (HB 12-1311), ch. 281, p. 1608, § 7, effective July 1.

**8-42-113. Limitations on payments to prisoners - incentives to sheriffs and department of corrections.** (1) Notwithstanding any other provision of law to the contrary except as provided in subsection (4) of this section, any individual who is otherwise entitled to benefits under articles 40 to 47 of this title shall neither receive nor be entitled to such benefits for any week following conviction during which such individual is confined in a jail, prison, or any department of corrections facility.

(1.5) (a) In the event the identifying information transmitted to the department of labor and employment pursuant to section 17-26-118.5 (2), C.R.S., results in the termination of workers' compensation benefits pursuant to subsection (1) of this section, the employer or the insurance carrier, if any, shall pay to the sheriff a reward equal to ten percent of one week's benefit to which the ineligible individual would otherwise be eligible to receive.

(b) An individual who is ineligible pursuant to subsection (1) of this section shall repay to the employer or the insurance carrier, if any, any amounts received while not eligible.

(2) After such individual's release from confinement, the individual shall be restored to the same position with respect to entitlement to benefits under articles 40 to 47 of this title as said individual would otherwise have enjoyed at the point in time of such release from confinement. However, except as provided in subsection (3) of this section, said individual shall not be able to recover, recoup, or otherwise be retroactively entitled to any of the benefits to which the individual would have been entitled without the limitation specified in subsection (1) of this section.

(3) If upon appeal such conviction is overturned, such individual shall be entitled to recover the benefits to which such individual would have been entitled except for the operation of subsection (1) of this section.

(4) This section shall not apply to benefits under articles 40 to 47 of this title to which an inmate of a department of corrections facility or a city, county, or city and county jail is entitled for injury or occupational disease arising out of and in the course of the inmate working, performing services, or participating in a training, rehabilitation, or work release program that has been certified by the federal prison industry enhancement certification program pursuant to the federal "Justice System Improvement Act of 1979", 18 U.S.C. sec. 1761 (c). The inmate shall be entitled to benefits in accordance with section 8-40-301 (3) (a).

**Source:** L. 90: Entire article R&RE, p. 495, § 1, effective July 1. L. 99: (1.5) added, p. 553, § 3, effective August 4. L. 2010: (1) amended and (4) added, (HB 10-1109), ch. 171, p. 606, § 2, effective August 11.

**Editor's note:** This section is similar to former § 8-52-104.5 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 117 (November 2004).

**Annotator's note.** Since § 8-42-113 is similar to § 8-52-104.5 as it existed prior to the

1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**This section does not violate the constitu-**

**tional prohibition against ex post facto laws because it does not impose criminal penalties.** The intent behind this section is to relieve employers and insurance carriers of the obligation to pay benefits as compensation for lost earning capacity to persons who have no earning capacity because they are imprisoned. *Wood v. Beatrice Foods Co.*, 813 P.2d 821 (Colo. App. 1991).

**Statute was not applied retroactively where claimant did not receive award of benefits until after the section was enacted,** even though the events supporting the award occurred before the section was enacted. *Wood v. Beatrice Foods Co.*, 813 P.2d 821 (Colo. App. 1991).

**The statute does not deny the claimant due process where the claimant did not have a vested entitlement to an award of benefits when the statute was enacted.** The existence of workers' compensation benefits is dependent on the workers' compensation statutes, and legislation limiting those benefits does not affect a constitutionally protected property interest. *Wood v. Beatrice Foods Co.*, 813 P.2d 821 (Colo. App. 1991).

**The statute does not violate due process or equal protection requirements because the distinction made between prisoners and other persons claiming workers' compensation benefits bears a rational relationship to the purpose of the statute which is to protect em-**

ployees injured in the course of their work from becoming wards of the state by providing compensation for lost earning capacity. *Wood v. Beatrice Foods Co.*, 813 P.2d 821 (Colo. App. 1991).

**Suspension of claimant's medical impairment benefits during incarceration** was required by the clear and unambiguous language of this section. *Salazar v. Hi-Land Potato Co.*, 917 P.2d 326 (Colo. App. 1996).

**Under subsection (2), upon release from prison, a claimant may again receive medical, disability, and death benefits under the Workers' Compensation Act.** *Landeros v. Indus. Claim Appeals Office*, 214 P.3d 544 (Colo. App. 2008).

**Subsection (2) of this section does not toll the statute of limitations while claimant is in prison.** And nothing in either this article 42 or article 43 of the Workers' Compensation Act provides authority for tolling the limitation periods provided in § 8-43-303 while a claimant is in prison. *Landeros v. Indus. Claim Appeals Office*, 214 P.3d 544 (Colo. App. 2008).

**A community corrections facility is not a "jail, prison, or any department of corrections facility."** A community corrections facility is specifically excluded from the definition of a minimum security corrections facility. Therefore, confinement in a community corrections facility does not suspend benefits. *City & County of Denver v. Indus. Claim Appeals Office*, 98 P.3d 969 (Colo. App. 2004).

**8-42-113.5. Recovery of overpayments - notice required.** (1) If a claimant has received an award for the payment of disability benefits or a death benefit under articles 40 to 47 of this title and also receives any payment, award, or entitlement to benefits under the federal old-age, survivors, and disability insurance act, an employer-paid retirement benefit plan, or any other plan, program, or source for which the original disability benefits or death benefit is required to be reduced pursuant to said articles, but which were not reflected in the calculation of such disability benefits or death benefit:

(a) Within twenty calendar days after learning of such payment, award, or entitlement, the claimant, or the legal representative of a claimant who is a minor, shall give written notice of the payment, award, or entitlement to the employer or, if the employer is insured, to the employer's insurer. If the claimant or legal representative gives such notice, any overpayment that resulted from the failure to make the appropriate reduction in the original calculation of such disability benefits or death benefit shall be recovered by the employer or insurer in installments at the same rate as, or a lower rate than, the rate at which the overpayments were made. Such recovery shall reduce the disability benefits or death benefit payable after all other applicable reductions have been made.

(b) If the claimant or legal representative of a claimant who is a minor was receiving benefits in excess of the amounts that should have been paid under articles 40 to 47 of this title and failed to give the notice required by paragraph (a) of this subsection (1), the employer or insurer is authorized to cease all disability or death benefit payments immediately until the overpayments have been recovered in full.

(b.5) (I) After the filing of a final admission of liability, except in cases of fraud, any attempt to recover an overpayment shall be asserted within one year after the time the requestor knew of the existence of the overpayment.

(II) Subparagraph (I) of this paragraph (b.5), as enacted by Senate Bill 09-168, enacted in 2009, is declared to be procedural and was intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.



(c) If for any reason recovery of overpayments as contemplated in paragraph (a) or (b) of this subsection (1) is not practicable, the employer or insurer is authorized to seek an order for repayment.

(d) When an overpayment is repaid to the insurer, the insurer shall credit the losses on the claim and report the corrected losses to the insurance rating organization on the next scheduled report for purposes of the employer's experience modification.

**Source: L. 97:** Entire section added, p. 113, § 2, effective July 1. **L. 2009:** (1)(b.5) added, (SB 09-168), ch. 184, p. 806, § 2, effective August 5. **L. 2010:** (1)(b.5) amended, (SB 10-163), ch. 66, p. 231, § 2, effective March 31.

#### ANNOTATION

**Action to recoup overpayment of workers' compensation benefits under subsections (1)(a) and (1)(b) does not violate the discharge injunction of 11 U.S.C. § 524, federal bankruptcy code.** City may pursue a determination of whether or not debtor received an overpayment of workers' compensation benefits and recoup any overpayment in accordance with the provisions of subsections (1)(a) and (1)(b).

In re Gonzales, 298 B.R. 771 (Bankr. D. Colo. 2003).

**City is prohibited under 11 U.S.C. § 524 from collecting any overpayment of workers' compensation benefits from debtor by way of an order for repayment under subsection (1)(c).** In re Gonzales, 298 B.R. 771 (Bankr. D. Colo. 2003).

**8-42-114. Death benefits.** In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

**Source: L. 90:** Entire article R&RE, p. 495, § 1, effective July 1. **L. 91:** Entire section amended, p. 1351, § 4, effective May 29.

**Editor's note:** This section is similar to former § 8-50-103 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For note, "One Year Review of Colorado Law - 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980).

**Annotator's note.** Since § 8-42-114 is similar to § 8-50-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Constitutionality of offset provision.** The offset provision of this section is constitutional, and does not violate equal protection. Meyer v. Indus. Comm'n, 644 P.2d 46 (Colo. App. 1981).

The prevention of duplication of benefits is a legitimate goal, and a coordination of various state and federal programs into a single system of wage-loss protection is rationally related to the offset scheme. Meyer v. Indus. Comm'n, 644 P.2d 46 (Colo. App. 1981).

Even though similar deductions are not made for payment from all possible sources, provision is not violative of equal protection. Boehm v. Indus. Comm'n, 738 P.2d 804 (Colo. App. 1987).

**This section does not violate the supremacy clause of the U.S. Constitution and is not preempted by the Social Security Act.** Therefore, under this section, the state could properly offset social security survivors' benefits against

workers' compensation death benefits. *Rosa v. Warner Elec. Contracting*, 870 P.2d 1210 (Colo. 1994).

**Only dependents can receive compensation** under the workmen's compensation act. *Vaughn v. Indus. Comm'n*, 79 Colo. 257, 245 P. 712 (1926).

**And this section sets the legislative maximums and minimums on death benefits** and directs what deductions will be made against death benefits. *Schenfeld v. Shaffer*, 29 Colo. App. 425, 487 P.2d 818 (1971).

**Amount of death benefits should be fixed as of the date of death**, not the date of injury. *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983); *State Comp. Ins. Fund v. Indus. Comm'n*, 724 P.2d 679 (Colo. App. 1986).

**Benefit payments unlike survival actions.** While the legal representative, in an action at law which survives under the statute in question, stands in the place of the decedent, the workmen's compensation law differs and provides specific benefits for and to the widow, children and other dependents. *In re Dick v. Indus. Comm'n*, 197 Colo. 71, 589 P.2d 950 (1979).

**Death benefits and disability benefits are independent.** Disability benefits awarded to a worker and death benefits awarded to a worker's dependents are entirely independent of one another. This results in two distinct rights — one for the benefit of the workman, the other for the benefit of his dependents. *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983).

**Under the "rule of independence", disability benefits awarded an employee and death benefits awarded an employee's dependents are independent of one another**, that is, there are two distinct rights, one for the benefit of the worker and the other for the benefit of his or her dependents. Therefore, under the rule, both the death benefit amount and the amount of offset should be determined based on the law in effect on the date of the employee's death. *Hoffman v. Hoffman*, 872 P.2d 1367 (Colo. App. 1994).

**Death benefits are distinct from wage loss and disability benefits**, and the limitation on medical impairment disability benefits applies to those cases in which disability benefits are payable to an eligible claimant, not to cases in which a claimant seeks death benefits. *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

**Deduction of federal death benefits.** Federal death benefits are to be deducted from the aggregate benefits payable for death under this section before the amount of compensation is reduced by 50 percent if the employee engaged in conduct proscribed by § 8-52-104. *Cline v. Indus. Comm'n*, 43 Colo. App. 123, 599 P.2d 973 (1979).

**Federal social security benefits** payable to widow, regardless of cause or circumstances of

husband's death, are not the type of periodic benefits to serve as basis for offset against workers' compensation benefits awarded to widow. *Larimer Cty. Sch. Dist. v. Indus. Comm'n*, 727 P.2d 401 (Colo. App. 1986), cert. denied, 752 P.2d 80 (Colo. 1988).

**This section does not violate the "anti-alienation" provision of the Social Security Act** since that provision was designed to prevent the use of traditional legal process to allow a third party to receive another individual's social security benefits, the petitioners will receive their social security benefits, and this section does not prohibit a worker from receiving social security benefits. *Rosa v. Warner Elec. Contracting*, 870 P.2d 1210 (Colo. 1994).

**The purpose of the social security offset is to preclude an injured worker or his dependents from receiving duplicate benefits.** There is no duplication of benefits, however, where it is undisputed that the widow is not receiving any social security benefits nor does she have dependents who receive such benefits. *Hoffman v. Hoffman*, 872 P.2d 1367 (Colo. App. 1994).

The ruling in *Hoffman v. Hoffman*, 872 P.2d 1367 (Colo. App. 1994), that no purpose would be served by offsetting a widow's benefits by the social security benefits received by decedent's children from a prior marriage is highly persuasive and achieves a better reasoned result than an earlier decision. The court expressly declines to follow the decision in *Knight v. Dept. of Natural Res.s*, 689 P.2d 733 (Colo. App. 1984). *Koch Indus. v. Pena*, 910 P.2d 77 (Colo. App. 1995).

**Cost of living increases in social security "periodic death benefits" are not to be offset against workers' compensation death benefits** payable because of an industrial accident. However, this ruling only applies to cost of living increases, made after the Engelbrecht ruling (680 P.2d 231 (Colo. 1984)). *Wilson v. Jim Snyder Drilling*, 729 P.2d 1022 (Colo. App. 1986), aff'd in part and rev'd in part on other grounds, 747 P.2d 647 (Colo. 1987).

**The provisions of this section which establish that, when period death benefits under the social security act are payable**, the benefits payable pursuant to this section shall be reduced by one hundred percent of such periodic benefits does not exceed the scope of the state offset permitted by the social security act, and there is no violation of the supremacy clause. *Rosa v. Warner Elec. Contracting*, 849 P.2d 845 (Colo. App. 1992), aff'd, 870 P.2d 1210 (Colo. 1994) (decided under former § 8-50-103 as it existed prior to the 1990 repeal and reenactment of the Workers' Compensation Act of Colorado, articles 40 to 47 of title 8).

**Federal "mother's insurance benefits" are subject to offset under this section.** Phrase "federal old age, survivors, and disability insurance act" specifically refers to Subchapter II of



the Social Security Act, and all benefits payable under that act are within the intended scope of this section's offset provisions. *L.E.L. Construction v. Goode*, 867 P.2d 875 (Colo. 1994) (explicitly disapproving Larimer County case, 727 P.2d 401, to the extent inconsistent with this opinion).

**Amendment in 1991, changing social security offset amount to fifty percent, applies only prospectively.** The ALJ and the industrial claim appeals panel erred in ordering a claim reopened to reduce the offset from one hundred to fifty percent. *Rosa v. Indus. Claim Appeals Office*, 885 P.2d 331 (Colo. App. 1994).

**Wage value where decedent employee's duties of different character.** Where a decedent employee's duties were of a different character but did not constitute a new contract of employment, his trips without wage were a service rendered to enhance his value as an employee rather than a new arrangement. Thus, his wage value for the purposes of this section was the same as that paid for his other work. *State Comp. Ins. Fund v. Coleman*, 135 Colo. 82, 392 P.2d 598 (1964).

**No additional death benefit.** Since amount paid claimant in periodic disability payments during his lifetime plus amount of lump-sum disability award in which he acquired a vested

property right during his lifetime total together in excess of the gross maximum permanent disability award allowed under the statute, than upon payment of the lump-sum award, no additional death benefit is payable to claimant's widow. *Schenfeld v. Shaffer*, 29 Colo. App. 425, 487 P.2d 818 (1971).

**Regardless of § 8-50-106, payments cannot exceed statutory maximum.** Regardless of the provision in § 8-50-106 which allows the survival of death benefits to remaining dependents when such benefits are terminated as to another dependent, the payments cannot exceed the statutory maximum. *Indus. Comm'n v. Employers Liab. Assurance Corp.*, 169 Colo. 396, 456 P.2d 739 (1969).

**Court has no jurisdiction to consider minor child's argument that the industrial claim appeals panel erred in determining that her old age, survivors, and disability insurance benefits were the type of "periodic benefits" to which the offset applies where the child did not file a notice of cross-appeal.** *Hoffman v. Hoffman*, 872 P.2d 1367 (Colo. App. 1994).

**Applied in** *State Comp. Ins. Fund v. City of Colo. Springs*, 43 Colo. App. 112, 602 P.2d 881 (1979); *Knight v. Dept. of Natural Res.*, 689 P.2d 733 (Colo. App. 1984).

**8-42-115. Death from injury - benefits.** (1) In case death proximately results from the injury, the benefits shall be in the amount and to the persons following:

(a) If there are no dependents, compensation shall be limited to the expenses provided for medical, hospital, and funeral expense of the deceased, together with such sums as may have accrued or been paid to the deceased during the deceased's lifetime for disability, and any amount or payment which is due under section 8-46-101.

(b) If there are wholly dependent persons at the time of death, the payment shall be in accordance with the provisions of section 8-42-114.

(c) If there are partially dependent persons at the time of death, the payment shall not exceed sixty-six and two-thirds percent of the average weekly wages, subject to the limitations of articles 40 to 47 of this title as to maximum and minimum weekly amounts, to continue for such period after the date of death as is required to pay, at the weekly rate, the total amount awarded by the director to be paid to such partially dependent persons.

**Source: L. 90:** Entire article R&RE, p. 495, § 1, effective July 1. **L. 2000:** (1)(a) amended, p. 821, § 1, effective May 24.

**Editor's note:** This section is similar to former § 8-50-111 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-41-115 is similar to § 8-50-111 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Payment of expenses as payment of compensation.** In this section the general assembly

shows an intent to treat the payment of medical, hospital, and funeral expenses as the payment of compensation. *Royal Indem. Co. v. Indus. Comm'n*, 88 Colo. 113, 293 P. 342 (1930).

**Burden on claimant to establish accident and causal connection between accident and death.** In order for a claimant to recover workmen's compensation, the burden is upon the one seeking the benefits under the act to establish by

competent evidence an accident and the causal connection between the accident and death. Claimants In re Death of Rumsey v. State Comp. Ins. Fund, 162 Colo. 545, 427 P.2d 694 (1967).

**A computation of death benefits without regard to statutory maximums and credits** would result in a larger death benefit award to a disabled employee who dies of causes unrelated to a work-connected injury than the benefit conferred on an employee whose death results from his work-connected, disabling injury. Such results contravene the mandate of statutory construction which we must follow requiring us to read together all portions of the workmen's compensation act and to harmonize them if possible. Schenfeld v. Shaffer, 29 Colo. App. 425, 487 P.2d 818 (1971).

**The word "accrued" in this section is used in the sense of due and payable.** Employers' Mut. Ins. Co. v. Indus. Comm'n, 89 Colo. 475, 3 P.2d 1079 (1931).

**Since the general assembly can legitimately deny nondependent heirs benefits** upon the death of an employee, the fact that payments in cases where there are no statutory dependents may be made to the subsequent injury fund does

not wrongfully deprive nondependent heirs of property. Ryan v. Centennial Race Track, Inc., 196 Colo. 30, 580 P.2d 794 (1978).

**Survivors are entitled to death benefits if a decedent's death proximately resulted from more than one condition, so long as one condition was the occupational disease.** Subsequent Injury Fund v. Indus. Claim Appeals Office, 131 P.3d 1224 (Colo. App. 2006).

**For a death to proximately result from a compensable injury or occupational disease, there must be a significant, direct, and consequential nexus between the death and the injury or disease.** Subsequent Injury Fund v. Indus. Claim Appeals Office, 131 P.3d 1224 (Colo. App. 2006).

A compensable injury would necessarily be a significant, direct, and consequential cause of death if the death would not have occurred "but for" the compensable injury; if the injury was "a necessary precondition or trigger" of the death; or if the injury was the sole cause of the death. Subsequent Injury Fund v. Indus. Claim Appeals Office, 131 P.3d 1224 (Colo. App. 2006).

**8-42-116. When death not proximate result - benefits.** (1) If death occurs to an injured employee, other than as a proximate result of any injury, before disability indemnity ceases and the deceased leaves persons wholly dependent upon the deceased for support, death benefits shall be as follows:

(a) Where the injury proximately caused permanent total disability, the death benefit shall consist of the unpaid and unaccrued portion of the permanent total disability benefit which the employee would have received had the employee lived until receiving compensation at the employee's regular rate for a period of six years.

(b) Where the injury proximately caused permanent partial disability, the death benefit shall consist of the unpaid and unaccrued portion of the permanent partial disability benefit which the employee would have received had he lived.

**Source:** L. 90: Entire article R&RE, p. 496, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-112 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-42-116 is similar to § 8-50-112 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**A computation of death benefits without regard to statutory maximums and credits** would result in a larger death benefit award to a disabled employee who dies of causes unrelated to a work-connected injury than the benefit conferred on an employee whose death results from his work-connected, disabling injury. Such results contravene the mandate of statutory con-

struction which we must follow requiring us to read together all portions of the workmen's compensation act and to harmonize them if possible. Schenfeld v. Shaffer, 29 Colo. App. 425, 487 P.2d 818 (1971).

**Thus, a literal application of subsection (1)(b) yields a computed amount which is only a preliminary figure, subject to further modification** by virtue of the statutory maximum limitation and which is reducible by the mandatory credits imposed by § 8-50-103 if all such credits have not been previously deducted. From this amount § 8-50-103 directs that there shall be deducted any sums paid to the employee prior to his death as compensation for his dis-



ability under the provisions of the workmen's compensation act. *Schenfeld v. Shaffer*, 29 Colo. App. 425, 487 P.2d 818 (1971).

**This section does not prohibit the posthumous proof that an industrial injury caused a deceased employee to suffer a permanent disability** when the employee dies of unrelated causes before reaching maximum medical improvement. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

**For purposes of this section, there is no distinction between permanent disability benefits and permanent medical impairment benefits** and, therefore, no right of compensation based upon the statute's reference to permanent disability benefits without any accompanying mention of permanent medical impairment benefits. *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005).

**This section does not apply where the widow is a nonresident of the United States.** *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 93 Colo. 188, 24 P.2d 1117 (1933).

**Where decedent's death was not proximately related to the injury for which decedent was receiving permanent disability payments**, the duration of benefit payments

receivable by decedent's dependent is limited to six years from the date decedent began receiving payments. *Winters v. Indus. Claim Appeals Office*, 819 P.2d 542 (Colo. App. 1991).

**When an industrial injury is not the proximate cause of the death**, an award of death benefits that is based on the amount of unpaid permanent disability benefits can be made only where there are dependents; therefore, the estate of the deceased is not entitled to benefits. *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005).

**The amount of the death benefit payable under this section is not subject to an offset for social security disability insurance payments that terminate upon the disabled worker's death.** The applicable "regular rate" is the rate of total permanent disability benefits without regard for the SSDI offset. *Metro Glass & Glazing, Inc. v. Orona*, 868 P.2d 1178 (Colo. App. 1994).

**A lump sum permanent disability payment made to an employee prior to the death of the employee** that becomes part of the decedent's estate is not an overpayment and does not have to be repaid. *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005).

**Applied in Employers' Mut. Ins. Co. v. Indus. Comm'n**, 89 Colo. 475, 3 P.2d 1079 (1931).

**8-42-117. Benefits to partial dependents.** (1) If death occurs to an injured employee, other than as a proximate result of the injury, before disability indemnity ceases and the deceased leaves persons partially dependent upon the deceased for support, death benefits shall be as follows:

(a) Where the injury proximately caused permanent total disability, the death benefit shall consist of that proportion of the unpaid and unaccrued portion of the permanent total disability benefit which the employee would have received had the employee lived until said employee had received compensation at the employee's regular rate for a period of six years as the amount devoted by the deceased to the support of such persons for the year immediately prior to the injury bears to the total income of the persons during said year.

(b) Where the injury caused permanent partial disability, the death benefit shall consist of that proportion of the unpaid and unaccrued portion of the permanent partial disability benefit which the employee would have received if the employee had lived as the amount devoted by the deceased to the support of such persons for the year immediately prior to the injury bears to the total income of the persons during said year.

**Source:** L. 90: Entire article R&RE, p. 496, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-113 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-42-117 is similar to § 8-50-113 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**The purpose of the workmen's compensation act** is to cast upon the particular industry the burden resulting from accidental injuries sustained by its employees while performing duties arising out of and in the course of their employment. *Borquez v. John Burbank Trucking*, 164 Colo. 217, 433 P.2d 767 (1967).

**However, this section was not intended** to compensate employees for injuries on illness not due to their employment; or to pay benefits to their dependents when death results from such injuries or illness; or to pay the medical, hospital, funeral, or other expenses incurred by reason of such injuries, illness, or death. *Borquez v. John Burbank Trucking*, 164 Colo. 217, 433 P.2d 767 (1967).

**But not unreasonable to pay dependents award made during employee's lifetime.** It is not unreasonable to pay dependents, when the employee's death resulted from injuries not due to employment, any unpaid installments or com-

pensation that may become due and payable to the employee during his lifetime, under a disability award made during his lifetime. *Borquez v. John Burbank Trucking*, 164 Colo. 217, 433 P.2d 767 (1967).

**And this section has no application were the employee dies before** there has been any determination that he is even entitled to any permanent partial disability benefits. *Borquez v. John Burbank Trucking*, 164 Colo. 217, 433 P.2d 767 (1967).

**Applied in** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 89 Colo. 475, 3 P.2d 1079 (1931).

**8-42-118. Applicability of repeal of death benefits to nonresident dependents.** The repeal of section 8-50-114, as said section existed prior to July 1, 1983, shall not affect the payments of death benefits which are being paid before July 1, 1983.

**Source: L. 90:** Entire article R&RE, p. 496, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-114.1 as it existed prior to 1990.

**8-42-119. Partial dependents - compensation.** Partial dependents shall be entitled to receive only that portion of the benefits provided for those wholly dependent which the average amount of the wages regularly contributed by the deceased to such partial dependents at and for a reasonable time immediately prior to the injury bore to the total income of the dependents during the same time. The director has power and discretion to determine the proper elements to be considered as income of said dependents in each particular case. Where there are persons both wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation.

**Source: L. 90:** Entire article R&RE, p. 496, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-104 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-42-119 is similar to § 8-50-104 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Employer and the state compensation insurance fund were without standing to raise the constitutionality of this section** as violative of the equal protection clause of the fourteenth amendment, as such challenges may only be leveled by members of the group whose rights are impaired by the contested legislation. *Am. Metal Climax, Inc. v. Claimant of Butler*, 188 Colo. 116, 532 P.2d 951 (1975).

**Minor children presumed "wholly" dependent.** Under the clear statutory language of this section, minor children are presumed "wholly" dependent, and the presumption may be overcome only by evidence showing that the chil-

dren received no support from the deceased. *Knight v. Dept. of Natural Res.*, 689 P.2d 733 (Colo. App. 1984).

**Partially dependent claimants are not entitled to receive compensation during the time that a wholly dependent claimant is entitled thereto.** *Central Sur. & Ins. Corp. v. Indus. Comm'n*, 94 Colo. 341, 30 P.2d 253 (1934).

**But where payment of compensation to those wholly dependent upon an employee is discontinued** for statutory reasons, partial dependents are entitled to receive compensation to the extent of the determined percentage of the balance only, due under the original award. *Central Sur. & Ins. Corp. v. Indus. Comm'n*, 94 Colo. 341, 30 P.2d 253 (1934).

**Presumed whole dependency has no priority over actual whole dependency.** *Central Sur. & Ins. Corp. v. Indus. Comm'n*, 94 Colo. 341, 30 P.2d 253 (1934); *L.B. Cole Produce Co. v. Indus. Comm'n*, 123 Colo. 278, 228 P.2d 808 (1951).



**Evidence supporting findings of whole dependency on son.** In a proceeding for compensation where claimant alleged that decedent, her son, had never married, finding that claimant was wholly dependent on son and that he was killed in course of employment and not in violation of a safety rule were supported by competent evidence. *L.B. Cole Produce Co. v. Indus. Comm'n*, 123 Colo. 278, 228 P.2d 808 (1951).

**Social security payments used in determining amount of benefits due.** Where social security payments constitute substantial and regular income to claimants, such payments are properly considered as source of income in determining amount of benefits due claimants under statute. *Truitt v. Indus. Comm'n*, 31 Colo. App. 166, 499 P.2d 621 (1972).

**Under this section the question of dependency is to be determined as a matter of fact,** and cannot be based on an existing legal duty to

provide support. *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 90 Colo. 330, 9 P.2d 285 (1932).

**But error to dismiss claim despite no detailed findings of fact.** If the findings are sufficient to support award on the question of partial dependency, it is error for the trial court to dismiss the claim on the ground that the action was without and in excess of statutory powers, notwithstanding no detailed findings of fact as to partial dependency were made. *Indus. Comm'n v. Calumet Fuel Co.*, 108 Colo. 133, 114 P.2d 297 (1941).

**Applied in** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 82 Colo. 281, 260 P. 106 (1927); *Diamond Indus. v. Claimants in Death of Crouse*, 41 Colo. App. 541, 589 P.2d 1383 (1978).

**8-42-120. Termination of right to benefits.** Death benefits shall be paid to a dependent widow or widower for life or until remarriage, and, if there are no dependent children, as defined in section 8-41-501 (1) (b) and (1) (c), at the time of remarriage, a two-year lump-sum benefit without discount, less any lump sums previously paid, shall be paid to such widow or widower. Death benefits shall terminate upon the happening of any of the following contingencies and shall thereupon survive to the remaining dependents, if any: Upon the death of any dependent; when a child or brother or sister of the deceased reaches the age of eighteen years, except as otherwise provided in sections 8-41-501 (1) (b) and (1) (c) and 8-41-502; and upon the expiration of six years from the date of the death of the injured employee in the case of partial dependents.

**Source:** L. 90: Entire article R&RE, p. 497, § 1, effective July 1. L. 91: Entire section amended, p. 1352, § 5, effective May 29.

**Editor's note:** This section is similar to former § 8-50-106 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-42-120 is similar to § 8-50-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**This section is constitutional** and does not violate equal protection of the law or due process. *Dow Chemical Co. v. Gabel*, 746 P.2d 1357 (Colo. App. 1987).

**This section does not explicitly provide that termination cannot occur for reasons other than those enumerated.** *Berry Constr., Inc. v. Indus. Comm'n*, 39 Colo. App. 251, 567 P.2d 806 (1977).

**Termination where dependents pursue remedy against third-party tortfeasor.** The propriety of termination of death benefits where the dependents of deceased elect to take compensation under articles 40 to 54 but nevertheless pursue their remedy against a third-party

tortfeasor is implicit in section 8-52-108. *Berry Constr., Inc. v. Indus. Comm'n*, 39 Colo. App. 251, 567 P.2d 806 (1977).

**The adoption of a minor dependent is not a condition upon which the right to death benefits shall lapse.** The arguments that the adopted child has ceased to be dependent and that he could collect two death benefits at the same time if his adopted father should be killed by accident in the course of his employment, would be forceful if addressed to the general assembly but the statute is explicit and it cannot be added to or taken from. *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 70 Colo. 229, 199 P. 483 (1921).

**Words not applying exclusively to wholly dependents.** It is contended that the words "shall thereupon survive to the remaining dependents", in this section were intended to apply only to those who are wholly dependent. But if the general assembly so intended, no doubt the word "wholly" would have been inserted in the appropriated place. Its omission is significant. If

the provision were not intended to apply to others than those wholly dependent, it would serve no useful purpose; for if there were two or more persons wholly dependent and one remarried or died, the rights of the other or others to compensation would continue without any such provisions. Indeed, the word "survive" would hardly be selected if the intent were such as counsel contend it was. *Central Sur. & Ins. Corp. v. Indus. Comm'n*, 94 Colo. 341, 30 P.2d 253 (1934).

**Benefits survive.** The sixty-six and two-thirds percent of the deceased's salary is payable to those wholly dependent upon the deceased regardless of number. Such benefits survive as provided by statute if one dependent becomes ineligible. *Indus. Comm'n v. Employers' Liab. Assurance Corp.*, 169 Colo. 396, 456 P.2d 739 (1969).

**But payments cannot exceed statutory maximum.** Regardless of the language providing for the share of surviving dependents to other dependents, the payments cannot in any event exceed the statutory maximum. *Indus. Comm'n v. Employers' Liab. Assurance Corp.*, 169 Colo. 396, 456 P.2d 739 (1969).

**And the right of a widow to receive compensation under an award for the death of**

**her husband terminates upon her remarriage.** *Tavernor v. Royal Indem. Co.*, 84 Colo. 521, 272 P. 3 (1928); *Nat'l Sugar Mfg. Co. v. Bauer*, 148 Colo. 436, 366 P.2d 388 (1961).

**If a widow with a right to receive compensation under an award for the death of her husband remarries, and the new marriage ends in divorce,** the widow's right to receive from her first husband is not reinstated upon the divorce. *Dow Chemical Co. v. Gabel*, 746 P.2d 1357 (Colo. App. 1987).

**Moreover, dependents must prove their dependency** on the employee and that such dependency has not been terminated by the dependent's marriage, death, or attainment of age 18. *In re Hampton v. State*, 31 Colo. App. 141, 500 P.2d 1186 (1972).

**Children of deceased worker entitled to death benefits as full-time students pursuant to § 8-50-101 (now § 8-41-501) even though they were not 18 at time of death.** *Western Gas v. Indus. Claim App. Office*, 797 P.2d 823 (Colo. App. 1990).

**Applied in** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 152 Colo. 256, 381 P.2d 267 (1963); *Indus. Comm'n v. Employers' Liab. Assurance Corp.*, 169 Colo. 396, 456 P.2d 739 (1969).

**8-42-121. Director to determine and apportion benefits.** Death benefits shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable. Payment to a dependent subsequent in right may be made, if the director deems it proper, which payment shall operate to discharge all other claims therefor. The dependents or persons to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support in compliance with the finding and direction of the director.

**Source:** L. 90: Entire article R&RE, p. 497, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-50-115 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** (1) Since § 8-42-121 is similar to § 8-50-115 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor instead of the industrial commission with the power to determine and apportion benefits.

**No specific provision of this article prescribes an equal apportionment among dependents.** It does not follow from the language

of former § 8-50-101, "conclusively presumed to be wholly dependent", when read in conjunction with this section, that all such dependents must, as a matter of law, be treated on an equal basis. To so conclude would be to ignore the express provisions of this section. *Spoo v. Spoo*, 145 Colo. 268, 358 P.2d 870 (1961).

**For it was the intent of the general assembly to vest the commission with some apportioning power,** first among those claiming to be dependents whose status depends upon proof of their dependency, and second, those dependents whose status is fixed by statute. *Spoo v. Spoo*, 145 Colo. 268, 358 P.2d 870 (1961).

**However, an inequitable award is not in accord with the requirements of this section**



**which limits the discretion of the commission to that which is just and equitable.** Spoo v. Spoo, 145 Colo. 268, 358 P.2d 870 (1961).

**Applied** in Indus. Comm'n v. Employers' Liab. Assurance Corp., 169 Colo. 396, 456 P.2d 739 (1969).

**8-42-122. Minor dependents - safeguarding payments.** In all cases of death where the dependents are minor children, it shall be sufficient for the surviving spouse or a friend to make application and claim on behalf of the minor children. The director, for the purpose of protecting the rights and interests of any dependents whom the director deems incapable of fully protecting their own interests, may deposit the payments in any type of account in state or national banks insured by the federal deposit insurance corporation or its successor, savings and loan associations that are insured by the federal deposit insurance corporation or its successor, or credit unions that are insured by the national credit union share insurance fund and may otherwise provide for the manner and method of safeguarding the payments due such dependents in such manner as the director sees fit.

**Source:** L. 90: Entire article R&RE, p. 497, § 1, effective July 1. L. 2004: Entire section amended, p. 148, § 50, effective July 1.

**Editor's note:** This section is similar to former § 8-50-116 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** (1) Since § 8-41-205 is similar to § 8-51-113 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor

instead of the industrial commission with the power to safeguard payments to minor children.

**The industrial commission has the power to prevent the diversion of the money awarded to the children** by their mother to her personal uses, or to the use of her children by her second marriage. Spoo v. Spoo, 145 Colo. 268, 358 P.2d 870 (1961).

**Applied** in Truitt v. Indus. Comm'n, 31 Colo. App. 166, 499 P.2d 623 (1972).

**8-42-123. Burial expenses.** When, as a proximate result of an injury, death occurs to an injured employee, there shall be paid in one lump sum within thirty days after death a sum not to exceed seven thousand dollars for reasonable funeral and burial expenses. Said sum may be paid to the undertaker, cemetery, or any other person who has paid the funeral and burial costs, if the director so orders. If the employee leaves no dependents, compensation shall be limited to said sum and the compensation, if any, which has accrued to date of death and the medical, surgical, and hospital expenses provided in articles 40 to 47 of this title. If the deceased employee leaves dependents, said sum shall be paid in addition to all other sums of compensation provided for in this article.

**Source:** L. 90: Entire article R&RE, p. 497, § 1, effective July 1. L. 91: Entire section amended, p. 1313, § 20, effective July 1. L. 2000: Entire section amended, p. 431, § 1, effective April 17.

**Editor's note:** This section is similar to former § 8-50-107 as it existed prior to 1990.

**8-42-124. Assignability and exemption of claims - payment to employers - when.** (1) Except for amounts due under court-ordered support or for a judgment for a debt for fraudulently obtained public assistance, fraudulently obtained overpayments of public assistance, or excess public assistance paid for which the recipient was ineligible, claims for compensation or benefits due, or any proceeds thereof, under articles 40 to 47 of this title shall not be assigned, released, or commuted except as provided in said articles and shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy or recovery or collection of a debt, which exemption may not be waived.

(2) The power given in any power of attorney or other authority from any injured employee or the dependents of any killed employee purporting to authorize any other person to receive, be paid, or receipt for any compensation benefits awarded any such claimant shall be wholly void and illegal and of no force and effect; except that:

(a) Any employer who is subject to the provisions of articles 40 to 47 of this title and who, by separate agreement, working agreement, contract of hire, or any other procedure, continues to pay a sum in excess of the temporary total disability benefits prescribed by articles 40 to 47 of this title to any employee temporarily disabled as a result of any injury arising out of and in the course of such employee's employment and has not charged the employee with any earned vacation leave, sick leave, or other similar benefits shall be reimbursed if insured by an insurance carrier or shall take credit if self-insured to the extent of all moneys that such employee may be eligible to receive as compensation or benefits for temporary partial or temporary total disability under the provisions of said articles, subject to the approval of the director. If the employee is injured while under a fixed duration contract of employment, all salary and wages paid pursuant to that contract shall be prorated over the duration of the contract in determining whether in any given week the employer paid a sum in excess of the temporary total disability benefit.

(b) This subsection (2) shall not apply to an attorney licensed to practice law in this state and acting in accordance with a power of attorney given by the claimant solely for the purpose of distributing funds pursuant to an admission of liability or an order of the division.

(3) Such payments shall be paid directly to the employer during the period of time that such employer continues to pay a sum in excess of the temporary total disability benefits prescribed by articles 40 to 47 of this title and has not charged any earned vacation leave, sick leave, or other similar benefits to any employee so disabled and for so long as such employee is eligible for temporary disability benefits under the provisions of articles 40 to 47 of this title. The payment of such moneys to an employer shall constitute the payment of compensation or benefits to the employee in accordance with the provisions of section 8-42-103.

(4) When the payment by an employer to any such disabled employee is reduced to a sum equal to or less than the temporary total disability benefits prescribed by articles 40 to 47 of this title, or when the employer has charged the employee with any earned vacation leave, sick leave, or other similar benefits for any reason, the rights of the employee to receive direct payment of any award for temporary partial or temporary total disability that said employee may be entitled to on and after the effective date of such reduction shall be reinstated in accordance with the provisions of articles 40 to 47 of this title.

(5) Any employer subject to the provisions of articles 40 to 47 of this title and otherwise qualifying for direct payment of employee benefits as provided in this section shall notify the division and the insurance carrier of such employer's eligibility to receive such moneys. The director shall approve such direct payment after the filing of such information by the employer as the director may require.

(6) Nothing in this section shall be construed to limit in any way the right of any employee to full payment of any award which may be granted to said employee for permanent partial or permanent total disability under the provisions of articles 40 to 47 of this title; except that benefits for permanent total disability and permanent partial disability shall be subject to wage assignment or income assignment as wages pursuant to section 14-14-102 (9), C.R.S., and subject to garnishment as earnings pursuant to section 13-54.5-101 (2) (b), C.R.S., and subject to administrative lien and attachment pursuant to section 26-13-122, C.R.S., for purposes of enforcement of court-ordered child support and subject to garnishment as earnings pursuant to sections 13-54-104 (1) (b) (IV) and 13-54.5-101 (2) (d), C.R.S., for purposes of enforcement of a judgment for a debt for fraudulently obtained public assistance, fraudulently obtained overpayments of public assistance, or excess public assistance paid for which the recipient was ineligible.

(7) Following an injury, any injured employee may authorize in writing the continuation of any payroll deduction which the employee had authorized or could have authorized before the injury, which authorization shall be legal and may be honored by the employer to the extent that proceeds of compensation of claims are available to the employer or are



made available to the employer by the employer's insurance carrier for this purpose until the authorization is revoked in writing by the injured employee.

(8) If any employer who pays to an injured employee a sum in excess of the temporary total disability benefits prescribed by articles 40 to 47 of this title and who has not charged the employee with any earned vacation leave, sick leave, or other similar benefits seeks to have assigned the compensation benefits otherwise due the injured employee as provided in this section, the employer shall notify the employee of said request at the same time the employer makes the request of the director or insurance carrier or both.

**Source:** **L. 90:** Entire article R&RE, p. 498, § 1, effective July 1. **L. 92:** (6) amended, p. 218, § 22, effective August 1. **L. 94:** (6) amended, p. 2048, § 6, effective June 3. **L. 96:** (6) amended, p. 621, § 29, effective July 1. **L. 2000:** (2) amended, p. 224, § 1, effective July 1. **L. 2001:** (6) amended, p. 720, § 1, effective May 31. **L. 2006:** (1) and (6) amended, p. 948, § 6, effective August 7. **L. 2007:** (1) amended, p. 879, § 9, effective May 14.

**Editor's note:** (1) This section is similar to former § 8-52-107 as it existed prior to 1990.

(2) Section 9 of chapter 208, Session Laws of Colorado 2006, provides that the act amending subsections (1) and (6) applies to judgments entered prior to, on, or after August 7, 2006.

**Cross references:** For the legislative intent contained in the 2006 act amending subsections (1) and (6), see section 8(2) of chapter 208, Session Laws of Colorado 2006; for the legislative declaration contained in the 2007 act amending subsection (1), see section 1 of chapter 226, Session Laws of Colorado 2007.

## ANNOTATION

**Law reviews.** For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L. J. 82 (1970). For article, "Update on Colorado Appellate Decisions in Colorado Workers' Compensation Law", see 30 Colo. Law. 69 (April 2001). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 117 (November 2004).

**Annotator's note.** Since § 8-42-124 is similar to § 8-52-107 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

This section reflects a legislative intent to ensure that workers' compensation benefits are available as a wage substitute. This policy would be contravened by a judicial holding that such awards are marital property to be divided upon dissolution of the marriage. Unliquidated workers' compensation awards are different from pensions, and whether award is marital property depends on extent to which award compensates for loss of earning capacity and medical expenses incurred during the marriage. If award compensates the spouse for post-dissolution loss of earning capacity, it is not marital property even if the compensable injury occurred during the marriage. If workers' compensation claim is pending on date of dissolution and will likely include indemnification for loss of marital earnings or medical expenses, trial court may reserve jurisdiction to apportion mar-

ital interest upon receipt of award. In re Smith, 817 P.2d 641 (Colo. App. 1991).

**The general assembly intended that the 2001 amendment to subsection (6) be applied retroactively.** Am. Comp. Ins. Co. v. McBride, 107 P.3d 973 (Colo. App. 2004).

**Only permanent total disability benefits may be garnished for child support**, under the plain meaning of the exception stated in subsection (6). Permanent partial disability benefits may not be so garnished. In re Hamby, 954 P.2d 635 (Colo. App. 1997).

**Because the 2001 amendment to subsection (6) did not specify an effective date, the amendment creating an exception that permitted garnishment of temporary total disability benefits for enforcement of child support orders was effective upon its enactment on May 21, 2001, and had to be applied immediately because it was remedial and procedural in nature.** Am. Comp. Ins. Co. v. McBride, 107 P.3d 973 (Colo. App. 2004).

Retroactive application of a statute is not necessarily unconstitutional. Where a statute effects a change that is procedural or remedial, it may be applied retroactively. A statute is remedial if it does not create, eliminate, or modify vested rights or liabilities. When retroactive application of a statute is unconstitutional, it is deemed retrospective. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973 (Colo. App. 2004).

**Generally, claim that is not assignable does not survive death of claimant.** In re Dick v. Indus. Comm'n, 197 Colo. 71, 589 P.2d 950 (1979).

**Child Support Enforcement Procedures Act did not create exception to statute** specifically prohibiting satisfaction of judgments out of workers' compensation benefits. In re Snyder, 739 P.2d 923 (Colo. App. 1987) (decided prior to 1987 amendment to subsection (1)).

**If benefits have been received by claimant and subsequently deposited into a bank account, they are no longer "due" under this statute.** Therefore, such benefits are no longer exempt from garnishment when a plaintiff serves a writ of garnishment on defendant's bank. *Borrayo v. Lefever*, 159 P.3d 657 (Colo. App. 2006).

**Vacation and sick benefits paid to claimant are earned benefits and cannot be deducted from or credited against the temporary disability benefits to which claimant is entitled.** *Pub. Serv. Co. v. Johnson*, 789 P.2d 487 (Colo. App. 1990).

**Employer did not charge claimant sick leave within the meaning of subsection (2)(a)**

when it returned and reinstated the sick leave previously used by claimant after a determination that the claimant suffered a compensable injury. Further, employer continued to pay claimant his full wages in excess of the temporary total disability benefits prescribed under this section throughout the relevant period of time. Therefore, employer is not liable for further temporary disability benefits. *City & County of Denver v. Indus. Claim Appeals Office*, 107 P.3d 1019 (Colo. App. 2004).

**Attorney lien statute does not create implied exception to protections offered to workers' compensation benefits,** because the workers' compensation statute unequivocally exempts workers' compensation benefits from any remedy ordinarily available to satisfy a debt, with only one explicit exception. *James E. Freemyer, P.C. v. Indus. Claim Appeals Office*, 32 P.3d 564 (Colo. App. 2000).

**8-42-125. Data gathering on workers' compensation system.** The governor and the leader of the opposing party in the house of representatives and the leader of the opposing party in the senate shall contract with a person or entity for obtaining information on the workers' compensation system. The person or entity gathering the information shall work solely at the unanimous direction of the governor and the opposition leadership. Issues or topics that will be subject to the information gathering process shall be determined by unanimous decision of the governor and the opposition leadership. The contractor for the gathering of the information shall have complete access to all records of and files in the division of workers' compensation and the office of administrative courts. Such contractor shall guarantee that any information gathered on any individual shall be kept confidential.

**Source: L. 94:** Entire section added, p. 2003, § 6, effective July 1. **L. 2005:** Entire section amended, p. 853, § 9, effective June 1.

ARTICLE 43

Procedure

**Editor's note:** This article was numbered as article 4 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

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## PART 1

### NOTICES AND REPORTS

#### **8-43-101. Record of injuries - occupational disease - reported to division - rules.**

(1) Every employer shall keep a record of all injuries that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days and the contraction by an employee of an occupational disease that has been listed by the director by rule. Within ten days after notice or knowledge that an employee has contracted such an occupational disease, or the occurrence of a permanently physically impairing injury, or lost-time injury to an employee, or immediately in the case of a fatality, the employer shall, upon forms prescribed by the division for that purpose, report said occupational disease, permanently physically impairing injury, lost-time injury, or fatality to the division. The report shall contain such information as shall be required by the director.

(2) Unless exempted by the director pursuant to rule because of a small number of filings or a showing of financial hardship, beginning July 1, 2006, reports submitted pursuant to this section shall be submitted in an electronic format as determined by the director. Exposure to an injurious substance as defined by the director by rule and injuries to employees that result in no more than three days' or three shifts' loss of time from work, or no permanent physical impairment, or no fatality to the employee shall be reported by the employer only to the insurer of said employer's workers' compensation insurance liability, which injuries and exposure the insurer shall report only by monthly summary form to or as otherwise requested by the division.

**Source:** L. 90: Entire article R&RE, p. 499, § 1, effective July 1. L. 2005: Entire section amended, p. 200, § 3, effective July 1. L. 2006: (2) amended, p. 1489, § 5, effective June 1.

**Editor's note:** This section is similar to former § 8-45-101 as it existed prior to 1990.

### ANNOTATION

**Annotator's note.** Since § 8-43-101 is similar to § 8-45-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Report made part of judgment roll when filed in clerk's office.** The first report, made as directed by this section, is one of the class of "documents and papers on file in the matter" which by § 8-1-134 is made a part of the judgment roll when filed in the office of the clerk of the district court. *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929).

**Not necessary that report be formally introduced in evidence.** *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929).

**Report's weight as evidence.** Report of an accident by employer may be considered on hearing of the claim of employee for compen-

sation, its weight as evidence being for the division. *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929).

**Admissibility of admissions against interest contained in report by employer.** Admissions against interest contained in a report of accident by employer cannot be rejected as evidence because contradicted by statements set out in a so-called "notice of contest" filed by the employer. *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929).

**Employer's failure to make report, or to correct an erroneous report, tolls the limitation period** within which claimant must file notice claiming compensation. *City of Englewood v. Indus. Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998).

**Motor vehicle accident reports not part of workmen's compensation act.** The provisions which require police reports of all motor vehicle accidents within the state resulting in injury are not a part of the workmen's compensation act. *Stewart v. United States*, 716 F.2d 755 (10th Cir.



1982), cert. denied, 469 U.S. 1018, 105 S. Ct. 432, 83 L. Ed.2d 359 (1984).

**Applied** in Grant v. Indus. Claim Apps. Office, 740 P.2d 530 (Colo. App. 1987).

**8-43-102. Notice to employer of injury - notice to employees of requirement - failure to report.** (1) (a) Every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence of the injury. If the employee is physically or mentally unable to provide said notice, the employee's foreman, superintendent, manager, or any other person in charge who has notice of said injury shall submit such written notice to the employer. Any other person who has notice of said injury may submit a written notice to the said person in charge or to the employer, and in that event the injured employee shall be relieved of the obligation to give such notice. Otherwise, if said employee fails to report said injury in writing, said employee may lose up to one day's compensation for each day's failure to so report. If, at the time of said injury, the employer has failed to display the notice specified in paragraph (b) of this subsection (1), the time period allotted to the employee shall be tolled for the duration of such failure.

(b) Every employer shall display at all times in a prominent place on the workplace premises a printed card with a minimum height of fourteen inches and a width of eleven inches with each letter to be a minimum of one-half inch in height, which shall read as follows:

#### **WARNING**

**IF YOU ARE INJURED ON THE JOB, WRITTEN NOTICE OF YOUR INJURY MUST BE GIVEN TO YOUR EMPLOYER WITHIN FOUR WORKING DAYS AFTER THE ACCIDENT, PURSUANT TO SECTION 8-43-102 (1), COLORADO REVISED STATUTES.**

**IF THE INJURY RESULTS FROM YOUR USE OF ALCOHOL OR CONTROLLED SUBSTANCES, YOUR WORKERS' COMPENSATION DISABILITY BENEFITS MAY BE REDUCED BY ONE-HALF IN ACCORDANCE WITH SECTION 8-42-112.5, COLORADO REVISED STATUTES.**

(1.5) (a) Every employee of an employer who has permission to be its own insurance carrier pursuant to section 8-44-201 or of an employer who participates in a public entity self-insurance pool pursuant to section 8-44-204 who sustains an injury resulting from an accident shall notify his employer in writing of said injury within four working days of the occurrence of the injury, unless the employer, or the employee's foreman, superintendent, or manager has written notice of said injury. If the employee is physically or mentally unable to provide said notice, the employee's foreman, superintendent, or manager, or any other person in charge who has written notice of said injury, shall submit such written notice to the employer. If said employee fails to report said injury in writing, such employee may lose up to one day's compensation for each day's failure to so report. Any other person who has notice of said injury may submit a written notice to the employer which report shall relieve the injured employee from reporting the accident. Any employer receiving written notice of an injury pursuant to this subsection (1.5) shall affix thereon the date and time of receipt of such notice and shall make a copy of such notice available to the injured employee within two working days following receipt of such notice.

(b) Every employer who has permission to be its own insurance carrier pursuant to section 8-44-201 or who participates in a public entity self-insurance pool pursuant to section 8-44-204 shall display at all times in a prominent place on the workplace premises a printed card with a minimum height of fourteen inches and a width of eleven inches with each letter to be a minimum of one-half inch in height, which shall read as follows:

## WARNING

**IF YOU ARE INJURED ON THE JOB, WRITTEN NOTICE OF YOUR INJURY MUST BE GIVEN TO YOUR EMPLOYER WITHIN FOUR WORKING DAYS AFTER THE ACCIDENT, PURSUANT TO SECTION 8-43-102 (1.5), COLORADO REVISED STATUTES.**

**IF THE INJURY RESULTS FROM YOUR USE OF ALCOHOL OR CONTROLLED SUBSTANCES, YOUR WORKERS' COMPENSATION DISABILITY BENEFITS MAY BE REDUCED BY ONE-HALF IN ACCORDANCE WITH SECTION 8-42-112.5, COLORADO REVISED STATUTES.**

(2) Written notice of the contraction of an occupational disease shall be given to the employer by the affected employee or by someone on behalf of the affected employee within thirty days after the first distinct manifestation thereof. In the event of death from such occupational disease, written notice thereof shall be given to the employer within thirty days after such death. Failure to give either of such notices shall be deemed waived unless objection is made at a hearing on the claim prior to any award or decision thereon. Actual knowledge by an employer in whose employment an employee was last injuriously exposed to an occupational disease of the contraction of such disease by such employee and of exposure to the conditions causing it shall be deemed notice of its contraction. If the notice required in this section is not given as provided and within the time fixed, the director may reduce the compensation that would otherwise have been payable in such manner and to such extent as the director deems just, reasonable, and proper under the existing circumstances.

**Source: L. 90:** Entire article R&RE, p. 499, § 1, effective July 1; (1.5) added, p. 577, § 1, effective July 1. **L. 91:** Entire section amended, p. 1314, § 21, effective July 1. **L. 99:** (1)(b) and (1.5)(b) amended, p. 581, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-45-102 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-43-102 is similar to § 8-45-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**An injury takes place when the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury.** *Crest Fence Co. v. Cec*, 175 Colo. 21, 485 P.2d 709 (1971).

**And to interpret this section so that a person who reasonably discovers his injury long after the accident and is entitled to compensation, is not entitled to his medical expenses is nearly absurd, and a defeat of the purpose of the act.** *Crest Fence Co. v. Cec*, 175 Colo. 21, 485 P.2d 709 (1971).

**Penalties for failure of an employee to report an accidental injury** will be enforced unless the case comes within one of the exceptions contained in the section. *Jabot v. Indus. Comm'n*, 94 Colo. 424, 30 P.2d 871 (1934).

**Verbal notice given to the superintendent of the company immediately after the acci-**

**dent is sufficient.** *Frank v. Indus. Comm'n*, 96 Colo. 364, 43 P.2d 158 (1935).

**Verbal notice to supervisor and company physician of pain and suffering caused by prolonged standing and lifting was sufficient notification to employer to require compliance with § 8-53-102.** *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984).

**Combined investigatory and adjudicatory functions.** Any order purporting to combine investigatory and adjudicatory functions in a single referee would raise serious questions of propriety. *Thompson v. Indus. Comm'n*, 33 Colo. App. 369, 520 P.2d 139 (1974).

**Extrajudicial visit to claimant's home improper.** Absent any authorization for such an investigation, the referee acted in excess of his powers when he made an extrajudicial visit to claimant's home. *Thompson v. Indus. Comm'n*, 33 Colo. App. 369, 520 P.2d 139 (1974).

**Actual notice to contractor sufficient.** This section does not require a claimant to give notice to landowners within two days from the time of the accident when the contractor in actual charge of a job on the landowners' prop-



erty is the employer of the claimant at the time of the accident and remained the employer even though he had no insurance. Actual notice to the contractor is sufficient to comply with this section. *Stewart v. Indus. Comm'n*, 163 Colo. 12, 428 P.2d 367 (1967).

**Time begins to run for filing notice claiming compensation when the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury.** *Romero v. Indus. Comm'n*, 632 P.2d 1052 (Colo. App. 1981).

**And timing of penalty for failure to report injury.** Penalties for failure to report an injury to an employer should only be assessed from the time the employee discovered, or should have discovered, the probable compensable character of the injury; penalties in such cases should not be assessed from the date of the accident. *Romero v. Indus. Comm'n*, 632 P.2d 1052 (Colo. App. 1981).

**Since the imposition of penalties reduces the employer's liability for disability benefits, it is in the nature of an affirmative defense.** Accordingly, the employer bears the initial burden of proving it did not receive written notice of an injury to an employee. *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

**Once an employer presents prima facie evidence that the claimant did not timely report an injury, the burden shifts to the claimant to rebut the prima facie showing.** *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

**Oral notice to an employer of an industrial injury is insufficient and strict compliance with the writing requirement is necessary.** *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

**Applied in** *Sommers v. Borgmann*, 111 Colo. 552, 144 P.2d 554 (1943).

**8-43-103. Notice of injury - time limit.** (1) Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury, and, in case of the death of any employee resulting from any such injury or any accident in which three or more employees are injured, the employer shall give immediate notice thereof to the director. If no such notice is given by the employer, as required by articles 40 to 47 of this title, such notice may be given by any person. Any notice required to be filed by an injured employee or, if deceased, by said employee's dependents may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing filed with the division within a reasonable time. Such notice shall be in writing and upon forms prescribed by the division for that purpose and served upon the division by delivering to, or by mailing by registered mail two copies thereof addressed to, the division at its office in Denver, Colorado. Upon receipt of such notice from a claimant, the division shall immediately mail one copy thereof to said employer or said employer's agent or insurance carrier.

(2) The director and administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title. Except in cases of disability or death resulting from exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestosis, silicosis, and anthracosis, the right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury or after death resulting therefrom, a notice claiming compensation is filed with the division. This limitation shall not apply to any claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby, and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section; but, in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of said articles, this statute of limitations shall not begin to run against the claim of the injured employee or said employee's dependents in the event of death until the required report has been filed with the division.

(3) In cases of disability or death resulting from exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestosis, silicosis, or

anthracosis, the right to compensation and benefits shall be barred unless, within five years after the commencement of disability or death, a notice claiming compensation is filed with the division.

**Source:** **L. 90:** Entire article R&RE, p. 500, § 1, effective July 1. **L. 92:** (1) amended, p. 1825, § 3, effective April 29. **L. 94:** (2) amended, p. 1873, § 1, effective June 1. **L. 2005:** (2) amended, p. 854, § 10, effective June 1.

**Editor's note:** This section is similar to former § 8-52-105 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Notice of Injury by Employer.
- III. Jurisdiction.
- IV. Limitation on Filing Claims.
  - A. In General.
  - B. Commencement and Tolling of Statute of Limitations.
  - C. Estoppel.
- V. Effect of Payment of Compensation.
- VI. Excuse of Failure to File.
  - A. In General.
  - B. Reasonable Excuse.
  - C. Lack of Prejudice to Employer.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "The Occupational Disease Disability Act From the Standpoint of the Claimant", see 28 Dicta 41 (1951). For article, "One Year Review of Torts", see 35 Dicta 53 (1958).

**Annotator's note.** (1) Since § 8-43-103 is similar to § 8-52-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1986 amendment which vested the director of the division of labor with the jurisdiction previously exercised by the industrial commission to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided or were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission.

**The proceedings hereunder are purely statutory** and not equivalent to a suit in equity. The question of permitting the defense of laches or something analogous thereto in a purely statutory proceeding is one of legislative policy which probably can be answered only by express act of the general assembly. The courts are not allowed to indulge in judicial legislation. *Indus. Comm'n v. Carpenter*, 102 Colo. 22, 24, 76 P.2d 418 (1938).

**Compliance with this section is not an admission of liability.** The filing of the first report of injury as required in this section is not an admission of liability by an employer. *Stadler v. Indus. Claim Appeals Office*, 811 P.2d 447 (Colo. App. 1991).

**Applied** in *First Nat'l Bank v. Long*, 44 Colo. App. 317, 616 P.2d 180 (1980).

### II. NOTICE OF INJURY BY EMPLOYER.

**Employer only required to report accident resulting in injury.** Under this section an employer is not required to report all accidents or incidents in connection with his employees, but only those resulting in injury to an employee, the plain legislative intent being that only injuries be reported within the 10-day period prescribed. *Monks Excavating & Redi-Mix Cement v. Kopsa*, 148 Colo. 586, 367 P.2d 321 (1961).

**Injury means compensable injury.** Since no benefits flow to a workman merely because he has been the victim of an accident and since injuries must be of sufficient magnitude to prevent him from working for more than seven days before they are compensable, it follows that the term "injury", as it is employed in this section, means compensable injury. The statute so states, in slightly different verbiage. It requires notice to be given of an injury, for which compensation and benefits are payable. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

**For occupational disease, compensable "injury" occurs when the claimant becomes disabled.** Before then, although the claimant may suspect that his or her health problems are work-related, no compensable injury has yet occurred. *City of Colo. Springs v. Indus. Claim Appeals Office*, 89 P.3d 504 (Colo. App. 2004).

**However, where an employer has no notice of an injury communicated to him by the employee**, and where no such injury is apparent, the employer is not required to do anything under this section. *Monks Excavating & Redi-Mix Cement v. Kopsa*, 148 Colo. 586, 367 P.2d 321 (1961).

**And when a claimant states to his employer that he is all right** and thus continues for many



months thereafter with the work and makes no claim of compensation, the employer is not required to give notice of the injury or to file notice of contest for no such claim of compensation had been made. *Monks Excavating & Redi-Mix Cement v. Kopsa*, 148 Colo. 586, 367 P.2d 321 (1961).

**This section would be an absurdity if interpreted to require the employer to report something about which he has no knowledge,** namely an injury to an employee. By the same token, to interpret the statute so as to require the employer to report all accidents would be a burden not to be found in the statute. Because of the burden involved in reporting all of these small incidents, it was plain that the general assembly intended that only injuries be reported within the 10-day period prescribed. *Monks Excavating & Redi-Mix Cement v. Kopsa*, 148 Colo. 586, 367 P.2d 321 (1961); *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

**Subsection (1) provides that anyone can make a claim for a claimant.** *Colo. Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966).

**Litigation of issues with knowledge of oral claim waives requirement of written claim.** While it may be true that an objection to the lack of a written claim at the time of a hearing, upon notice, might result in supplying the omission within the two-year period (now five-year period), the voluntary litigation of other issues, with full knowledge of the oral claim could be construed by the director as a voluntary waiver of the technical requirement of a written claim. *Colo. Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966).

**But no waiver where no notice of injury.** There is a clear distinction delineated by the authorities between no notice of a claimed injury and mere irregularity in the form thereof. When no notice of a claimed injury occurs, it is jurisdictional, and there can be no waiver. When a deficiency is only as to form of notice of a claimed injury there can be a waiver, and the conduct of the parties after the notice can form the basis of such a waiver. *Colo. Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966).

### III. JURISDICTION.

**The fact-finding function in support of any award of compensation is for the fact-finder and not the reviewing court.** *Bohmann v. Indus. Comm'n*, 76 Colo. 588, 233 P. 621 (1925); *Pacific Employers Ins. Co. v. Indus. Comm'n*, 127 Colo. 400, 257 P.2d 404 (1953); *State Comp. Ins. Fund v. Foulds*, 167 Colo. 123, 445 P.2d 716 (1968); *Indus. Comm'n v. Nye*, 171 Colo. 433, 468 P.2d 28 (1970).

**Thus, reviewing court will remand as to issues industrial commission has not heard or determined.** Where on review of a judgment in

a workmen's compensation case it appears that the commission has not theretofore had an ample opportunity to hear and determine any issues raised in the proceeding, or has for any reason not in fact heard and determined the issues raised, this court should remand the case to the lower court with directions to set aside its judgment and transmit to the commission a statement of the issues not fully presented, staying its proceedings until the commission should hear and determine such issues and return its findings to the court. *Black Diamond Fuel Co. v. Frank*, 99 Colo. 528, 64 P.2d 797 (1936).

**But industrial commission abuses discretion when evidence insufficient to sustain this ruling.** When the evidence is insufficient as a matter of law to sustain the commission's suspension of the six month (now three year) limitation of this section, in finding otherwise the commission abused its discretion. *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 368 P.2d 798 (1962).

**And court must set forth facts to determine whether evidence is competent.** In order to determine whether there is competent evidence in the record to support the claim or whether there are reasonable inferences to be drawn therefrom to support the findings, it is necessary for the supreme court to set forth the factual situation as presented by the record. *Pacific Employers Ins. Co. v. Indus. Comm'n*, 127 Colo. 400, 257 P.2d 404 (1953).

**Court may draw its own conclusions when evidence not conflicting.** When the evidence in workmen's compensation cases, as disclosed by the record in the proceeding, is undisputed and without substantial conflict, the court may properly draw its own conclusions therefrom and enter a judgment accordingly, notwithstanding the findings and award of the industrial commission may be to the contrary. *Indus. Comm'n v. Pappas*, 89 Colo. 329, 1 P.2d 919 (1931); *Pacific Employers Ins. Co. v. Indus. Comm'n*, 127 Colo. 400, 257 P.2d 404 (1953).

### IV. LIMITATION ON FILING CLAIMS.

#### A. In General.

**Claim does not exist until filed and established.** Until a claim is filed and established under the procedure set out in this section, neither claim nor dependents exist. *Frontier Airlines v. Indus. Comm'n*, 654 P.2d 1333 (Colo. App. 1982).

**Time limitation for filing claims is governed by statute in effect** at time of onset of disability or death because the extent of employer's liability cannot be determined until disability or death has occurred. *Hadley v. Indus. Comm'n*, 677 P.2d 443 (Colo. App. 1984).

**The time for the filing of a claim under subsection (2) is one year (now three years)** from the date of the accident. *Colo. Auto Body,*

Inc. v. Newton, 160 Colo. 113, 414 P.2d 480 (1966).

**Three-year period not jurisdictional.** The terms of this section imply a statute of limitations, for they are more like the terms employed in such statutes than like terms of jurisdictional import. The three-year period is not jurisdictional. Kersting v. Indus. Comm'n, 39 Colo. App. 297, 567 P.2d 394 (1977).

**General limitation statutes do not govern** a proceeding under the workmen's compensation act. Miller v. Indus. Comm'n, 106 Colo. 364, 105 P.2d 404 (1940).

**For failure of employee to file notice of claim within one year (now three years) bars recovery.** An employee who fails to file notice of his claim for compensation within the time period required by this section is barred from recovery. This is conclusive against employee. Indus. Comm'n v. W.A. Hover & Co., 82 Colo. 335, 259 P. 509 (1927); London Guarantee & Accident Co. v. Indus. Comm'n, 83 Colo. 252, 263 P. 405 (1928); Monks Excavating & Redi-Mix Cement v. Kopsa, 148 Colo. 586, 367 P.2d 321 (1961).

**And fact that employer does not report accident as required does not waive necessity of employee's giving such notice.** Indus. Comm'n v. W.A. Hover & Co., 82 Colo. 335, 259 P. 509 (1927); Monks Excavating & Redi-Mix Cement v. Kopsa, 148 Colo. 586, 367 P.2d 321 (1961).

**Although the notice may be waived.** C.W. Kettering Mercantile Co. v. Fox, 77 Colo. 90, 234 P.464 (1925).

**As where employer files petition for rehearing.** Objection that no notice of claim was filed is waived by the employer who files a petition for rehearing, participates in the rehearing, and introduces testimony on the merits. Indus. Comm'n v. Employers' Liab. Assurance Corp., 78 Colo. 267, 241 P. 729 (1925); Ontario Mining Co. v. Indus. Comm'n, 86 Colo. 206, 280 P. 483 (1929).

**Also, an employer waives the limitation for filing claims when** the objection is not made until it filed its petition for review after the case had once been decided in its favor, a further hearing ordered, additional evidence taken, and an award made in favor of claimant. Indus. Comm'n v. Co-Operative Oil Co., 93 Colo. 192, 24 P.2d 753 (1933).

**If employer in good faith fails to notify, he does not waive right to assert this section.** If an employer does not give notice of an accident in the honest belief that the employee was an independent contractor, and so advised employee's agent at the first opportunity, he does not waive his right to assert the running of this section as a defense. Weidensaul v. Indus. Comm'n, 107 Colo. 28, 108 P.2d 234 (1940).

## B. Commencement and Tolling of Statute of Limitations.

**The time begins to run for filing "a notice claiming compensation" when** the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); Indus. Comm'n v. Workman, 165 Colo. 61, 437 P.2d 795 (1968); Peterson v. Wandell-Lowe Transp. & Storage, 168 Colo. 250, 450 P.2d 660 (1969); Indus. Comm'n v. Canfield, 172 Colo. 18, 469 P.2d 737 (1970); City & County of Denver v. Moore, 31 Colo. App. 310, 504 P.2d 367 (1972); Inter-mountain Rubber Industries v. Valdez, 688 P.2d 1133 (Colo. App. 1984); City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997).

**And the critical date involved in this statute of limitations is not the date of the accident,** but the date of the injury. Indus. Comm'n v. Canfield, 172 Colo. 18, 469 P.2d 737 (1970); City & County of Denver v. Moore, 31 Colo. App. 310, 504 P.2d 367 (1972).

For occupational disease, "injury" occurs when the claimant becomes disabled, and not before. City of Colo. Springs v. Indus. Claim Appeals Office, 89 P.3d 504 (Colo. App. 2004).

**Rather, claimant need only file claim after discovery of injury.** Although claimant had been experiencing monthly acoustic trauma since 1947, where a marked loss of hearing was not revealed by a doctor's examination until March, 1969, and a claim was filed in December, 1969, the claimant met the time requirements, as he was not required to make a report or file a claim until after the discovery of the injury. City & County of Denver v. Moore, 31 Colo. App. 310, 504 P.2d 367 (1972).

**Sections 8-43-101 (1) and 8-43-203 (1) do not mandate a conclusion that an employee meeting this three-day or three-shift requirement has, as a matter of law, become aware of the nature or seriousness of his or her injury.** City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997).

**Statute of limitations on worker's claim for compensation never began to run** since employer failed to file an injury report even though worker testified he reported injury to employer two days after accident which constituted sufficient notice. Halliburton Servs. v. Miller, 720 P.2d 571 (Colo. 1986).

**Employer's failure to correct an erroneous report tolls the limitation period set forth in this section.** Where initial report indicated that claimant was able to continue working after the injury, but instead he missed 23 consecutive shifts encompassing 71 calendar days and this lost time was never reported, his claim was not time-barred. City of Englewood v. Indus. Claim Appeals Office, 954 P.2d 640 (Colo. App. 1998).



**Employer's failure to file injury report tolls limitation periods in both subsection (2) and subsection (3).** *Miller v. Indus. Claim Appeals Office*, 985 P.2d 94 (Colo. App. 1999).

**Determination of issue of time of injury requires fact-finding by director.** Although the claimant, sought medical treatment for his injuries the day following the accident, the fact that his injury was not immediately disabling, and he was able to continue with his employment raises an issue of when the injury occurred and the six-month (now three-year) period commenced. Upon remand, that issue must be determined and a finding of fact made thereon by the director. *Indus. Comm'n v. Canfield*, 172 Colo. 18, 469 P.2d 737 (1970).

**Finding as to when claimant should have recognized compensable injury required.** Where industrial commission dismissed a compensation claim for failure of claimant to file within the statutory time period provided in this section, the commission was required to make a finding as to when the claimant reasonably should have recognized the compensable character of his injury. *Richmond v. Indus. Comm'n*, 33 Colo. App. 21, 513 P.2d 1088 (1973).

**Employer relieved of financial burden when injured claimant files.** If claimant has a compensable injury and files his claim therefor within the time provided by statute, the employer is relieved of all financial burdens respecting his injured employee. It becomes the primary obligation of the insurance carrier to pay any compensation which the director should determine to be due. *Pacific Employers Ins. Co. v. Indus. Comm'n*, 127 Colo. 400, 257 P.2d 404 (1953).

**War is sufficient to toll the running of this section.** *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 73 Colo. 579, 216 P. 706 (1923); *Indus. Comm'n v. Peppas*, 71 Colo. 25, 203 P. 664 (1922).

**Mistaken allegation of ownership of property where injury occurred will not bar recovery.** *Joe Dandy Mining Co. v. Indus. Comm'n*, 112 Colo. 241, 148 P.2d 817 (1944).

**And an employee's claim for compensation for a back injury is not barred by the six-month (now three-year) limitation in this section,** where his claim for another injury, received in the same accident, has been allowed by the director and later suspended, and his claim for the back injury was made when the cause was reopened on the director's own motion for the purpose of determining whether or not there had been error, mistake, or change in condition. *Safeway Stores v. Newman*, 123 Colo. 362, 230 P.2d 168 (1951).

**But claimant's minority and ignorance of death will not toll the statutory limitation.** *Miller v. Indus. Comm'n*, 106 Colo. 364, 105 P.2d 404 (1940).

**Nor will physical and mental incapacity.** *Weidensaul v. Indus. Comm'n*, 107 Colo. 28, 108 P.2d 234 (1940).

**Corporate officer is not precluded from receiving protection of tolling of statute of limitations by virtue of his status alone.** The mere fact that such officer had the authority to file a first report of injury on behalf of the corporate employer does not restrict such officer's right to file a claim. There must be a showing of fraud or improper corporate manipulation in order to overcome the statutory protection. (Decided under previous § 8-52-105.) *White House Industries, Inc. v. May*, 845 P.2d 544 (Colo. App. 1992).

C. Estoppel.

**The doctrine of equitable estoppel may in a proper case be invoked to prevent a party from relying upon a statute of limitations.** *Kettering Mercantile Co. v. Fox*, 77 Colo. 90, 234 P. 464 (1925); *Greeley Gas & Oil Co. v. Thomas*, 87 Colo. 486, 288 P. 1051 (1930).

**Estoppel not shown.** Where injured employee's personal friend and physician told him that he would take care of everything and file all necessary papers and reports, but failed to tell employee that employer would resist his claim, and there was no evidence that the doctor was the employer's agent for any purpose, there was no basis for estoppel against the employer to preclude him from relying on the running of this section. *Weidensaul v. Indus. Comm'n*, 107 Colo. 28, 108 P.2d 234 (1940).

**Waiver.** Where the state compensation insurance fund awaits the outcome of a hearing on the merits before invoking the three-year statute of limitations, it waives its right to the protection of that provision. *Kersting v. Indus. Comm'n*, 39 Colo. App. 297, 567 P.2d 394 (1977).

**Defense of untimely filing not estopped by employer's payments.** The previous payment by an employer and his insurer of most of an employee's medical expenses and an offer to pay for surgery do not estop them from asserting as a defense the employee's untimely filing of his claim. *Martin v. Indus. Comm'n*, 43 Colo. App. 521, 608 P.2d 366 (1979).

## V. EFFECT OF PAYMENT OF COMPENSATION.

**The bar of this section "does not apply to any claimant to whom compensation has been paid".** *Indus. Comm'n v. Globe Indem. Co.*, 74 Colo. 52, 218 P. 910 (1923); *C. W. Kettering Mercantile Co. v. Fox*, 77 Colo. 90, 234 P. 464 (1925); *Ontario Mining Co. v. Indus. Comm'n*, 86 Colo. 206, 280 P. 483 (1929); *Frank v. Indus. Comm'n*, 96 Colo. 364, 43 P.2d 158 (1935); *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

**But payment of wages to employee injured in employment accident does not of itself establish payment of compensation.** *Pacific Employers Ins. Co. v. Indus. Comm'n*, 127 Colo. 440, 257 P.2d 404 (1953), rev'g *Comerford v. Carr*, 86 Colo. 590, 284 P. 121 (1930); *Morrow v. Indus. Comm'n*, 98 Colo. 348, 56 P.2d 35 (1936); *Sommers v. Borgmann*, 111 Colo. 552, 144 P.2d 554 (1943); *Stauss v. Indus. Comm'n*, 144 Colo. 288, 355 P.2d 1076 (1960).

**And in order that the payment of wages during the absence of an employee may be held to be the payment of compensation** under the workmen's compensation act, it must be established by competent evidence or reasonable inferences to be drawn therefrom that in making these payments the employer was doing so conscious of the fact that he was making the same as compensation, and it must be received by the employee with the knowledge or reasonable grounds for assuming that the payments made to him were being made as compensation for his injuries. *Pacific Employers Ins. Co. v. Indus. Comm'n*, 127 Colo. 400, 257 P.2d 404 (1953); *Stauss v. Indus. Comm'n*, 144 Colo. 288, 355 P.2d 1076 (1960).

**Furthermore, payment of salary during bona fide illness does not constitute payment of compensation tolling the statutory limitation.** *Rahder v. Indus. Comm'n*, 105 Colo. 594, 100 P.2d 1043 (1940).

**Also, donation is not compensation.** A donation of a burial lot to widow of deceased in consideration of long and faithful services of the latter to the donor, was held not to be a compensation payment within the meaning of this section so as to toll the running of the statute. *Moreno v. State Indus. Comm'n*, 104 Colo. 610, 92 P.2d 739 (1939).

**Compensation paid to a claimant under the workmen's compensation laws of a sister state** does not constitute "compensation paid" as contemplated by this section so as to permit filing of a claim for compensation in this state after expiration of the statutory period for such filing. *Indus. Comm'n v. Pearcy*, 149 Colo. 457, 369 P.2d 560 (1962).

**Rather, such payments satisfy all claims for disability.** Where employee employed in another state is injured in this state and claims and is paid compensation under that state's law, and lump sum is paid in full and final settlement of all claims for disability resulting from accident, such payment is made and received as satisfaction of all claims for disability and not as compensation as contemplated by this section. *Indus. Comm'n v. Pearcy*, 149 Colo. 457, 369 P.2d 560 (1962).

**Prior to 1941, employer's furnishing medical treatment was considered "compensation" tolling statutory limitation.** *Indus. Comm'n v. Globe Indem. Co.*, 74 Colo. 52, 218 P. 910 (1923); *Royal Indem. Co. v. Indus.*

*Comm'n*, 88 Colo. 113, 293 P. 342 (1930); *Indus. Comm'n v. Lockard*, 89 Colo. 428, 3 P.2d 416 (1913); *Frank v. Indus. Comm'n*, 96 Colo. 364, 43 P.2d 158 (1935); *Miller v. Indus. Comm'n*, 106 Colo. 364, 105 P.2d 404 (1940); *State Hwy. Dept. v. Stunkard*, 115 Colo. 358, 174 P.2d 346 (1946); *Gregorich v. Indus. Comm'n*, 117 Colo. 423, 188 P.2d 886 (1948); *Gregorich v. Indus. Comm'n*, 121 Colo. 477, 217 P.2d 614 (1950).

**But mere medical examination and payment of burial expenses was not such "compensation"** prior to the 1941 amendment. *Evanoff v. Indus. Comm'n* 96 Colo. 550, 45 P.2d 688 (1935); *Garden Farm Dairy v. Dorchak*, 102 Colo. 36, 76 P.2d 743 (1938); *Moreno v. State Indus. Comm'n*, 104 Colo. 610, 92 P.2d 739 (1939); *Rahder v. Indus. Comm'n*, 105 Colo. 594, 100 P.2d 1043 (1940).

**Time limitation not tolled by payment of medical expenses.** Payment of medical expenses, such as those paid for by the insurer on behalf of an employer, are not to be considered compensation so as to toll or modify the time limitation for filing a claim. *Martin v. Indus. Comm'n*, 43 Colo. App. 521, 608 P.2d 366 (1979).

## VI. EXCUSE OF FAILURE TO FILE.

### A. In General.

**Failure of claimant to file within six months (now three years) requires showing of reasonable excuse and no prejudice to employer.** Under this section a claim for compensation must be filed within the statutory time period after injury unless it is established by evidence produced by the claimant to the satisfaction of the industrial commission that a reasonable excuse exists for failure to file such claim and that the employer's rights have not been prejudiced thereby. *Monks Excavating & Redi-Mix Cement v. Kopsa*, 148 Colo. 586, 367 P.2d 321 (1961); *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 368 P.2d 798 (1962); *Univ. of Denver-Colorado Sem. & Univ. Park Campus v. Johnston*, 151 Colo. 465, 378 P.2d 830 (1963); *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967); *Bynon v. W.T. Rawleigh Co.*, 164 Colo. 182, 433 P.2d 333 (1967).

**The industrial commission is entrusted with the discretionary power to determine the reasonableness of the excuse and the prejudice resulting from the delay.** *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594, 314 P.2d 297 (1957); *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 368 P.2d 798 (1962); *State Comp. Ins. Fund v. Stampfel*, 153 Colo. 448, 386 P.2d 582 (1963); *State Comp. Ins. Fund v. Foulds*, 167 Colo. 123, 445 P.2d 716 (1968); *Indus. Comm'n v. Canfield*, 172 Colo. 18, 469 P.2d 737 (1970).



**And the commission's decision as to excuse and prejudice will only be set aside** upon a showing of fraud or abuse of discretion. *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594, 314 P.2d 297 (1957); *State Comp. Ins. Fund v. Stampfel*, 153 Colo. 448, 386 P.2d 582 (1963); *State Comp. Ins. Fund v. Foulds*, 167 Colo. 123, 445 P.2d 716 (1968); *Indus. Comm'n v. Canfield*, 172 Colo. 18, 469 P.2d 737 (1970).

#### B. Reasonable Excuse.

**Not all reasons for delayed applications constitute legally justifiable excuses within the purview of the statute.** *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 368 P.2d 798 (1962); *Silsby v. Tops Drive In Restaurant-Dutton Enterprises, Inc.*, 160 Colo. 549, 418 P.2d 525 (1966); *Indus. Comm'n v. Canfield*, 172 Colo. 18, 469 P.2d 737 (1970).

**For a "legally justifiable" excuse is one which the industrial commission, under all attendant circumstances, finds to be reasonably sufficient to excuse the delay.** *Silsby v. Tops Drive In Restaurant-Dutton Enterprises, Inc.*, 160 Colo. 549, 418 P.2d 525 (1966).

**Thus, while a claimant may demonstrate his reason for the delayed filing of his claim, the reason may not compel the commission, as a matter of law, to accept it as a legally justifiable excuse.** *Indus. Comm'n v. Canfield*, 172 Colo. 18, 469 P.2d 737 (1970).

**However, this section makes no requirement that the reasonable excuse be one that is legally watertight.** *City & County of Denver v. Phillips*, 166 Colo. 312, 443 P.2d 379 (1968).

**As when there is evidence to support the referee's conclusion that the employee presented a reasonable excuse for his late filing, the referee errs in going further and holding that the excuse though reasonable is not legally sufficient.** *City & County of Denver v. Phillips*, 166 Colo. 312, 443 P.2d 379 (1968).

**Reasonable excuse where claimant does his best under circumstances.** An incorrect address was given by the employer for claimant, hence the notice to claimant, enclosing claim forms did not reach him. The claimant was not made aware of the necessity of filing a claim for compensation until after he had retained counsel who secured the proper forms and promptly prepared and filed the claim for compensation. This claim was actually filed within six months from the date the employer filed its denial of liability. As we read this record it is apparent that this claimant was doing the best he could under the circumstances. *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594, 314 P.2d 297 (1957).

**But the fact that claimant did not desire to take the time to have x-rays taken which would have indicated the nature of her ail-**

**ment, if considered the "reason" for her late filing, was legally insufficient.** *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 368 P.2d 798 (1962).

#### C. Lack of Prejudice to Employer.

**Finding of excuse will not stand without finding of nonprejudice.** A finding of nonexcuse ends the matter, but a finding that the claimant is excused from the delinquency will not stand alone unless there is also a finding of nonprejudice to the employer. *Univ. of Denver-Colorado Sem. & Univ. Park Campus v. Johnston*, 151 Colo. 465, 378 P.2d 830 (1963).

**And prejudice to the employer must be actual and must be shown to be so.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 129 Colo. 287, 269 P.2d 696 (1954); *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 368 P.2d 798 (1962).

**But the burden of proof of lack of prejudice to the employer is not on claimant.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 129 Colo. 287, 269 P.2d 696 (1954); *Indus. Comm'n v. Newton Lumber & Mfg.*, 135 Colo. 594, 314 P.2d 297 (1957).

**Finding of reasonable excuse will stand where prejudice is not contended.** Where it is not contended that the late filing of a claim resulted in any prejudice to the rights of the employer, and where the industrial commission has wide discretion in determining whether reasonable excuse exists for failure to file the claim within a year, and the court cannot say as matter of law that the commission has abused its discretion in permitting late filing of the claim, the finding that reasonable excuse existed will be sustained. *State Comp. Ins. Fund v. Stampfel*, 153 Colo. 448, 386 P.2d 582 (1963).

**And the employer's rights are not prejudiced by the late filing of the claim where the employer knows of the accident, when it occurred, who the medical attendants of claimant were, where he was hospitalized, when admitted and when discharged from the hospital, as disclosed by the employer's report.** *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594, 314 P.2d 297 (1957).

**However, the receipt of initial medical reports does not support a ruling of nonprejudice** where the employer admits it had notice of the accident, and that there was some treatment afforded and paid for, for notice of the accident is not equivalent to notice of claim for compensable injury. The initial reports, far from being notice to the employer, indicated that there was no claim for compensation. *City & County of Denver v. Bush*, 166 Colo. 76, 441 P.2d 666 (1968).

**Employer prejudiced by claimant's failure to file within statutory period because not afforded opportunity to examine and treat injuries.** *Armour & Co. v. Indus. Comm'n*, 149

Colo. 251, 368 P.2d 798 (1962); City & County of Denver v. Bush, 166 Colo. 76, 441 P.2d 666 (1968).

**8-43-104. Electronic filings - rules.** (1) The rejection for technical errors by the division of any document, form, or notice that is filed electronically shall not affect the validity of the notice to the claimant or any other party.

(2) The director may promulgate rules concerning electronic filing of documents, forms, or notices in accordance with article 4 of title 24, C.R.S. Such rules shall be consistent with any policies, standards, and guidelines set forth by the office of information technology, created in section 24-37.5-103, C.R.S.

**Source:** L. 2003: Entire section added, p. 837, § 1, effective August 6. L. 2007: (2) amended, p. 910, § 1, effective May 17.

## PART 2

### SETTLEMENT AND HEARING PROCEDURES

#### **8-43-201. Disputes arising under “Workers’ Compensation Act of Colorado”.**

(1) The director and administrative law judges employed by the office of administrative courts in the department of personnel shall have original jurisdiction to hear and decide all matters arising under articles 40 to 47 of this title; except that the following principles shall apply: A claimant in a workers’ compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers’ compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers’ compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

(2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers’ compensation claims, regardless of the date the claim was filed.

**Source:** L. 90: Entire article R&RE, p. 501, § 1, effective July 1. L. 91: Entire section amended, p. 1315, § 22, effective July 1. L. 95: Entire section amended, p. 635, § 13, effective July 1. L. 2005: Entire section amended, p. 854, § 11, effective June 1. L. 2009: Entire section amended, (SB 09-168), ch. 184, p. 807, § 3, effective August 5. L. 2010: Entire section amended, (SB 10-163), ch. 66, p. 232, § 3, effective March 31.

**Editor’s note:** This section is similar to former § 8-53-101 as it existed prior to 1990.

**Cross references:** For judicial review of findings by the director, see § 8-1-130.

## ANNOTATION

**Law reviews.** For article on “Colorado Practice in Workmen’s Compensation”, see 31 Rocky Mt. L. Rev. 500 (1959).

**Annotator’s note.** (1) Since § 8-43-201 is similar to § 8-53-101 as it existed prior to the 1990 repeal and reenactment of the “Workers’ Compensation Act of Colorado”, articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment

which required the submission of disputes concerning workmen’s compensation to the division of labor instead of the industrial commission.

**Constitutionality.** The general assembly’s grant of limited authority in this section to administrative law judges and the industrial claim appeals office over the area of workers’ compensation matters does not create a substantial threat to the separation of powers doctrine under article III of the Colorado Constitution, nor does it violate the requirement that district courts have original jurisdiction in civil cases as man-



dated in article VI, § 9(1), of the Colorado Constitution. *Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430 (Colo. App. 2003); *Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177 (Colo. App. 2009).

The establishment of original jurisdiction with administrative law judges by this section does not violate the constitutional conferment of jurisdiction on district courts, as the parties in workers' compensation proceedings have expressly surrendered common law rights, remedies, and proceedings in exchange for the benefits of the act. *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177 (Colo. App. 2009).

**Industrial commission shall dispose of issues regarding compensation claims.** One of the fundamental aims in adopting the workmen's compensation act was that of substituting for any and all previously existing remedies the special procedure supplied by the act. Anything that tends to complicate the issues arising out of claims for compensation or to take the disposition thereof away from the commission must be firmly discouraged. *Roper v. Indus. Comm'n*, 93 Colo. 250, 25 P.2d 725 (1933).

**For the industrial commission is the only body or agency authorized to find the facts determinative** of whether both the employer and employee are subject to the act. *Miller v. Denver Post, Inc.* 137 Colo. 61, 322 P.2d 661 (1958).

**Hence, a hearing officer has authority** to determine whether the conditions of coverage under a policy issued by the fund are met. Once the existence of a valid insurance contract has been established, the burden is upon the insurer

to establish that the policy has lapsed. The allocation of the burden of proof is a substantial right of the parties, and it is reversible error if the burden is allocated improperly. *Butkovich v. Indus. Comm'n*, 690 P.2d 257 (Colo. App. 1984).

**Since a bad faith tort claim falls outside of those "matters arising under" the act**, this provision cannot place jurisdiction over the claim within the division of labor. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**Despite the division's original jurisdiction to determine workers' compensation issues, a trial court with jurisdiction over a personal injury tort claim also has jurisdiction to apportion settlement proceeds** between loss of consortium, economic losses, and non-economic losses. *Colo. Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156 (Colo. 2000).

**The failure of the state compensation insurance fund to specify the time of effective cancellation of coverage** results in the policy coverage being in effect until midnight of the date of cancellation. *State Comp. Ins. Fund v. Bldg. Sys.*, 713 P.2d 940 (Colo. App. 1985).

**Under this section, the director has the authority to enter an order regarding a claimant's benefits** even though the claimant's case is in the process of being determined by an administrative law judge. *Cornerstone Partners v. Indus. Claim Appeals Office*, 830 P.2d 1148 (Colo. App. 1992).

**The director's authority to act under this section is not limited by § 8-43-208.** *Cornerstone Partners v. Indus. Claim Appeals Office*, 830 P.2d 1148 (Colo. App. 1992).

**Applied in** *Cornerstone v. Indus. Claim App. Office*, 830 P.2d 1148 (Colo. App. 1992).

**8-43-202. Director may refer taking of evidence in cases to appropriate officials of other states.** The director, after notice to the parties in interest, may refer the taking of any evidence to any commission, court, or board administering in another state the compensation laws thereof, and such commission, court, or board of such other state, after notifying the parties in interest of the time and place of holding such hearing, shall hold hearings and take such evidence in the same manner and by the officers as authorized by the laws of such state, and all such proceedings shall be certified and return thereof made as prescribed by the director.

**Source:** L. 90: Entire article R&RE, p. 501, § 1, effective July 1. L. 91: Entire section amended, p. 1316, § 23, effective July 1. L. 94: Entire section amended, p. 1874, § 2, effective June 1.

**Editor's note:** This section is similar to former § 8-53-104 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Original trier of fact.** Where no petition for review of a referee's order is filed, the industrial

commission (now director) may enter an order that additional evidence be taken upon application of the claimant, and the commission (now director) becomes the trier of the facts, and may enter an award without the recommendation or

findings of a referee. There can be no doubt about the right to dispose of a claim in this manner, for there is nothing in the statute which deprives the commission (now director) of the

power to function as an original trier of the facts regarding any claim. *Pittman Motors, Inc. v. Indus. Comm'n*, 156 Colo. 218, 399 P.2d 784 (1964).

**8-43-203. Notice concerning liability - notice to claimants - notice of rights and claims process - rules.** (1) (a) The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee or, if deceased, the decedent's dependents within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for the purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier. The employer or the employer's insurance carrier may notify the division electronically. Unless exempted by the director pursuant to rule because of a small number of filings or a showing of financial hardship, beginning July 1, 2006, all notices of contest shall be filed electronically. The rejection of an electronically filed notice by the division for a technical error shall not affect the validity of the notice to the claimant. If the insurance carrier or self-insured employer denies liability for the claim, the claimant may request an expedited hearing on the issue of compensability if the application therefor is filed within forty-five days after the date of mailing of the notice of contest. The director shall set any such expedited matter for hearing within forty days after the date of the application, when the issue is liability for the disease or injury. The time schedule for such an expedited hearing is subject to the extensions set forth in section 8-43-209. If a claimant elects not to request an expedited hearing pursuant to this subsection (1), the time schedule for hearing the matter shall be as set forth in section 8-43-209.

(b) The written notice given pursuant to this subsection (1) shall include a specific reference to the claimant's obligations under section 8-42-113.5.

(1.5) (Deleted by amendment, L. 92, p. 1825, § 4, effective April 29, 1992.)

(2) (a) If such notice is not filed as provided in subsection (1) of this section, the employer or, if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify; except that the employer or, if insured, the employer's insurance carrier shall not be liable for more than the aggregate amount of three hundred sixty-five days' compensation for failure to timely admit or deny liability. Fifty percent of any penalty paid pursuant to this subsection (2) shall be paid to the subsequent injury fund, created in section 8-46-101, and fifty percent to the claimant.

(b) (I) If the employer or, if insured, the employer's insurance carrier admits liability, such notice shall specify the amount of compensation to be paid, to whom compensation will be paid, the period for which compensation will be paid, and the disability for which compensation will be paid, and payment thereon shall be made immediately.

(II) (A) An admission of liability for final payment of compensation shall include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical examination is requested pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason. Any issue for which a hearing or an application for a hearing is pending at the time that the final admission of liability is filed shall proceed to the hearing without the need for the applicant to refile an application for hearing on the issue. This information shall also be included in the admission of liability for final payment of compensation. The respondents shall have thirty days after the date of mailing of the report from the division's independent medical examiner to file a revised final admission or to file an application for hearing. The



claimant shall have thirty days after the date respondents file the revised final admission or application for hearing to file an application for hearing, or a response to the respondents' application for hearing, as applicable, on any disputed issues that are ripe for hearing. The revised final admission shall contain the statement required by this subparagraph (II), and the provisions relating to contesting the revised final admission shall apply. When the final admission is predicated upon medical reports, such reports shall accompany the final admission.

(B) The amendments made to sub-subparagraph (A) of this subparagraph (II) by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

(c) No penalty may be assessed under this subsection (2) for failure to timely admit or deny liability if a request for such penalty is filed more than seven years after the alleged violation. The division shall retain original claim records filed with the division for at least seven years after closure of the case. Seven years after a case is closed, the records may only be used for reopening a settlement on the grounds of fraud or mutual mistake of material fact.

(d) Once a case is closed pursuant to this subsection (2), the issues closed may only be reopened pursuant to section 8-43-303. Upon proper showing in writing made within said times fixed therefor, the director may extend the time for filing such admission of liability or notice of contest, but not exceeding ten days at any one time. Hearings may be set to determine any matter, but, if any liability is admitted, payments shall continue according to admitted liability.

(3) In addition to any other notice required by this section, at the time that the employer or, if insured, the employer's insurance carrier provides the notice required by subsection (1) of this section, the employer or insurance carrier shall provide to the claimant a brochure written in easily understood language, in a form developed by the director after consultation with employers, insurance carriers, and representatives of injured workers, describing the claims process and informing the claimant of his or her rights. If the claimant has previously authorized the employer or, if insured, the employer's insurance carrier to communicate with the claimant through electronic transmission, the brochure may be sent to the claimant electronically. The brochure shall, at a minimum, contain the following information:

(a) Who the claimant may contact with questions concerning the claim, the claims process, and assistance with the claim, including:

- (I) The insurance carrier or employer;
- (II) The division and the web site for the division;
- (III) The office of administrative courts and the web site for the office; and
- (IV) An attorney hired at the expense of the claimant;

(b) The claimant's right to receive medical care for work-related injuries or occupational diseases paid for by the employer or the employer's insurance carrier including:

(I) That most claimants have a right to choose from a list of at least two different doctors;

(II) That most claimants have a right to change doctors one time within ninety days after the injury and all claimants have the right to request a change of doctor at other times under certain other circumstances;

(III) The claimant's doctor's right to refer the claimant to other medical providers and specialists to provide the reasonable and necessary medical care that the claimant's work-related injuries or illness require;

(IV) The claimant's right to discuss with his or her doctor who should be present during a claimant's medical appointment, and the right to refuse to have a nurse case manager employed on the claimant's claim present at the claimant's medical appointment;

(V) The claimant's right to see and have copies of all of the claimant's medical records related to the medical care the claimant received for his or her work-related injury or illness;

(VI) The claimant's right to seek medical care and medical opinions about the claimant's work-related injury at the claimant's own expense;

(VII) The claimant's right to a medical examination by a doctor chosen by the claimant or by the division at the claimant's expense;

(VIII) The claimant's right to a permanent impairment evaluation after the claimant's treating doctors determine that the claimant has reached maximum medical improvement; and

(IX) The claimant's right to be informed whether medical care after maximum medical improvement will be provided and to receive reasonable continued medical care if it is necessary to maintain maximum medical improvement;

(c) A description of the claimant's right to receive benefit payments, including the claimant's right to receive:

(I) Wage replacement payments in the form of temporary total disability payments or temporary partial disability payments;

(II) Permanent impairment benefits if the claimant is left with a permanent impairment as a result of a work-related injury or disease;

(III) Disfigurement payments for permanent scarring or disfigurement caused by the claimant's work-related injury or surgery required because of the claimant's work-related injury; and

(IV) Mileage expenses for travel to and from work-related medical care and to and from pharmacies to obtain medical prescriptions for work-related medical care;

(d) A description of how the claims process works, including:

(I) The claimant's right to file a claim for workers' compensation with the division within two years after the date of the claimant's injury or occupational disease;

(II) The claimant's right to receive a general admission of liability or notice of contest once the claim has been properly reported to the division;

(III) The claimant's right to verify that the claimant's average weekly wage payments for temporary total disability have been properly calculated by the claimant's employer or the employer's insurance carrier;

(IV) The claimant's right to prehearings and hearings on disputed issues;

(V) The claimant's right to present evidence, testify, introduce medical and other records, present witnesses, and make arguments at any hearing;

(VI) The claimant's right to object to and request a hearing on any final admission of liability within thirty days after the mailing of the admission in order to retain certain rights;

(VII) The claimant's right to challenge a finding of an impairment rating or maximum medical improvement in a final admission of liability within thirty days after the mailing of the admission in order to retain certain rights;

(VIII) The claimant's right to pursue penalties for violations of the law including late payment of benefits or improper refusal to pay benefits;

(IX) The claimant's right, subject to certain requirements, to reopen a claim within six years after the date of the injury or illness or within two years after the date of the last receipt of medical or wage benefits; and

(X) A description of other rights conferred upon a claimant pursuant to law or rule.

**Source:** **L. 90:** Entire article R&RE, p. 501, § 1, effective July 1. **L. 91:** (1.5) added, p. 1316, § 24, effective July 1. **L. 92:** (1) and (1.5) amended, p. 1825, § 4, effective April 29. **L. 96:** (2) amended, p. 830, § 1, effective July 1. **L. 97:** (1) amended, p. 113, § 3, effective July 1. **L. 98:** (2)(b) amended, p. 1431, § 3, effective August 5. **L. 2001:** (2)(b)(II) amended, p. 49, § 1, effective March 11. **L. 2003:** (2)(b)(II) amended, p. 1956, § 1, effective May 22; (1)(a) amended, p. 837, § 2, effective August 6. **L. 2005:** (1)(a) amended, p. 200, § 4, effective July 1. **L. 2009:** (2)(b)(II) amended, (SB 09-168), ch. 184, p. 807, § 4, effective August 5. **L. 2010:** (2)(b)(II) amended, (SB 10-163), ch. 66, p. 232, § 4, effective March 31; (3) added, (HB 10-1038), ch. 275, p. 1258, § 1, effective May 26.

**Editor's note:** This section is similar to former § 8-53-102 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 113 (Oct. 2003).

**Annotator's note.** Since § 8-43-203 is similar to § 8-53-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Com-



pensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Section held to be constitutional.** Eachus v. Cooper, 738 P.2d 383 (Colo. App. 1986).

**Notice requirement.** Notification by claimant that he was asserting his then current disability to be job-related was sufficient to trigger the notice requirement of this section. Gallegos v. Green Const. Co., 754 P.2d 1177 (Colo. App. 1987).

**Subsection (2) directs that payments cannot be abrogated unilaterally.** Vargo v. Indus. Comm'n, 626 P.2d 1164 (Colo. App. 1981); Snyder v. Indus. Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).

**Payments begun as result of admitted liability must continue until order** is entered pursuant to a hearing. Vargo v. Indus. Comm'n, 626 P.2d 1164 (Colo. App. 1981); Snyder v. Indus. Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).

**Admission of liability for "closed" period not permitted.** The insurer may not unilaterally terminate benefits without complying with § 8-42-105 (3) and other applicable statutes and rules governing the termination of benefits. Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Office, 18 P.3d 790 (Colo. App. 2000).

**Retroactive withdrawals of admission of liability not permitted.** There is no provision in subsection (2), or elsewhere in this section, which permits retroactive withdrawals of an admission of liability. Vargo v. Indus. Comm'n, 626 P.2d 1164 (Colo. App. 1981); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).

**Admission based upon material false information declared void ab initio.** Where the evidence supported the referee's finding that the claimant supplied materially false information upon which his employer and its insurer relied in filing an admission of liability, the referee was justified in declaring the admission void ab initio. Vargo v. Indus. Comm'n, 626 P.2d 1164 (Colo. App. 1981); Krause v. Aircraft Sign Co., 710 P.2d 480 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).

**Lack of causal connection may be asserted at any time.** In a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. Snyder v. Indus. Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).

An employer is precluded from challenging the IME physician's finding that claimant was not at MMI, including the IME physician's find-

ing regarding the cause of claimant's symptoms because employer failed either to admit or contest liability within 30 days of the IME physician's report as required by subsection (2)(b)(II). Leprino Foods Co. v. Indus. Claim Appeals Office, 134 P.3d 475 (Colo. App. 2005).

**Denial of withdrawal of admission of liability.** Where an admission of liability is made by an insurance carrier and compensation paid thereunder for more than two years, there is no abuse of discretion in denying the withdrawal of such admission, where all the facts pertinent to the case were known to the carrier for more than two years, and there is no suggestion of fraud. Indus. Comm'n v. Johnson Pontiac, Inc., 140 Colo. 160, 344 P.2d 186 (1959) (decided under former § 8-53-103).

**Release obtained as a result of a mutual mistake** of material fact may be set aside in a workmen's compensation case. Loper v. Indus. Comm'n, 648 P.2d 1092 (Colo. App. 1982).

**Successful claim requirement for recovery of penalties** under subsection (2) is met by establishing the employer's liability, notwithstanding the fact that no additional compensation was payable as a result of that liability. Smith v. Myron Stratton Home, 676 P.2d 1196 (Colo. 1984); McManus v. Indus. Claim Appeals Office, 81 P.3d 1074 (Colo. App. 2003).

**Claimant's receipt of benefits** constitutes substantial compliance with the notice requirements of this section. Pub. Serv. Co. of Colo. v. Boatwright, 749 P.2d 456 (Colo. App. 1987); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).

**A final admission must be mailed to the claimant's home address** unless he or she has designated another location. Bowlen v. Munford, 921 P.2d 59 (Colo. App. 1996).

**Claimant's receipt of benefit checks that were not mailed to his home address did not provide him with constructive receipt of the final admissions.** Bowlen v. Munford, 921 P.2d 59 (Colo. App. 1996).

**Contest of admission of liability.** If an admission of liability is contested by either party, the determination of the matter placed in issue is subject to determination by the administrative law judge at the adversary hearing. The admission is binding only until the controverted issue is determined after the hearing. HIJ Mgmt. Group, Inc. v. Kim, 804 P.2d 250 (Colo. App. 1990).

**Authority to modify erroneous admission.** The administrative law judge's order providing for retroactive modification of employer's admission held incorrect. Since error in admission was caused by employer's own mistake in calculation of employee's average weekly wage, the order should apply to payments after the date of the order. HIJ Mgmt. Group, Inc. v. Kim, 804 P.2d 250 (Colo. App. 1990).

**Employer's knowledge of employee's injury should not be imparted to insurer for the purpose of the penalty imposed by this section** since it would be impossible for the insurer, without actual notice of the injury, to admit or deny liability within 25 days as required by this section. *State Comp. Ins. Fund v. Wilson*, 736 P.2d 33 (Colo. 1987).

An employer's knowledge of the employee's injury may not be imputed to the insurance carrier. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

**When employer admits liability, it is obligated to pay accordingly.** *Williams v. Indus. Comm'n*, 723 P.2d 749 (Colo. App. 1986); *Cibola Constr. v. Indus. Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998).

**Employer required to pay claimant the full amount specified in its final admission of liability (FAL)** where the employer failed to expressly notify the claimant in the final admission of a credit for benefits previously paid to claimant because an uncontested final admission dispositively settles the amount of an employer's liability. *Cibola Constr. v. Indus. Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998).

**Uncontested admission of liability became a "final" award**, which could not be reopened except pursuant to statute, despite parties' assertion that fraud rendered award void ab initio. *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995).

Issue of PTD, therefore, was closed by FAL based upon division-sponsored independent medical examination that agreed with a prior determination that placed claimant at maximum medical improvement (MMI) and when claimant failed to endorse the issue of PTD benefits within 30 days. *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006).

**Although issues raised in an FAL automatically close if not contested within 30 days** under subsection (2)(b)(II), where a second FAL is issued before that time expires, the first admission has been superseded in its entirety. Under these circumstances, finality does not attach to the initial admission, and the case remains open during the 60-day period following the second admission. *Leeway v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007).

**Final admission of liability for permanent partial disability (PPD) benefits implicitly denies admission of liability for permanent total disability (PTD) benefits.** *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006).

**To contest an aspect of an FAL, a claimant must state in the application for the hearing the benefit to which he or she is entitled.** The claimant may not keep his or her case from being closed by filing a general objection to the

FAL. *Perego v. Indus. Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004).

**Neither subsection (2)(b)(II), nor any other provision in the Workers' Compensation Act, states or implies that a claimant may file an objection to an FAL without identifying a contested issue.** Likewise, no provision states or implies that issues admitted in an FAL may remain open indefinitely until the claimant identifies a disputed issue and requests a hearing. *Perego v. Indus. Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004).

**Neither state nor federal guarantees of equal protection are offended by the fact that a person whose claim has been closed under subsection (2)(b) must follow the reopening provisions of § 8-43-303** to reopen his or her workers' compensation claim. *Perego v. Indus. Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004).

**The language "as to the issues admitted" in subsection (2)(b)(II) does not mean only those "issues" on which an employer agrees to pay benefits.** Instead, the phrase should be interpreted as referring to issues on which the employer affirmatively takes a position, either by agreeing to pay benefits or by denying liability to pay benefits. Therefore, because permanent partial disability benefits and permanent total disability benefits both compensate for a claimant's permanent loss of earning capacity, an admission for permanent partial benefits constituted an implicit denial of liability for permanent total disability benefits. *Dyrkopp v. Indus. Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001).

**An admission or denial of liability, though not in writing, is sufficient to terminate the running of the penalty period.** *Harrison v. Indus. Comm'n*, 716 P.2d 477 (Colo. App. 1986); *Eastman Kodak Co. v. Indus. Comm'n*, 725 P.2d 85 (Colo. App. 1986).

An admission of liability filed with the division of labor, with a copy to the claimant, is sufficient to terminate the penalty period; however, the penalty period is not terminated upon commencement of compensation payments absent such a filing because of the prejudice a claimant could suffer as a result of such an omission. *Dorris v. Gardner Zemke Co.*, 765 P.2d 602 (Colo. App. 1988).

**Section has been uniformly interpreted as requiring payment of a penalty in addition to payment of compensation.** Therefore if an employer has failed timely to admit or deny liability and the claimant is successful in his claim for compensation, this section mandates assessment of a penalty in addition to requiring payment of compensation. *Eastman Kodak Co. v. Indus. Comm'n*, 725 P.2d 85 (Colo. App. 1986).

**Employee is not entitled to penalty for failure of employer to timely admit or deny liability** if employee missed no time from work



and only medical benefits are awarded. *Racon Const. v. Indus. Claim Appeals Office*, 775 P.2d 61 (Colo. App. 1989).

**No penalty is provided in this section** for failure of employer to promptly report an injury to its insurer. *Campion v. Barta Builders*, 780 P.2d 23 (Colo. App. 1989); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

Because the general assembly has amended this section several times, but has not changed the wording affecting the liability of an insured employer, the holding that an employer is not liable for failing to report an injury to its insurer remains valid. *U.S. Fidelity & Guar., Inc. v. Kourlis*, 868 P.2d 1158 (Colo. App. 1994).

**For purposes of triggering a penalty assessment**, a claim for compensation is successful at the time an employer files an admission of liability; a claimant need not establish an employer's liability through litigation on the merits of the claim. *Dorris v. Gardner Zemke Co.*, 765 P.2d 602 (Colo. App. 1988).

**Duty of carrier to admit or deny liability was not triggered by requests from employer for reimbursement of claimant's medical expenses under employer's wage continuation plan.** There is no basis for holding that an employer's request for reimbursement is equivalent to actual notification or knowledge of a lost time work injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

**It is the duty of the trier of fact to resolve conflicting evidence**, and court is bound by conclusions on review if such conclusions are supported by evidence. *Eachus v. Cooper*, 738 P.2d 383 (Colo. App. 1986).

**Section 2-4-108 (1) covers computation of time periods under this section.** Thus, the date of the claimant's injury should be excluded from the computation of the three-day waiting period. *Ralston Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991).

**Ruling of administrative law judge concluding that claimant had failed to establish the statutory requisites under subsection (2)** was not contested by claimant and, thus, was binding on appeal. *Rocky Mountain Gen. v. Simon*, 827 P.2d 629 (Colo. App. 1992).

**The issue of a penalty provided by subsection (2) was not an issue admitted in a final**

**admission.** Thus, the case was not automatically closed within the meaning of subsection (2). The ALJ retained jurisdiction to impose a penalty, and the claimant was not required to contest an FAL pursuant to § 8-43-303. *Dalco Indus., Inc. v. Garcia*, 867 P.2d 156 (Colo. App. 1993).

**The phrase "as the case may be" included in subsection (2) is not ambiguous**, but is the same as saying, "depending on the circumstances". *U.S. Fidelity & Guar., Inc. v. Kourlis*, 868 P.2d 1158 (Colo. App. 1994).

**Employer's FAL for permanent total disability without reservation of the issue of the subsequent injury fund contribution** was an admission that employer was solely liable. *Safeway v. Indus. Claim Appeals Office*, 968 P.2d 162 (Colo. App. 1998).

**Once a claimant has successfully challenged a finding of MMI through the division independent medical examination (DIME) process, that process remains open**, such that when the authorized treating physician (ATP) makes a second finding of MMI, the employer or insurer may not file an FAL to close the case until they return the claimant to the IME for a follow-up examination and determination of MMI. *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006); *Sanco Indus. v. Stefanski*, 147 P.3d 5 (Colo. 2006).

**A court's jurisdiction consists of two elements**, jurisdiction over the parties and jurisdiction over the subject matter. The employer argued that "jurisdiction was lost" when claimant failed to respond to the first FAL within 30 days as required by subsection (2)(b)(II). In making this argument, employer conflates the issues of jurisdiction and failure to comply with a statutory provision. The ALJ and the panel had subject matter jurisdiction to consider claimant's MMI and PPD issues regarding compensation, so the subject matter jurisdiction of the ALJ and the panel are not implicated. *Leeway v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007).

**Applied in** *Riley v. Indus. Comm'n*, 628 P.2d 147 (Colo. App. 1981); *Indus. Comm'n v. Riley*, 653 P.2d 723 (Colo. 1982); *Melnick v. Indus. Comm'n*, 656 P.2d 1318 (Colo. App. 1982); *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984); *Johnson v. McDonald*, 697 P.2d 810 (Colo. App. 1985).

**8-43-204. Settlements - rules. (1)** An injured employee may settle all or part of any claim for compensation, benefits, penalties, or interest. If such settlement provides by its terms that the employee's claim or award shall not be reopened, such settlement shall not be subject to being reopened under any provisions of articles 40 to 47 of this title other than on the ground of fraud or mutual mistake of material fact.

(2) Such a settlement shall be in writing and shall be signed by a representative of the employer or insurer and signed and sworn to by the injured employee. For claims that have a settlement amount of seventy-five thousand dollars or more, a written notice of the settlement agreement shall be provided to the employer.

(3) The settlement shall be reviewed in person with the injured employee and approved

in writing by an administrative law judge or the director of the division prior to the finalization of such settlement. The settlement shall be filed with the division as a part of the injured employee's permanent record.

(4) If an employee owes child support and a garnishment has been filed pursuant to section 13-54.5-101, C.R.S., or the state child support enforcement agency has filed a notice of administrative lien and attachment pursuant to section 26-13-122, C.R.S., with the insurer or self-insured employer, all proceeds of any award, lump sum settlement, and the indemnity portion of any structured settlement shall be subject to said garnishment or administrative lien and attachment. Proceeds up to the amount of the garnishment or administrative lien and attachment shall be paid as directed on the notice to the obligee or to the state child support enforcement agency on behalf of the obligee to whom support is owed.

(5) If an employee owes a debt for which a writ is issued as a result of a judgment for fraudulently obtained public assistance, fraudulently obtained overpayments of public assistance, or excess public assistance paid for which the recipient was ineligible and a garnishment has been filed pursuant to section 13-54-104 or 13-54.5-101, C.R.S., with the insurer or self-insured employer, all proceeds of any award, lump sum settlement, and the indemnity portion of any structured settlement shall be subject to the garnishment. Proceeds up to the amount of the garnishment shall be paid as directed by the county department of social services responsible for administering the state public assistance programs.

(6) To aid in settlement, the director shall review mortality tables from the United States government and private industry and issue rules establishing a single life expectancy table on July 1 in every even-numbered year, commencing July 1, 2010. The director may adopt current mortality tables used by medicare. Nothing in this subsection (6) shall be construed to limit the use of rated ages.

(7) Any lump sum payable as a full or partial settlement shall be paid to the claimant or the claimant's attorney within fifteen calendar days after the date the executed settlement order is received by the carrier or the noninsured or self-insured employer.

**Source:** L. 90: Entire article R&RE, p. 502, § 1, effective July 1. L. 98: Entire section amended, p. 530, § 1, effective April 30. L. 2001: Entire section amended, p. 720, § 2, effective May 31. L. 2006: (5) added, p. 949, § 7, effective August 7. L. 2010: (6) and (7) added, (SB 10-163), ch. 66, p. 233, § 5, effective March 31.

**Editor's note:** (1) This section is similar to former § 8-53-105 as it existed prior to 1990.

(2) Section 9 of chapter 208, Session Laws of Colorado 2006, provides that the act enacting subsection (5) applies to judgments entered prior to, on, or after August 7, 2006.

**Cross references:** For the legislative intent contained in the 2006 act enacting subsection (5), see section 8(2) of chapter 208, Session Laws of Colorado 2006.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Interest of state in recovery of just compensation induced provision requiring approval of settlements.** It is the fact that the state has an interest in the recovery of just compensation by injured employees to the end that they do not, because of their injuries, become public charges, which induced the lawmakers to require the approval of settlements as a condition of their becoming binding on the parties to them. *Indus. Comm'n v. London Guarantee & Accident Co.* 66 Colo. 575, 185 P. 344 (1919).

**A settlement made on stipulation in court is no more effective without such approval** than is any other settlement. *Indus. Comm'n v. London Guarantee & Accident Co.*, 66 Colo. 575, 185 P. 344 (1919).

**Settlement does not discharge claim against physician for malpractice.** Settlement under the workmen's compensation act for accidental injuries incurred by an employee does not operate to release or discharge a claim for damages for malpractice which he may have against the physician who treated his injuries. *Froid v. Knowles*, 95 Colo. 223, 36 P.2d 156 (1934).



**A claim may be closed upon payment of a final settlement.** In re Brunetti v. Indus. Comm'n, 670 P.2d 1246 (Colo. App. 1983).

**The division of labor's approving the employer's admission of liability** "subject to any further liability as provided by law" did not constitute a termination of claimant's right to payment for medical treatments by the employer's doctor. To the contrary, specific provision is made in the act for obtaining final approval by the commission of the settlement of a claim. Granite Constr. Co. v. Leonard, 40 Colo. App. 20, 568 P.2d 500 (1977).

**Effect of settlements on reopening.** In view of prior cases, the beneficial purposes of the act and the language of §§ 8-51-108 and 8-53-113, the conclusion is inescapable that the general assembly has given the director authority to reopen a case within requisite time limitations regardless of whether there was a settlement. Padilla v. Indus. Comm'n, 696 P.2d 273 (Colo. 1985) (decided prior to 1985 amendment).

Worker's compensation claim may be reopened despite claimant's stipulation waiving right to reopen case because the supreme court decision in Padilla v. Indus. Comm'n (696 P.2d 273 (Colo. 1985)) allowing such reopenings should be given retroactive effect. Loffland Bros. v. Indus. Claim Appeals Office, 754 P.2d 768 (Colo. App. 1988), aff'd, 770 P.2d 1221 (Colo. 1989).

**Document signed by claimant at request of claims adjuster in which claimant rejected his right to workers' compensation benefits was ineffective as a waiver** where document was in the nature of a settlement and was not approved as required by this section. Oxford Chems., Inc. v. Richardson, 782 P.2d 843 (Colo. App. 1989).

**Release signed by injured worker was ineffective in barring her pursuit of workers' compensation claims because it was not approved by the division.** Cook v. McLister, 820 P.2d 1167 (Colo. App. 1991).

**Administrative law judge properly found settlement was voidable** on ground claimant was mentally incompetent at the time he entered into the settlement. Although the settlement of a claim may be reopened only on grounds of fraud or mutual mistake of fact, an administrative law judge is empowered to determine the competency of a claimant entering into such a settle-

ment agreement, and when no such capacity exists because of mental incompetency, the contract is voidable by the person lacking capacity to contract. Powderhorn Coal Co. v. Weaver, 835 P.2d 616 (Colo. App. 1992).

**A mutual mistake is one which is reciprocal and common to both parties to an agreement,** and both parties must share the same misconception as to the terms and conditions of the agreement. Cary v. Chevron U.S.A., Inc., 867 P.2d 117 (Colo. App. 1993).

**A prehearing administrative law judge has jurisdiction to enter an order approving a settlement agreement in a workers' compensation case.** Indus. Claim Appeals Office v. Orth, 965 P.2d 1246 (Colo. 1998).

**The orders of a prehearing administrative law judge that relate to prehearing conferences are not final** for purposes of appeal. Indus. Claim Appeals Office v. Orth, 965 P.2d 1246 (Colo. 1998).

**However, the orders of a prehearing administrative law judge approving a settlement are final** for purposes of appeal. Indus. Claim Appeals Office v. Orth, 965 P.2d 1246 (Colo. 1998).

**Subsection (4) applies to a claimant's settlement for an injury that occurred prior to the enactment of subsection (4), thereby subjecting the settlement to a lien filed by the division of child support enforcement for unpaid child support.** While the state constitution prohibits laws that are retrospective in operation, subsection (4) can be applied retroactively because it created a procedural enforcement remedy that does not impair the claimant's substantive rights. Div. of Child Support Enforcement v. Indus. Claim Appeals Office, 109 P.3d 1042 (Colo. App. 2004).

**The statutory amendment creating subsection (4) merely created a new enforcement remedy by allowing a portion of a claimant's settlement to be sent directly to the child support registry to satisfy a preexisting child support obligation.** Claimant's right to the lump-sum settlement vested after subsection (4) was enacted and is, therefore, subject to the lien filed by the division of child support enforcement. Div. of Child Support Enforcement v. Indus. Claim Appeals Office, 109 P.3d 1042 (Colo. App. 2004).

**8-43-205. Mediation.** (1) Any party involved in a claim arising under articles 40 to 47 of this title may request mediation services by filing a request for mediation services with the division. However, mediation shall be entirely voluntary and shall not be conducted without the consent of all parties to the claim. If a request for mediation services is made after an application for a hearing has been filed, the administrative law judge hearing the dispute shall approve, on motion of the parties, the submission of the dispute to mediation prior to hearing the matter. An application for mediation services shall be filed on a form prescribed by the director. Upon receiving the application for mediation services, the director shall cause a mediation conference to occur within thirty days thereafter. At a mediation conference, the claimant may be represented by the claimant, counsel, or any

other agent of the claimant's choice. Mediators need not be attorneys.

(2) Mediation proceedings conducted pursuant to this section shall be considered to be settlement negotiations and are confidential. No admission, representation, or statement made in the course of such mediation proceedings that is not otherwise subject to discovery or otherwise obtainable under the procedures established in articles 40 to 47 of this title shall be admissible as evidence or subject to discovery under said articles. No mediator who participates in mediation proceedings conducted pursuant to this section shall be compelled or permitted to testify about any matter discussed or revealed during such proceedings in any other proceeding under articles 40 to 47 of this title.

(3) The division shall develop a program to implement the provisions of this section. Such program shall be a simple, nonadversarial method for the mediation of disputes arising under articles 40 to 47 of this title. Such program shall provide for the use of neutral mediators and the conduct of proceedings in an informal setting. The director shall adopt rules and regulations to implement such program.

**Source:** **L. 90:** Entire article R&RE, p. 502, § 1, effective July 1. **L. 91:** (1) amended, p. 1316, § 25, effective July 1. **L. 94:** (1) amended, p. 1874, § 3, effective June 1.

**Editor's note:** This section is similar to former § 8-53-105.5 as it existed prior to 1990.

#### ANNOTATION

**In workers' compensation proceedings, "authorization" refers to the treating physician's status** as the health care provider legally authorized to treat an injured worker rather than

the particular medical treatment or procedure recommended by the authorized treating physician. *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

**8-43-206. Settlement conference procedures.** (1) Any employee, insurer, or employer, if self-insured, involved in a dispute arising under articles 40 to 47 of this title may request settlement conference services from the director or the office of administrative courts in the department of personnel. However, such settlement procedures are optional and entirely voluntary, and no such procedures shall be conducted without the consent of both parties to the dispute.

(2) Settlement conferences shall be conducted by a settlement conference officer who may be a prehearing administrative law judge or an administrative law judge in the office of administrative courts in the department of personnel appointed pursuant to section 24-30-1003, C.R.S., and assigned to hear disputes arising under articles 40 to 47 of this title. The parties may agree on the selection of a settlement conference officer; except that such officer shall not be the administrative law judge who is regularly assigned to hear the employee's case. If the parties fail to agree on the selection of such officer, they may apply to the director or to the office of administrative courts for the designation of a settlement conference officer who shall not be the administrative law judge who is regularly assigned to hear the employee's case.

(3) Settlement conference proceedings conducted pursuant to this section shall be considered to be settlement negotiations and are confidential. No admission, representation, or statement made in the course of such settlement conference proceedings that is not otherwise subject to discovery or otherwise obtainable under the procedures established in articles 40 to 47 of this title shall be admissible as evidence or subject to discovery under said articles. No settlement conference officer who participates in settlement conference proceedings conducted pursuant to this section shall be compelled or permitted to testify about any matter discussed or revealed during such proceedings in any other proceeding under articles 40 to 47 of this title.

(4) The executive director of the department of personnel shall adopt rules and regulations to implement the provisions of this section. Such rules and regulations shall be consistent with the provisions of section 8-43-204.



(5) The director of the division of workers' compensation shall adopt rules and regulations to implement the provisions of this section. Such rules and regulations shall be consistent with the provisions of section 8-43-204.

**Source:** **L. 90:** Entire article R&RE, p. 503, § 1, effective July 1. **L. 94:** (1) and (2) amended and (5) added, p. 1875, § 4, effective June 1. **L. 95:** (1), (2), and (4) amended, p. 635, § 14, effective July 1. **L. 2005:** (1) and (2) amended, p. 854, § 12, effective June 1.

**Editor's note:** This section is similar to former § 8-53-105.6 as it existed prior to 1990.

**8-43-206.5. Right to binding arbitration for resolution of disputes under articles 40 to 47.** At any time prior to a hearing, the parties may agree to submit any dispute under articles 40 to 47 of this title to binding arbitration. Said arbitration shall be by an administrative law judge of the parties' choice or pursuant to arbitration procedures as provided by the Colorado rules of civil procedure. Any arbitration award pursuant to the provisions of this section shall be binding upon the parties, and no other procedure contained in this article shall be available to the parties for the further review of such award.

**Source:** **L. 91:** Entire section added, p. 1317, § 26, effective July 1. **L. 94:** Entire section amended, p. 1875, § 5, effective June 1.

**8-43-207. Hearings.** (1) Hearings shall be held to determine any controversy concerning any issue arising under articles 40 to 47 of this title. In connection with hearings, the director and administrative law judges are empowered to:

(a) In the name of the division, issue subpoenas for witnesses and documentary evidence which shall be served in the same manner as subpoenas in the district court;

(b) Administer oaths;

(c) Make evidentiary rulings;

(d) Limit or exclude cumulative or repetitive proof or examination;

(e) Upon written motion and for good cause shown, permit parties to engage in discovery; except that permission need not be sought if each party is represented by an attorney. The director or administrative law judge may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery.

(f) Upon written motion and for good cause shown, conduct prehearing conferences for the settlement or simplification of issues;

(g) Dispose of procedural requests upon written motion or on written briefs or oral arguments as determined appropriate;

(h) Control the course of the hearing and the conduct of persons in the hearing room;

(i) Upon written motion and for good cause shown, grant reasonable extensions of time for the taking of any action contained in this article;

(j) Upon good cause shown, adjourn any hearing to a later date for the taking of additional evidence;

(k) Issue orders;

(l) Appoint guardians ad litem, as appropriate, in matters involving dependents' claims, and assess the reasonable fees and costs, therefore, from one or more of the parties;

(m) Determine the competency of witnesses who testify in a workers' compensation hearing or proceeding and the competency of parties that have entered into settlement agreements pursuant to section 8-43-204. Such competency determinations shall only be for the purpose of the particular workers' compensation proceeding.

(n) Dismiss all issues in the case except as to resolved issues and except as to benefits already received, upon thirty days notice to all the parties, for failure to prosecute the case unless good cause is shown why such issues should not be dismissed. For purposes of this paragraph (n), it shall be deemed a failure to prosecute if there has been no activity by the parties in the case for a period of at least six months.

(o) Set aside all or any part of any fee for medical services rendered pursuant to articles 40 to 47 of this title if an administrative law judge determines after a hearing that, based upon a review of the medical necessity and appropriateness of care provided pursuant to said articles, any such fee is excessive or that the treatment rendered was not necessary or appropriate under the circumstances. If all or part of any fee for medical services is set aside pursuant to this paragraph (o), the provider of any such services shall not contract with, bill, or charge the claimant for such fees and shall not attempt in any way to collect any such charges from the claimant. No fee for medical services shall be set aside pursuant to this paragraph (o) if the treatment was authorized in writing by the insurer or employer.

(p) Impose the sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40 to 47 of this title;

(q) Require repayment of overpayments.

**Source:** **L. 90:** Entire article R&RE, p. 504, § 1, effective July 1. **L. 91:** (1)(e) and (1)(n) amended and (1)(o) and (1)(p) added, p. 1317, § 27, effective July 1. **L. 97:** (1)(q) added, p. 114, § 4, effective July 1. **L. 98:** (1)(e) amended, p. 147, § 1, effective April 2. **L. 2011:** (1)(e) amended, (SB 11-199), ch. 196, p. 759, § 2, effective May 23.

**Editor's note:** This section is similar to former § 8-53-103 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Powers of the Director and Hearing Officers.
- III. Evidence.

### I. GENERAL CONSIDERATION.

**Law reviews.** For note, "Use of Evidence in Hearings Before Colorado Administrative Agencies", see 29 Dicta 437 (1952). For note, "The Right to Cross-Examine Adverse Witnesses as a Part of Due Process in Hearings Before Colorado Agencies", see 31 Dicta 383 (1954). For article, "Medical Utilization Review Under Worker's Compensation", see 17 Colo. Law. 1995 (1988). For article, "An ALJ's View: The New, Unified Hearings in Worker's Compensation Cases", see 18 Colo. Law. 2327 (1989).

**Annotator's note.** Since § 8-43-207 is similar to § 8-53-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Jurisdictional challenge to hearing officer.** Additional hearing required where claimant alleged that hearing officer lacked jurisdiction to enter an order after the hearing officer had terminated his employment. *Welch v. Indus. Comm'n*, 722 P.2d 439 (Colo. App. 1986).

**Retrospective application** of section by administrative law judge (ALJ) in order to determine whether claimant was competent at the time he entered into the settlement agreement was proper because it effected a procedural rather than a substantive change. *Powderhorn*

*Coal Co. v. Weaver*, 835 P.2d 616 (Colo. App. 1992).

**The administrative and judicial review provisions of the Act are complete**, definitive, and organic, without the need of supplementation from other legislative acts or the procedural relief afforded by C.R.C.P. 16. *Gardner v. Friend*, 849 P.2d 817 (Colo. App. 1992).

**General extension-of-time provision in subsection (1)(i) does not overcome the jurisdictional time limits set forth elsewhere in the act.** *Speier v. Indus. Claim Appeals Office*, 181 P.3d 1173 (Colo. App. 2008).

**An aggrieved party to a medical utilization review proceeding may request an evidentiary hearing** under former § 8-53-103 if the order of the director of the division of labor terminates a medical benefit or if a party seeks to terminate medical benefits based on the review proceedings. *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-53-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

**If the issue in controversy involves the necessity and appropriateness of medical care, rather than industrial disability, the medical utilization committee reports and the director's order based thereon are admissible in hearings** under former § 8-53-103, subject to the hearing officer's evidentiary rulings. *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-53-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).



Party adversely affected by a medical utilization review proceeding can request that the matter be litigated *de novo* in a hearing under this section. *Donn v. Indus. Claim Appeals Office*, 865 P.2d 873 (Colo. App. 1993).

Where the director's medical utilization review order issued pursuant to § 8-43-501 terminates the claimant's care by a previously authorized health care provider, the claimant is entitled to have the order adjudicated *de novo* by an ALJ. *McWhorter v. CNA Ins. Co.*, 868 P.2d 1128 (Colo. App. 1993).

## II. POWERS OF THE DIRECTOR AND HEARING OFFICERS.

**Broad powers are granted by this section** and govern all proceedings on an initial claim or upon reopening. *Colo. Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966).

**Under the broad powers granted by this section**, the ALJ committed no abuse of discretion by joining parties when the question of their liability had been raised and the joinder posed no risk of prejudice. *Renaissance Salon v. Indus. Claim Appeals Office*, 994 P.2d 447 (Colo. App. 1999).

**Power to give notice, adjourn hearing, and give parties right to be present.** When it develops at a hearing that there is a possibility that disabilities in connection with which the claimant is seeking additional compensation might be the result of another accident, under this section — either upon the application of “any party” or upon its own motion — the fact-finder is empowered to send reasonable notice to all interested parties and to adjourn the hearing from time to time and to give all parties the right to be present. *Colo. Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966).

**Questions of fact can be determined only by the fact-finder.** *Roper v. Indus. Comm'n*, 93 Colo. 250, 25 P.2d 752 (1933); *O.P. Skaggs Co. v. Nixon*, 97 Colo. 314, 50 P.2d 55 (1935).

**Fact-finder determines which of two causes produced injury.** Where an existing condition may result from one of two causes shown in the evidence, it is the province of the director fact finder to determine which of these two causes produced the result of which complaint is made. *Indus. Comm'n v. Barton*, 98 Colo. 51, 52 P.2d 670 (1935).

**Hearing officer has discretion to reject consolidation of claims when issues are distinct and claimant will have future opportunity to litigate other claims.** *Roe v. Indus. Comm'n*, 734 P.2d 138 (Colo. App. 1986).

**Division has the authority to grant the parties to a medical utilization review proceeding an extension of time for good cause shown.** *Donn v. Indus. Claim Appeals Office*, 865 P.2d 873 (Colo. App. 1993).

**The power to grant reasonable extensions of time cannot overcome the jurisdictional time limitation** on filing a notice of appeal of a medical utilization review order, pursuant to § 8-43-501. *Cramer v. Indus. Claim Appeals Office*, 885 P.2d 318 (Colo. App. 1994).

**ALJ's imposition of discovery sanctions reasonable** upon a finding of a willful discovery violation when ALJ explicitly found that employer had not fully complied with the order compelling discovery. When the order is read in conjunction with: (1) The presumption accorded by department of labor & employment rule VIII(E)(7); (2) employer's failure to timely respond to the original discovery request; (3) its failure to timely comply with both the order compelling discovery and the order for discovery entered at the prehearing conference; and (4) its failure to respond to the motions to compel and for sanctions, the ALJ clearly found the violation was willful. *Shafer Commercial Seating, Inc. v. Indus. Claim Appeals Office*, 85 P.3d 619 (Colo. App. 2003).

**Employer did not substantially comply with the order to compel** when it supplied the requested information only two or three days beyond the last imposed deadline without a showing that its belated production of the information was the result of mistake, lack of knowledge, or some other basis that would explain the failure to comply with the prior orders and negate the determination of deliberate intent. *Shafer Commercial Seating, Inc. v. Indus. Claim Appeals Office*, 85 P.3d 619 (Colo. App. 2003).

## III. EVIDENCE.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions to the industrial claim appeals panel.

**The rules of evidence are generally the same in workmen's compensation cases as they are in civil suits.** *Watson v. Merritt*, 149 Colo. 562, 369 P.2d 989 (1962).

**For the general assembly did not authorize the adoption of rules of evidence which courts themselves are without authority to adopt.** *Puncce v. City & County of Denver*, 28 Colo. App. 542, 475 P.2d 359 (1970).

**Due process and fundamental rights may not be disregarded.** Although the rules of evidence may be somewhat more relaxed in an administrative proceeding than in a court of law, they cannot be so relaxed that due process of law and fundamental rights are disregarded. *Puncce v. City & County of Denver*, 28 Colo. App. 542, 475 P.2d 359 (1970).

**Thus, in a compensation hearing cross-examination is a fundamental right, and not a**

**mere privilege.** Although its scope may be restricted, within the sound discretion of the court, it cannot be denied. And where the claimant does not request an opportunity to inspect the hospital records before the director or seek to cross-examine on them, the referee's failure to advise claimant of her right of cross-examination is improper, as is his failure to offer her an opportunity to inspect the records before using them against her. *Puncec v. City & County of Denver*, 28 Colo. App. 542, 475 P.2d 359 (1970).

**Due process requires that a hearing officer either read or hear the evidence.** Therefore a hearing officer may read and rely on the transcript of evidence presented before another hearing officer and need not grant a *de novo* hearing. *Walton v. Indus. Comm'n*, 738 P.2d 66 (Colo. App. 1987).

**Hearing officer did not deprive employer and insurer of due process** in denying their request to depose experts in different city even though, as a result, experts did not testify since deposition should have been taken in advance and employer and insurer were advised 60 days in advance of hearing date that all evidence was to be presented at that time. *IPMC Transp. v. Indus. Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988).

**Use of video teleconferencing technology** to hear testimony from a remote location in evidentiary hearing did not violate claimant's due process and equal protection rights. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

**Although hearing officer had discretion to grant petitioner's request in conduct of evidentiary proceeding** upon a showing of good cause, such cause must be balanced against competing interests of other parties. *IPMC Transp. v. Indus. Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988).

**Rule against hearsay evidence may not properly be disregarded** in proceedings under the workmen's compensation act. *Olson-Hall v. Indus. Comm'n*, 71 Colo. 228, 205 P. 527 (1922); *Armour & Co. v. Indus. Comm'n*, 78 Colo. 569, 243 P. 546 (1926); *New Jersey Fid. & Plate Glass Ins. Co. v. Richey*, 85 Colo. 376, 275 P. 937 (1929); *H.C. Lallier Const. & Eng'r Co. v. Indus. Comm'n*, 91 Colo. 593, 17 P.2d 532 (1932).

**Parties are expected to introduce all their evidence** at the appointed hearing and on that evidence, so introduced, a decision is made. *Frank v. Indus. Comm'n*, 96 Colo. 364, 43 P.2d 158 (1935).

**Burden of proof.** It is elementary in compensation cases, as in other actions, that the burden of proof is upon the party asserting the claim and it is the duty of the claimant to show that the death or injury of the employee was the proximate result of an accident arising out of and in

the course of his employment. *Olson-Hall v. Indus. Comm'n*, 71 Colo. 228, 205 P. 527 (1922).

**Where all the evidence supports the claim,** because no evidence has been introduced to the contrary and no impeachment has taken place, the conclusion necessarily drawn by the law from the evidence must be enforced. *Frank v. Indus. Comm'n*, 96 Colo. 364, 43 P.2d 158 (1935).

**Hearing officer did not err in taking additional evidence** which might have affected the outcome of a claim for benefits during an additional hearing conducted upon remand. *Potomac Ins. Co. v. Indus. Comm'n*, 744 P.2d 765 (Colo. App. 1987).

**It is always proper for a claimant to testify as to his general health and feeling** immediately preceding and succeeding an accident, to the end that comparison may be made and the extent of the injury evaluated. *Montgomery Ward & Co. v. Indus. Comm'n*, 128 Colo. 465, 263 P.2d 817 (1953); *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594, 314 P.2d 297 (1957).

**Statements of a deceased employee as to his bodily or mental feelings are admissible** in evidence. *Olson-Hall v. Indus. Comm'n*, 71 Colo. 228, 205 P. 527 (1922).

**However, statements of a deceased employee as to the cause of his illness are not admissible,** if not within the *res gestae* rule. *Olson-Hall v. Indus. Comm'n*, 71 Colo. 228, 205 P. 527 (1922).

**Admissions against interest justify the finder of the facts in considering as established the facts admitted.** In the absence of opposing evidence their *prima facie* character remains undisturbed and intact. *Watson v. Merritt*, 149 Colo. 562, 369 P.2d 989 (1962).

**Probative value of employer's declaration against interest.** The report of an accident by an employer stating that a claimant strained or pulled his heart muscle when attempting to lift a transmission into an automobile is a declaration against the interest of the employer having probative value, the weight of which is for the fact-finder to determine. *Indus. Comm'n v. Johnson Pontiac, Inc.*, 140 Colo. 160, 344 P.2d 186 (1959).

**The written report of a doctor acting as a witness for a claimant may be considered** when filed and made part of the record. *J.W. Metz Lumber Co. v. Taylor*, 134 Colo. 249, 302 P.2d 521 (1956).

**Consideration of testimony of doctor.** The doctor who makes out a death certificate certifies as to the correctness of its contents at the time he makes it out, and where the doctor who makes out the certificate in the first instance seeks to explain away the legal effect of what he certifies, the fact-finder is justified in considering that circumstance carefully. *Elleman v.*



Indus. Comm'n, 100 Colo. 120, 66 P.2d 323 (1937).

**Opinion evidence of physician is competent in workmen's compensation cases.** Card Iron Works Co. v. Radovich, 94 Colo. 426, 30 P.2d 1108 (1934).

**Thus, question based on death certificate held not to be error.** It is not prejudicial error to ask a medical expert whether death was the result of an accident based upon his examination of the death certificate alone. It is reasonable that such an expert can make certain deductions from the contents of a death certificate, and in such a case it is at least corroborative testimony. Elleman v. Indus. Comm'n, 100 Colo. 120, 66 P.2d 323 (1937).

**Employer's report of accident, its conduct relative thereto, and report of mine inspector** are proper evidence in a workmen's compensation case involving a coal mining accident. Empire Zinc Co. v. Indus. Comm'n, 94 Colo. 98, 28 P.2d 337 (1933).

**Furthermore, hospital records may be received as evidence.** The general assembly authorized the director to receive as evidence, and use as proof of any fact in dispute, hospital records of an injured employee. Puncce v. City & County of Denver, 28 Colo. App. 542, 475 P.2d 359 (1970).

**When claimant refused to sign release of psychiatric records, the ALJ properly imposed**

sanctions. The judge agreed to review the records in camera to determine which, if any, should be released to respondents, but the claimant argued that the judge should meet in camera with her psychiatrist to identify areas that would not be disclosed. Sheid v. Hewlett Packard, 826 P.2d 396 (Colo. App. 1991).

**The orders of a prehearing ALJ that relate to prehearing conferences are not final** for purposes of appeal. Indus. Claim Appeals Office v. Orth, 965 P.2d 1246 (Colo. 1998).

**However, the orders of a prehearing ALJ approving a settlement are final** for purposes of appeal. Indus. Claim Appeals Office v. Orth, 965 P.2d 1246 (Colo. 1998).

**Additional hearings.** If a party seeks an additional hearing after the apparent completion of the contemplated hearing process, the commission may deny a further hearing unless there is presented a sufficient showing in justification for an additional hearing. Raffaello v. Indus. Comm'n, 670 P.2d 805 (Colo. App. 1983).

The industrial commission erred in refusing to set aside an order of a referee denying claimant's request for an additional hearing to present further medical evidence where there was a stipulation for further evaluation of claimant, it was undisputed that the evaluation was completed, and opposing counsel acceded to the desirability of further hearing. Raffaello v. Indus. Comm'n, 670 P.2d 805 (Colo. App. 1983).

**8-43-207.5. Prehearing conferences.** (1) Notwithstanding any provision of articles 40 to 47 of this title to the contrary, at any time not less than ten days prior to the formal adjudication on the record of any issue before the director or an administrative law judge in the office of administrative courts, any party to a claim may request a prehearing conference before a prehearing administrative law judge in the division of workers' compensation for the speedy resolution of or simplification of any issues and to determine the general readiness of remaining issues for formal adjudication on the record. The issues addressed in such prehearing conference shall be limited to: Ripeness of legal, but not factual, issues for formal adjudication on the record before the director or an administrative law judge in the office of administrative courts; discovery matters; and evidentiary disputes. The filing of an application for hearing with the office of administrative courts shall not be a prerequisite to a request for a prehearing conference under this section. The director and the administrative law judges in the office of administrative courts may also request a prehearing conference under this section.

(2) "Prehearing administrative law judge" means a qualified person appointed by the director pursuant to section 8-47-101 to preside over prehearing conferences pursuant to this section, to approve settlements pursuant to section 8-43-204, to conduct settlement conferences pursuant to section 8-43-206, and to conduct arbitrations pursuant to section 8-43-206.5. Such prehearing administrative law judges shall have authority to: Order any party to participate in a prehearing conference; issue interlocutory orders; issue subpoenas in the name of the division for production of documentary evidence which shall be served in the same manner as subpoenas in the district court; make evidentiary rulings; permit parties to cause depositions to be taken; determine the competency of any party to a claim to enter into a settlement agreement; and strike the application for hearing of a party for failure to comply with any provision of this section.

(3) An order entered by a prehearing administrative law judge shall be an order of the director and binding on the parties. Such an order shall be interlocutory. Prehearing conferences need not be held on the record; however, any party to a claim may request in

advance that a record be made of the prehearing conference, either taken verbatim by a court reporter provided and paid for by the requesting party or electronically recorded by the division.

(4) The director shall adopt rules and regulations as may be necessary to implement the provisions of this section.

**Source:** L. 94: Entire section added, p. 1875, § 6, effective June 1. L. 2005: (1) amended, p. 855, § 13, effective June 1.

#### ANNOTATION

**A prehearing administrative law judge has jurisdiction to enter an order approving a settlement agreement** in a workers' compensation case. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998).

**The orders of a prehearing administrative law judge that relate to prehearing conferences are not final** for purposes of appeal. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998).

**However, the orders of a prehearing administrative law judge approving a settle-**

**ment are final** for purposes of appeal. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998).

**A party may not elect, without fear of consequences, to ignore a ruling of a prehearing administrative law judge** in the hope of obtaining a more favorable ruling before the administrative law judge. *Kennedy v. Indus. Claim Appeals Office*, 100 P.3d 949 (Colo. App. 2004).

**8-43-208. Investigations.** (1) For the purpose of making any investigation with regard to any matter contemplated by the provisions of articles 40 to 47 of this title, the director shall have power to appoint, with the approval of the executive director by an order in writing, any competent person as an agent whose duties shall be prescribed in such order.

(2) (Deleted by amendment, L. 94, p. 1876, § 7, effective June 1, 1994.)

(3) The director may conduct any number of such investigations contemporaneously through different agents.

**Source:** L. 90: Entire article R&RE, p. 505, § 1, effective July 1. L. 94: Entire section amended, p. 1876, § 7, effective June 1.

**Editor's note:** This section is similar to former § 8-46-107 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** (1) Since § 8-43-205 is similar to § 8-46-107 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision has been included in the annotations to this section.

(2) The case included in the annotations to this section which refers to the industrial commission was decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to appoint agents for investigation purposes.

**In a hearing before the industrial commission, a referee may not take judicial notice of extraneous, nonevidentiary matters.** *Indus. Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957).

**And nothing in this section tends to indicate that the commission is bound by the**

**findings of the referee** grounded upon conflicting evidence. *Warner v. Mullens*, 111 Colo. 60, 137 P.2d 420 (1943).

**Nor is the commission, on reviewing an order or award of its referee, required to take further testimony**, if it does not deem such a course necessary. *Warner v. Mullens*, 111 Colo. 60, 137 P.2d 420 (1943).

**This section does not limit the director's authority to act pursuant to § 8-43-201.** *Cornerstone Partners v. Indus. Claim Appeals Office*, 830 P.2d 1148 (Colo. App. 1992).

**Verbal notice to supervisor and company physician** of pain and suffering caused by prolonged standing and lifting was sufficient notification to employer to require compliance with § 8-53-102. *Jones v. Adolph Coors Col.*, 689 P.2d 681 (Colo. App. 1984).

**Combined investigatory and adjudicatory functions.** Any order purporting to combine in-



vestigatory and adjudicatory functions in a single referee would raise serious questions of propriety. *Thompson v. Indus. Comm'n*, 33 Colo. App. 369, 520 P.2d 139 (1974).

**Extrajudicial visit to claimant's home improper.** Absent any authorization for such an

investigation, the referee acted in excess of his powers when he made an extrajudicial visit to claimant's home. *Thompson v. Indus. Comm'n*, 33 Colo. App. 369, 520 P.2d 139 (1974).

**8-43-209. Time schedule for hearings - establishment.** (1) Hearings shall commence within one hundred days after the hearing is set pursuant to section 8-43-211 (2). One extension of time to commence the hearing of no more than sixty days shall be granted by an administrative law judge upon agreement of the parties.

(2) One extension of time to commence the hearing of no more than sixty days may be granted by an administrative law judge upon written request by any party to the case and for good cause shown, in the following cases: When pulmonary lung disease, cancer, cardiovascular disease, or stroke is alleged as the cause of the disability; when the subsequent injury fund is a party; when permanent total disability is alleged; upon agreement of the parties; or when compensability of the injury is contested. In all other cases, extensions of time to commence the hearing of no more than twenty days may be granted by an administrative law judge upon written request by any party to the case and for good cause shown.

(3) Once the hearing is commenced, the administrative law judge may, for good cause shown, continue the hearing to a date certain to take additional testimony, to file an additional medical report, to file the transcript of a deposition, or to file a position statement. Except upon the agreement of all parties or for good cause shown, a continuance to complete a hearing shall not exceed thirty calendar days.

**Source:** **L. 90:** Entire article R&RE, p. 505, § 1, effective July 1. **L. 91:** Entire section amended, p. 1318, § 28, effective July 1. **L. 94:** Entire section amended, p. 1877, § 8, effective June 1. **L. 2003:** Entire section amended, p. 1957, § 2, effective May 22. **L. 2005:** (1) amended, p. 855, § 14, effective June 1. **L. 2007:** Entire section amended, p. 1473, § 4, effective May 30.

**Editor's note:** This section is similar to former § 8-53-130 as it existed prior to 1990.

#### ANNOTATION

**Claimant's reliance on this section is misplaced** because the statute addresses time limits for setting a hearing, not time limits for issuance of an order and delivery of benefits. *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684

(Colo. App. 2008).

Further, because benefits were denied, any claim of undue delay in delivery of benefits is moot. *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

**8-43-210. Evidence.** Notwithstanding section 24-4-105, C.R.S., the Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings; except that medical and hospital records, physicians' reports, vocational reports, and records of the employer are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case. Depositions may be substituted for testimony upon good cause shown. Convictions for alcohol-related offenses, pursuant to titles 18 and 42, C.R.S., the transcripts of proceedings leading to such convictions, and the court files relating to such convictions may be admissible in all hearings conducted under the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, where such conviction resulted from the same occurrence, accident, or injury occurring on the job that forms the basis for the workers' compensation claim. All relevant medical records, vocational reports, expert witness reports, and employer records shall be exchanged with all other parties at least twenty days prior to the hearing date.

**Source: L. 90:** Entire article R&RE, p. 505, § 1, effective July 1; entire section amended, p. 578, § 2, effective July 1. **L. 99:** Entire section amended, p. 994, § 1, effective May 29. **L. 2007:** Entire section amended, p. 1473, § 5, effective May 30.

**Editor's note:** This section is similar to former § 8-53-115 as it existed prior to 1990.

### ANNOTATION

**A tribunal has broad discretion to determine the admissibility of expert testimony** and appellate courts may not overturn a ruling unless it is manifestly erroneous. An ALJ is accorded similar discretion in a workers' compensation proceeding. *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

**Letter properly admitted into evidence.** The letter written by claimant's employer was a vocational report and a record of the employer. Therefore, such letter was properly admitted into evidence. *Churchill v. Sears, Roebuck & Co.*, 720 P.2d 171 (Colo. App. 1986) (decided under former § 8-53-115 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

Physician's letter calculating claimant's probable blood alcohol level at the time of the accident, explaining the adverse effects of such ethanol levels on claimant's abilities to function while driving, and concluding that the adverse

effects of the ethanol in claimant's body would have contributed to, if not caused, claimant's accident, are "physicians' reports" within the meaning of the statute and therefore admissible. *Ackerman v. Hilton's Mechanical Men*, 914 P.2d 524 (Colo. App. 1996).

**Section 8-41-301 (2) does not require that a mental impairment claimant produce a live witness in all cases.** Such a requirement would serve no legitimate purpose and would result in an equal protection violation when other claimants are allowed to submit expert reports and only provide the expert witness when the opposing party chooses to examine the expert. *Esser v. Indus. Claims Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), aff'd on other grounds, 30 P.3d 189 (Colo. 2001).

**Exceptions to the 20-day rule are clearly contemplated** by the allowance of continuances to file additional reports in appropriate circumstances, such as those stated in § 8-43-209 (3). *Ortega v. Indus. Claim Appeals Office*, 207 P.3d 895 (Colo. App. 2009).

**8-43-211. Notice - request for hearing.** (1) At least thirty days prior to any hearing, the office of administrative courts in the department of personnel shall send written notice to all parties by regular or electronic mail or by facsimile. The notice shall:

(a) Give the time, date, and place of the hearing;

(b) Inform the parties that they must be prepared to present their evidence concerning the issues to be heard;

(c) Inform the parties that they have the right to be represented by an attorney or other person of their choice at the hearing.

(2) Hearings shall be set by the office of administrative courts in the department of personnel within eighty to one hundred days after any of the following occur:

(a) The director sets any issue for hearing. The director may expedite the hearing for good cause shown.

(b) Any party requests a hearing on issues ripe for adjudication by filing a written request with the office of administrative courts in the department of personnel on forms provided by the office. The request shall be mailed to all parties at the time they are filed with the office of administrative courts. After the filing of the requests, the office of administrative courts in the department of personnel shall set the matter for hearing insofar as is practicable in the order in which requests are received by the office of administrative courts.

(c) Any party or the attorney of such party sends notice to set a hearing on issues ripe for adjudication to opposing parties or their attorneys. The director of the office of administrative courts shall determine the place and time or times during which settings can be made. At such setting, the party requesting the setting shall submit a completed request for hearing form. Any notice to set shall be mailed to opposing parties at least ten days prior to the setting date.

(d) If any person requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be



assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting.

(e) Except in claims in which compensability is contested or a hearing is requested in response to a final admission of liability or to overcome a conclusion in a division-sponsored independent medical examination, the party filing an application for a hearing shall certify on the application that the party attempted to resolve with the other parties all issues listed in the application for a hearing.

**Source:** **L. 90:** Entire article R&RE, p. 505, § 1, effective July 1. **L. 91:** Entire section amended, p. 1319, § 29, effective July 1. **L. 95:** IP(1), IP(2), and (2)(b) amended, p. 636, § 15, effective July 1. **L. 2003:** (2)(e) added, p. 1957, § 3, effective May 22. **L. 2005:** IP(1), IP(2), (2)(b), and (2)(c) amended, p. 855, § 15, effective June 1. **L. 2007:** (2)(e) amended, p. 1474, § 6, effective May 30. **L. 2009:** IP(1) amended, (HB 09-1150), ch. 309, p. 1665, § 1, effective August 5.

**Editor's note:** This section is similar to former § 8-53-109 as it existed prior to 1990.

### ANNOTATION

**Law reviews.** For article, "Dispute Resolution in Worker's Compensation", see 18 Colo. Law. 921 (1989). For article, "A Different Kind of Representative: DBA v. PUC Revisited", see 36 Colo. Law. 53 (December 2007).

**Annotator's note.** Since § 8-43-215 is similar to § 8-53-109 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**Administrative law judge abused his discretion** when he deprived petitioner of the right to substantiate its claim that its petition for review was timely filed, by ruling on pending motions without setting the matter for a full evidentiary hearing and complying with the notice provisions of subsection (1)(c). *Pueblo Sch. Dist. No. 60 v. Clementi*, 776 P.2d 1152 (Colo. App. 1989).

**Question of whether an appeal was filed in bad faith could not be decided until the appeal was adjudicated** and appellant was entitled to attorney fees and costs pursuant to subsection (2)(d) from appellee who applied for a hearing requesting penalties against appellant for filing a frivolous appeal before such appeal was adjudicated. *BCW Enters. v. Indus. Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997).

**Selection of an authorized treating physician as ordered by a medical utilization review committee was ripe for a hearing notwithstanding that the injured employee's appeal of the order was still pending; thus the denial of attorney fees was proper.** The statute requires the parties to act quickly to select a new authorized treating physician regardless of whether an appeal has been filed. *Franz v. Indus. Claim Appeals Office*, 250 P.3d 1284 (Colo. App. 2010).

**8-43-212. Compulsion of testimony.** When any person upon whom a subpoena issued in the name of the division has been served fails or refuses to appear, the party who requested the subpoena may apply to the district court in the county in which the person served resides for an order compelling attendance before the division of the witness or the production of the documents subpoenaed. Violation of such an order shall be treated as contempt of the court issuing the order.

**Source:** **L. 90:** Entire article R&RE, p. 506, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-53-108 as it existed prior to 1990.

**8-43-213. Transcripts.** (1) All testimony and argument of all hearings held pursuant to section 8-43-207 concerning any issue arising under articles 40 to 47 of this title shall either be taken verbatim by a hearing reporter or shall be electronically recorded by the division.

(2) Any party in interest may order a transcript at any time from a hearing reporter, a court reporter provided by any party, or, if the hearing is recorded, from the division. For

purposes of a petition to review, a transcript shall be all testimony taken that is relevant to the issue being appealed. In the preparation of transcripts, hearing reporters shall give preference to transcripts as part of the record in a petition to review; except that all transcripts shall be prepared and filed with the office of administrative courts within twenty-five working days after the date they were ordered. Hearing reporters shall be paid for transcripts and copies at the rate set by the supreme court for reporters in courts of record. If a court reporter is unable to meet the time limit specified in this section, any party, at its own expense, or the administrative law judge may contract with another court reporter to ensure the timely preparation of transcripts.

(3) Upon a satisfactory showing to the director in writing that a party petitioning to review is indigent and unable to pay for the preparation of the transcript, the director may order a transcript to be prepared at the division's expense, and, if the transcript was prepared by a hearing reporter, the division shall pay the hearing reporter the fee therefor.

(4) When a transcript is ordered as part of the record on a petition to review, the original of the transcript shall be filed with the division where it shall be available to all parties in interest.

**Source:** L. 90: Entire article R&RE, p. 506, § 1, effective July 1. L. 91: (2) amended, p. 1320, § 30, effective July 1. L. 2005: (2) amended, p. 856, § 16, effective June 1.

**Editor's note:** This section is similar to former § 8-53-106 as it existed prior to 1990.

**8-43-214. Transcript certified - evidence.** A transcribed copy of the evidence and proceedings, or any specific part thereof, of any investigation or hearing which was prepared at the direction of the director shall be certified by the hearing reporter, or the division if the hearing was recorded, to be a true and correct transcript of the testimony on the investigation or hearing of a particular witness, or a specific part thereof, carefully compared to original notes or to the original recording, and to be a correct statement of the evidence and proceedings had on such investigation or hearing. A transcribed copy which is so certified may be received as evidence by the director, the panel, and any court with the same effect as if the person who prepared the transcript were present and testified to the facts so certified.

**Source:** L. 90: Entire article R&RE, p. 506, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-53-107 as it existed prior to 1990.

**8-43-215. Orders.** (1) No more than fifteen working days after the conclusion of a hearing, the administrative law judge or director shall issue a written order allowing or denying said claim. Such written order shall either be a summary order or a full order. A full order shall contain specific findings of fact and conclusions of law. If compensation benefits are granted, such written order shall specify the amounts thereof, the disability for which compensation benefits are granted, by whom and to whom such benefits shall be paid, and the method and time of such payments. A certificate of mailing and a copy of such written order shall be served by regular or electronic mail or by facsimile to each of the parties in interest or their representatives, the original of which shall be a part of the records in said case. If an administrative law judge has issued a summary order, a party dissatisfied with the order may make a written request for a full order within seven working days after the date of mailing of the summary order. The request shall be a prerequisite to review under section 8-43-301. If a request for a full order is made, the administrative law judge shall have ten working days after receipt of the request to issue the order. A full order shall be entered as the final award of the administrative law judge or director subject to review as provided in this article.

(2) Repealed.

**Source:** L. 90: Entire article R&RE, p. 507, § 1, effective July 1. L. 91: Entire section amended, p. 1320, § 31, effective July 1. L. 92: Entire section amended, p. 1804, § 1,



effective April 16. **L. 94:** Entire section amended, p. 1877, § 9, effective June 1. **L. 2000:** Entire section amended, p. 480, § 1, effective April 28. **L. 2007:** (1) amended, p. 1474, § 7, effective May 30. **L. 2008:** (1) amended, p. 1880, § 9, effective August 5.

**Editor's note:** (1) This section is similar to former § 8-53-110 as it existed prior to 1990.

(2) Subsection (2)(b) provided for the repeal of subsection (2), effective July 1, 2004. (See L. 2000, p. 480.)

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**The only awards which are final and therefore reviewable are those which either allow or deny a claim** or in some manner fix the rights or responsibilities of the parties. *Indus. Comm'n v. Globe Indem. Co.*, 145 Colo. 453, 358 P.2d 885 (1961); *Stanley Hotel v. Thomas*, 153 Colo. 503, 387 P.2d 27 (1963); *Hayward v. Majestic Wax Co.*, 170 Colo. 203, 460 P.2d 74 (1969).

And where hearing officer directs party to prepare written form of order, the order is not final until signed by the hearing officer. *Neoplan USA Corp. v. Indus. Comm'n*, 721 P.2d 157 (Colo. App. 1986).

**And the order of the referee (now hearing officer) is the order of the industrial commission (now director) if a petition for review is not filed.** *Carlson v. Indus. Comm'n*, 79 Colo. 124, 244 P. 68 (1926).

**But compensation matter pending on petition of review not final award.** Where a workmen's compensation matter is still pending on the employer's petition to review a previous award, the referee (now hearing officer) still has statutory authority to modify or amend the award; it is not a final award. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**Order of hearing officer in workers' compensation cases does not enter until it is set forth in writing and copy is mailed to parties in interest.** *Wait v. Jan's Malt Shoppe*, 736 P.2d 1265 (Colo. App. 1987).

**"Parties in interest" construed.** Where the claimant was represented by an attorney, she was not required to receive her own separate copy of the order. *Brodeur v. Indus. Claim Appeals Office*, 159 P.3d 810 (Colo. App. 2007).

**Effective date of permission for change of treating physician is date of ALJ's oral summary order,** not the date of the written order required by this section. *Consolidated Landscape v. Indus. Claim Appeals Office*, 883 P.2d 571 (Colo. App. 1994).

**Order which was drafted by retired hearing officer, but was signed by substitute, was invalid,** as retired hearing officer had no authority to enter order where he was retired at time order was presented in written form and mailed to the parties. *Wait v. Jan's Malt Shoppe*, 736 P.2d 1265 (Colo. App. 1987).

**Section gives administrative law judge discretion to order that a portion of the benefits payable to claimant be reimbursed to claimant's automobile insurance company** pursuant to statute seeking to prevent duplication of benefits. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989).

**Administrative law judge did not lack jurisdiction to enter an order merely because the order was entered after the 15-day time limit found in this section.** The section is directory rather than mandatory, as the general assembly did not evidence a contrary intent to the general rule that time limits imposed on public bodies are construed as directory rather than mandatory. *Langton v. Rocky Mountain Health Care*, 937 P.2d 883 (Colo. App. 1996).

**A party does not have the right to receive specific findings of fact and conclusions of law unless the division of administrative services receives the request within 15 days.** Mailing the request within the 15 days does not suffice. The office must receive the request within 15 days; otherwise, the administrative law judge lacks jurisdiction to issue such specific findings. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 24 P.3d 1 (Colo. App. 2000).

## 8-43-216. Frivolous claims for compensation - repeal. (Repealed)

**Source:** **L. 91:** Entire section added, p. 1321, § 32, effective July 1.

**Editor's note:** Subsection (3) provided for the repeal of this section, effective March 1, 1996. (See L. 91, p. 1321.)

**8-43-217. Claims management - legislative declaration.** The general assembly hereby finds, determines, and declares that active management of workers' compensation claims should be practiced in order to expedite and simplify the processing of claims, reduce litigation, and better serve the public.

**Source: L. 91:** Entire section added, p. 1321, § 32, effective July 1.

**8-43-218. Authority of director.** (1) The director shall have authority to appoint claims managers to review, audit, and close cases, to educate, inform, and assist the public as to the workers' compensation system, to promote speedy and uncomplicated problem resolution of workers' compensation matters, and to otherwise manage claims.

(2) The director may require any party to a workers' compensation claim to attend, cooperate, and comply with the efforts of claims managers in managing claims or complaints received by the division.

(3) Any party willfully refusing to cooperate or comply with claims management efforts of the division shall be subject to the penalty provisions set forth in section 8-43-304 and to the denial or vacation of a hearing date.

(4) Any violation of any provision of this section shall be cause for the rejection of an application for hearing or a response thereto until such time as the violation is cured.

**Source: L. 91:** Entire section added, p. 1321, § 32, effective July 1.

**8-43-219. Not a limitation on rights or privileges.** Nothing in section 8-43-217 or 8-43-218 shall be construed to limit any party's rights or privileges as provided by law.

**Source: L. 91:** Entire section added, p. 1321, § 32, effective July 1.

**8-43-220. Injured worker exit survey.** (1) Upon closure of a claim, each insurer shall survey the claimant or, if deceased, the decedent's dependents regarding the claimant's satisfaction with the insurer for claims that are reported to the division pursuant to section 8-43-101. The survey shall be conducted in a form and manner as prescribed by the director. The director shall develop the form and manner of the survey with input from insurers that provide workers' compensation policies pursuant to articles 40 to 55 of this title, and with the least administrative burden as possible. The survey shall include questions regarding courtesy, promptness of medical care, promptness of handling the claim, promptness of resolving the claim, and overall satisfaction with the experience with the insurer. An employer or an insurer shall not take disciplinary action or otherwise retaliate against a claimant or his or her dependents for completing the survey.

(2) The insurer shall report the survey results annually to the division. The director shall post the results of the surveys on the division's web site.

**Source: L. 2010:** Entire section added, (SB 10-013), ch. 303, p. 1434, § 1, effective July 1.

## PART 3

### REVIEW PROCEDURES

**Law reviews:** For article, "Worker's Compensation Appeals", see 19 Colo. Law. 1853 (1990).

**8-43-301. Petitions to review.** (1) Any order, corrected order, or supplemental order is final unless a petition to review or appeal has been filed in accordance with this article.

(2) Any party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty may file a petition to review with the division, if the order was entered by the director, or at the Denver office of the office of administrative courts in the department of personnel, if the order was entered by an



administrative law judge, and serve the same by mail on all the parties. The petition shall be filed within twenty days after the date of the certificate of mailing of the order, and, unless so filed, the order shall be final. The petition to review may be filed by mail, and shall be deemed filed upon the date of mailing, as determined by the certificate of mailing, if the certificate of mailing indicates that the petition to review was mailed to the division or to the Denver office of the office of administrative courts in the department of personnel, as appropriate. The petition to review shall be in writing and shall set forth in detail the particular errors and objections of the petitioner. A petitioner shall, at the same time, order any transcript relied upon for the petition to review, arrange with the hearing reporter to pay for the same, and notify opposing parties of the transcript ordered. Opposing parties shall have twenty days after the date of the certificate of mailing of the petition to review to order any other transcript not ordered by the petitioner and arrange with the hearing reporter to pay for the same.

(3) If transcripts of hearings are ordered as part of the record in a petition to review, the director or administrative law judge cannot rule on the petition until the transcripts are lodged with the division.

(4) When the record upon which a petition to review has been filed is complete, the parties shall be notified in writing. The petitioner shall have twenty days after the date of the certificate of mailing of the notice to file a brief in support of the petition. The opposing parties shall have twenty days after the date of the certificate of mailing of the petitioner's brief to file briefs in opposition thereto. After the briefs are filed or the time for filing has run, the director or administrative law judge shall have thirty days to enter a supplemental order or transmit the file to the industrial claim appeals office for review.

(5) In ruling on a petition to review, the director or administrative law judge may issue a supplemental order labeled as such limited to the matters raised in the petition to review, and, as to those matters, the director or administrative law judge may amend or alter the original order or set the matter for further hearing. In any event, if it has not already been done, the administrative law judge or director, following a petition to review an order, shall make findings of fact and conclusions of law necessary to support such order.

(6) A party dissatisfied with a supplemental order may file a petition for review by the panel. The petition shall be filed with the division if the supplemental order was issued by the director or at the Denver office of the office of administrative courts in the department of personnel if the supplemental order was issued by an administrative law judge. The petition shall be filed within twenty days after the date of the certificate of mailing of the supplemental order. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. The petition and brief shall be mailed by petitioner to all other parties at the time the petition is filed. All parties, except the petitioner, shall be deemed opposing parties and shall have twenty days after the date of the certificate of mailing of the petition and brief to file with the division or the Denver office of the office of administrative courts, as appropriate, briefs in opposition to the petition.

(7) When any petition for review by the panel is filed, the division or the Denver office of the office of administrative courts shall, when all briefs are submitted to the division or the Denver office of the office of administrative courts or within fifteen days after the date briefs were due, certify and transmit the record to the industrial claim appeals office along with the petitions and briefs. The division or the Denver office of the office of administrative courts, as appropriate, shall simultaneously send notice to the parties including the date that the record has been transmitted to the industrial claim appeals office.

(8) The industrial claim appeals office shall have sixty days after receipt of the certified record to enter its order. The panel may issue a summary order affirming the order of the administrative law judge or director. The panel may correct, set aside, or remand any order but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the panel.

(9) The panel shall have the power to issue such procedural orders as may be necessary to carry out its appellate review under subsection (7) of this section, including but not limited to, orders concerning completion of the record and filing of briefs. In those cases where the parties file a stipulated motion requesting that consideration of the appeal be deferred pending ongoing settlement negotiations, the panel may extend the time for entry of its order up to a maximum of thirty days.

(10) The panel's order shall be mailed to all parties of record. Any party dissatisfied with the panel's order shall have twenty days after the date of the certificate of mailing of such order to commence an action for judicial review in the court of appeals.

(11) If the panel has failed to enter its order within sixty days of the receipt of the certified record, the order of the director or administrative law judge shall be deemed the order of the panel and final unless, within thirty days after the end of the sixty-day period, the petitioner commences an action for judicial review in the court of appeals. If the panel has not acted on the sixtieth day, the industrial claim appeals office shall send a written notice to all parties stating that the parties have thirty days after the date of the certificate of mailing of the notice to commence such an action.

(12) If a petition to review is filed, a hearing may be held and orders entered on any other issue in the case during the pendency of the petition to review. If the order which is under petition to review concerns compensability, orders entered on these later issues are final and appealable when entered, but not enforceable until the review of the order on compensability is completed.

(13) If the order which is under petition to review does not concern compensability, but concerns the respective liability of two or more employers or insurance carriers, and the injury or illness was found compensable in a hearing held pursuant to section 8-43-215, the employer or insurance carrier found liable by the director or administrative law judge shall pay benefits in accordance with the order under review until the review process is completed, at which time it shall be reimbursed by the other employer or carrier if reimbursement is necessary to comply with the final order.

(14) The signature of an attorney on a petition to review or brief in support thereof constitutes a certificate by the attorney that such attorney has read the petition or brief; that, to the best of the attorney's knowledge, information, or belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, cause delay, or unnecessarily increase the cost of litigation. If a petition or brief is signed in violation of this subsection (14), the director, the administrative law judge, or the panel shall award reasonable attorney fees and costs to the party incurring the fees and costs as a result of the improper actions.

**Source:** L. 90: Entire article R&RE, p. 507, § 1, effective July 1. L. 91: (10) and (11) amended and (14) added, p. 1322, § 33, effective July 1. L. 92: (2) amended, p. 1803, § 1, effective April 16. L. 94: (14) amended, p. 1878, § 10, effective June 1. L. 95: (10) and (11) amended, p. 234, § 2, effective April 17. L. 2009: (2), (6), and (7) amended, (SB 09-070), ch. 49, p. 176, § 3, effective August 5. L. 2010: (6) and (7) amended, (HB 10-1422), ch. 419, p. 2064, § 11, effective August 11.

**Editor's note:** This section is similar to former § 8-53-111 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Final Orders.
- III. Methods of Review.
- IV. Hearing Officer or Director as Fact Finder.
- V. Review by the Industrial Claim Appeals Panel.
- VI. Procedural Requirements.
- VII. Notice.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article on "Colorado Practice in Workmen's Compensation", see 31 Rocky Mt. L. Rev. 500 (1959). For comment on the administrative review of workmen's compensation claims, see 45 U. Colo. L. Rev. 195 (1973). For article, "Update on Colorado Appellate Decisions In Workers' Compensation



Law", see 32 Colo. Law. 87 (March 2003). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 83 (April 2004).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Constitutionality.** The general assembly's grant of limited authority in this section to administrative law judges and the industrial claim appeals office over the area of workers' compensation matters does not create a substantial threat to the separation of powers doctrine under article III of the Colorado Constitution, nor does it violate the requirement that district courts have original jurisdiction in civil cases as mandated in article VI, § 9(1), of the Colorado Constitution. *Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430 (Colo. App. 2003).

**Requirements of this section are jurisdictional in nature**, and if there is a failure to comply with the requirements of this section, there can be no subsequent review or appeal. *Sanchez v. Straight Creek Constructors*, 41 Colo. App. 19, 580 P.2d 827 (1978); *Brodeur v. Indus. Claim Appeals Office*, 159 P.3d 810 (Colo. App. 2007); *Speier v. Indus. Claim Appeals Office*, 181 P.3d 1173 (Colo. App. 2008).

**Panel may remand only on grounds enumerated in subsection (7) (now subsection (8)).** *London v. El Paso County*, 757 P.2d 169 (Colo. App. 1988).

**Administrative procedure act inapplicable.** The appeal procedures under the workmen's compensation act are complete and definitive and constitute an organic act which is self-operational without the need of supplementation from the administrative procedure act. *Zappas v. Indus. Comm'n*, 36 Colo. App. 319, 543 P.2d 101 (1975); *Maxon v. Indus. Comm'n*, 40 Colo. App. 196, 571 P.2d 319 (1977).

**Designation of record.** When the brief referred to specific portions of the record which were relied upon, the petition, together with the transcript on file, was sufficient compliance. *Goegelein v. Indus. Comm'n*, 686 P.2d 1377 (Colo. App. 1984).

**Neither an employer nor an employer's insurer is a claimant** as that term is used in the Workers' Compensation Act, but subsection (2) nonetheless does not deny an employer or its insurer the right to review of an order denying recovery of a penalty. However, an immediate right of appeal exists for the denial of a penalty only when the denial is no longer an interlocutory order. *BCW Enters. v. Indus. Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997).

**Because the administrative law judge's order is not a final order**, and because the order neither denies nor awards benefits but instead continues benefits previously ordered, the order is interlocutory and not subject to review under subsection (2). *Jefferson County Pub. Sch. v.*

*Indus. Claim Appeals Office*, 181 P.3d 1199 (Colo. App. 2008).

**Decision to hold additional hearing or to refer case is at the discretion of the hearing officer or director.** *Coven v. Indus. Comm'n*, 694 P.2d 366 (Colo. App. 1984).

**Industrial claim appeals office order setting aside award of permanent partial disability benefits** is not subject to judicial review. *Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989).

**Subsection (8) does not violate due process in limiting the agency's review to determining whether the administrative law judge's decision is supported by substantial evidence.** So long as judicial review is provided, due process does not require administrative review as well. Also, where administrative review is provided, the extent of the agency's review authority may be statutorily limited without due process implications. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995).

**Applied in City of Aurora v. Indus. Comm'n**, 44 Colo. App. 132, 609 P.2d 129 (1980); *Cibere v. Indus. Comm'n*, 624 P.2d 920 (Colo. App. 1980); *Gates Rubber Co. v. Indus. Comm'n*, 647 P.2d 244 (Colo. App. 1982); *Indus. Comm'n v. Riley*, 653 P.2d 723 (Colo. 1982); *Hanson v. Indus. Comm'n*, 716 P. 2d 477 (Colo. App. 1986); *Potomac Ins. Co. v. Indus. Comm'n*, 744 P.2d 765 (Colo. App. 1987); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003).

## II. FINAL ORDERS.

**Order granting claimant's petition to reopen claim was not final order** subject to review, since it neither required nor denied payment of penalty or benefits. *Dir., Div. of Labor v. Smith*, 725 P.2d 1161 (Colo. App. 1986).

**Referee's order requiring an insurer to pay claimant's medical expenses was an order to pay "benefits"** under subsection (2) and was thus reviewable. *Am. Express v. Indus. Comm'n*, 712 P.2d 1132 (Colo. App. 1985); *Bestway Concrete and TIG Ins. Co. v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

It is not necessary that all aspects of a claim be ruled upon before there is a final order. *Bestway Concrete and TIG Ins. Co. v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

**In the context of subsection (2), the term "penalty" is a "term of art"** and applies to statutory sanctions imposed on a party for failing to obey orders or for failing to take required procedural steps. *Am. Express v. Indus. Comm'n*, 712 P.2d 1132 (Colo. App. 1985).

**Order remanding for further proceedings on the merits of the penalty issue was not a final order** and was not ripe for appellate re-

view. *U.S. Fidelity Guar., Inc. v. Kourlis*, 868 P.2d 1158 (Colo. App. 1994).

**An order denying sanctions under C.R.C.P. 37 is not a final order;** therefore, subsection (2) does not apply. *Reed v. Indus. Claim Appeals Office*, 13 P.3d 810 (Colo. App. 2000).

### III. METHODS OF REVIEW.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the industrial claim appeals panel.

**Petition for review serves same purpose as motion for new trial** in court procedure, the petition calling attention to concrete matters so that any errors indicated may be corrected. It thus defines the limits of inquiry for courts and any errors or objections not specified in the petition will not be considered in subsequent judicial proceedings. *London Guarantee & Accident Co. v. Sauer*, 92 Colo. 565, 22 P.2d 624 (1933).

**Under this section, any party dissatisfied with an order entered by the referee or director may petition to review the same.** The order may be amended or modified and shall be a final award unless objection be made thereto by further petition for review. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**The procedure of reopening a claim, being jurisdictional, requires no findings.** Even if it be determined that certain of the findings were not supported by the record, such determination would not justify a reversal of the judgment entered by the trial court. *Zurek v. Gates Rubber Co.*, 163 Colo. 321, 430 P.2d 465 (1967).

**Where no appeal is taken from an award, it becomes final.** *Colo. Dept. of Agriculture v. Wayne*, 30 Colo. App. 311, 493 P.2d 683 (1971).

**Except that this section does not preclude a change or modification of an award** under § 8-53-119 (now § 8-53-113), even though no petition for a review has been filed. *State Comp. Ins. Fund v. Indus. Comm'n*, 80 Colo. 130, 249 P. 653 (1926); *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 83 Colo. 315, 265 P. 99 (1928); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962); *Colo. Dept. of Agriculture v. Wayne*, 30 Colo. App. 311, 493 P.2d 683 (1971).

**Thus, there are two methods of reviewing an award:** That prescribed by this section and that prescribed by § 8-53-119 (now § 8-53-113). *Tyler v. Hagerman*, 88 Colo. 60, 291 P. 1033 (1930); *Hoover v. Indus. Comm'n*, 156 Colo. 147, 397 P.2d 223 (1964).

**Parties must be advised whether proceeding is under this section or § 8-53-119 (now**

**§ 8-53-113).** Where an award of a referee or the commission is to be reviewed, claimant, insured and insurer must be advised whether the proceeding is to be under this section or § 8-53-119, in order that they may protect themselves accordingly. *Tyler v. Hagerman*, 88 Colo. 60, 291 P. 1033 (1930).

**"Final award"** means only that the matter has been concluded unless reopened as provided by § 8-53-119 (now § 8-53-113). *Graden Coal Co. v. Yuarralde*, 137 Colo. 527, 328 P.2d 105 (1958).

**Remand for failure to make supplemental findings unnecessary.** Where no supplemental findings were made by the referee, this failure normally would necessitate a remand of the matter to the commission for further findings, but where the petitioners filed a petition for review requesting that the matter be referred to the commission without further hearing or order by the referee, a procedure which was permitted under this section, such remand is unnecessary. *Keystone Int'l, Inc. v. Gale*, 33 Colo. App. 216, 518 P.2d 296 (1973).

**Issuance of supplemental order is discretionary in ruling on a petition for review.** It is not an abuse of discretion for ALJ to decline to issue supplemental order in ruling on a petition for review when party represents that a fact is uncontested, awaits outcome of ALJ's order, and then presents a question for the first time in petition for review. *Broadmoor Ins. Co. v. Indus. Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1996).

**Statement of stipulated facts equivalent of transcript.** Where the record necessary for judicial review consists of a statement of stipulated facts, that statement should be considered the equivalent of a transcript. *Riley v. Indus. Comm'n*, 628 P.2d 147 (Colo. App. 1981), *aff'd*, 653 P.2d 723 (Colo. 1982).

### IV. HEARING OFFICER OR DIRECTOR AS FACT FINDER.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1973 amendment which transferred fact-finding powers from the industrial commission to the director of the division.

**Due process requires second referee to hear or read evidence prior to issuing order,** although an employee was not denied due process of law on the basis that the referee who issued the order had not read the transcript of the first hearing where the referee issued a supplemental order after reading the transcript. *Ski Depot Rentals, Inc. v. Lynch*, 714 P.2d 516 (Colo. App. 1985).

**In workmen's compensation cases the industrial commission is the fact finder.** *Skinner*



v. Indus. Comm'n, 152 Colo. 97, 381 P.2d 253 (1963); State v. Richards, 158 Colo. 155, 405 P.2d 675 (1965); Clodfelter v. Indus. Comm'n, 160 Colo. 39, 413 P.2d 700 (1966); Breit v. Indus. Comm'n, 160 Colo. 205, 415 P.2d 858 (1966); Levy v. Everson Plumbing Co., 171 Colo. 468, 468 P.2d 34 (1970); Sena v. World of Sleep, Inc., 173 Colo. 348, 478 P.2d 671 (1970).

**The industrial commission is the fact finder upon petition for review commission shall make findings of fact.** Upon petition for review the commission may do one of several things, but in any event, if it has not already done so, it shall, following a petition to review the order, make findings of fact which shall include all evidentiary and ultimate facts necessary to support the order. Alvin H. Watkins, Inc. v. Hamilton, 159 Colo. 257, 411 P.2d 15 (1966).

**Thus, section operates prospectively.** The statutory provision that findings of fact shall be made which shall include all evidentiary and ultimate facts necessary to support an order operates prospectively and not retroactively. Game & Fish Dept. v. Pardoe, 147 Colo. 363, 363 P.2d 1067 (1961).

**It is the duty of the commission to make specific findings of fact** from the evidence adduced, and mere recitals of the evidence taken and conclusions of law do not meet that test. Parrish v. Indus. Comm'n, 151 Colo. 538, 379 P.2d 384 (1963); State Comp. Ins. Fund v. Foulds, 167 Colo. 123, 445 P.2d 716 (1968); Womack v. Indus. Comm'n, 168 Colo. 364, 451 P.2d 761 (1969).

**The hearing officer must make only findings of fact sufficient to make review possible.** Ferguson v. Rockwell Int'l Corp., 734 P.2d 131 (Colo. App. 1986).

**However, it is necessary only that evidentiary and ultimate facts be specific.** It is not required that the degree of specificity of the findings encompass the specific rejection of evidence which was not persuasive. In order to comply with the requirements of this section, it is necessary only that the evidentiary and ultimate findings be specific as to that evidence which is deemed to be persuasive and determinative of the issues to be resolved. In re Claim of Crandall v. Watson-Wilson Transp. Sys., 171 Colo. 329, 467 P.2d 48 (1970); Tague v. Coors Porcelain Co., 29 Colo. App. 226, 481 P.2d 424 (1971); Churchill v. Sears, Roebuck & Co., 720 P.2d 171 (Colo. 1986).

**Evidentiary and ultimate facts.** Evidentiary facts are those facts which are necessary for determination of the ultimate facts. Ultimate facts are the substance of the conclusions from the evidence. Parrish v. Indus. Comm'n, 151 Colo. 538, 379 P.2d 384 (1963); Womack v. Indus. Comm'n, 168 Colo. 364, 451 P.2d 761 (1969); Tague v. Coors Porcelain Co., 29 Colo. App. 226, 481 P.2d 424 (1971); Apache Corp. v.

Indus. Comm'n, 717 P.2d 1000 (Colo. App. 1986).

**Ultimate facts, as opposed to evidentiary facts, involve a conclusion of law** or a determination of a mixed question of law and fact, and settle the rights and liabilities of the parties. Therefore, commission may alter findings of ultimate fact. Raisch v. Indus. Comm'n, 721 P.2d 693 (Colo. App. 1986) (decided prior to 1986 abolishment of industrial commission).

**Unless the commission first finds the evidentiary and ultimate facts, it is futile for the reviewing court to examine the record,** because it cannot sit as a fact-finding body to ascertain facts from the testimony in the first instance, and it cannot on review determine whether the testimony is sufficient to establish facts that have not been found by the commission. Metros v. Denver Coney Island, 110 Colo. 40, 129 P.2d 911 (1942); United States Fid. & Guar. Co. v. Indus. Comm'n, 128 Colo. 68, 259 P.2d 869 (1952); Alvin H. Watkins, Inc. v. Hamilton, 159 Colo. 257, 411 P.2d 15 (1966); Tague v. Coors Porcelain Co., 29 Colo. App. 226, 481 P.2d 424 (1971).

**Determination of whether disability has causal connection with original accident is conclusive.** In a workmen's compensation case it is for the commission, in the exercise of sound discretion, to determine whether, under the evidence, a permanent disability has a causal connection with the original accident, and its determination of that issue is conclusive on the courts. London Guarantee & Accident Co. v. Sauer, 92 Colo. 565, 22 P.2d 624 (1933).

**Where the original referee does not enter an order** and a second referee who was not at the hearing is called upon to enter the order, the second referee must base his findings and conclusions on an independent examination of the facts contained in the record. State Compensation Ins. Fund v. Fulkerson, 680 P.2d 1325 (Colo. App. 1984); Legouffe v. Prestige Homes, Inc., 689 P.2d 697 (Colo. App. 1984); El Paso County Sch. Dist. No. 11 v. Bunger, 713 P.2d 935 (Colo. App. 1985).

**For discussion of what constitutes an evidentiary fact,** see F.R. Orr Constr. v. Rinta, 717 P.2d 965 (Colo. App. 1985).

**Where hearing officer entered supplemental order** only addressing and altering findings unrelated to claim of entitlement to workmen's compensation death benefits made by claimant and where hearing officer elected not to supplement his order concerning claimant's contentions, the hearing officer should have forwarded the file to the panel and the claimant was not required to file a second petition for review of order of hearing officer as first petition for review was still pending. Michalski v. Indus. Claim Appeals Office, 757 P.2d 1146 (Colo. App. 1988).

**Jurisdictional challenge to hearing officer.** Additional hearing required where claimant alleged that hearing officer lacked jurisdiction to enter an order after the hearing officer had terminated his employment. *Welch v. Indus. Comm'n*, 722 P.2d 439 (Colo. App. 1986).

## V. REVIEW BY THE INDUSTRIAL CLAIM APPEALS PANEL.

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the industrial claim appeals panel. Cases which refer to referees were decided prior to the 1983 repeal and reenactment which changed the term to hearing officer.

**Procedural changes in statute** are applicable to all cases pending at the time the new statute became effective unless a contrary legislative intent is expressed and, since the procedural changes were imposed in conjunction with the abolition of the industrial commission and the creation of the industrial claim appeals office, it would be illogical to conclude that the general assembly intended the panel to apply a standard of review other than that set forth in its grant of authority. *Kininger v. Indus. Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988).

**Further petition for review.** In a case first heard by a referee, where a petition for a review had been duly filed after the award, and the entire case is thereafter referred to the commission (now director), this section clearly contemplates a further petition for review. *Carlson v. Indus. Comm'n*, 79 Colo. 124, 244 P. 68 (1926).

**Commission may reject claim as untimely.** The commission may reject a claim for disfigurement which is asserted for the first time in a petition for review, on the ground that it has not been timely presented. *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983).

**It is commission's responsibility independently to review entire record** and either make new findings or adopt the referee's findings of fact. *Thompson v. Indus. Comm'n*, 33 Colo. App. 369, 520 P.2d 139 (1974).

**Meaningful review not possible** when referee makes no findings of evidentiary fact. *Beech Aircraft, Inc. v. Reif*, 678 P.2d 1049 (Colo. App. 1983); *Raisch v. Indus. Comm'n*, 721 P.2d 693 (Colo. App. 1986).

**Referee's findings part of record which commission considers in reaching decision.** The fact that a referee is required by law to make findings of fact sufficient to support his award presupposes that the referee's findings will be a part of the record and that the commission will consider such findings in reaching its independent decision. *Thompson v. Indus.*

*Comm'n*, 33 Colo. App. 369, 520 P.2d 139 (1974).

**Commission may adopt referee's findings.** The commission is not required to make independent findings of fact, but may adopt the referee's findings when affirming a decision. *Mattison v. Indus. Comm'n*, 33 Colo. App. 203, 516 P.2d 1143 (1973).

**Adopted findings should be adequate.** While generally the commission's adoption of specific factual findings entered by the referee suffices, this procedure presupposes that the adopted findings are adequate. *Grand Valley Enters., Inc. v. Claimants in re Death of Wonders*, 39 Colo. App. 166, 562 P.2d 1119 (1977).

**Commission cannot avoid being influenced by referee's findings and conclusions**, when he had the only opportunity to observe the manner and demeanor of the witnesses, including that of the claimant. *Thompson v. Indus. Comm'n*, 33 Colo. App. 369, 520 P.2d 139 (1974).

**Prior to 1973, the commission was not limited merely to review of the director's order**, but could on the record make findings of its own and enter an award thereon. *United States Fid. & Guar. Co. v. Indus. Comm'n*, 96 Colo. 571, 45 P.2d 895 (1935); *Colo. Dept. of Agriculture v. Wayne*, 179 Colo. 258, 499 P.2d 1188 (1972).

To hold that the commission had no independent fact-finding authority would in effect emasculate the commission's function to that of a mere rubber stamp approving the referee's findings. *Harrison W. Corp. v. Hicks' Claimants*, 185 Colo. 142, 522 P.2d 722 (1974).

**The statutory phrase in former § 8-53-106 "contrary to the weight of the evidence"** means unless the findings are not supported by a preponderance of the evidence and the preponderance standard is met when the existence of a contested fact is more probable than not. Therefore, the commission properly exercised its authority when it found that the claimant failed to sustain its burden of showing by a preponderance of the evidence that the cause of his symptoms was a prior injury. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984).

**If the findings of fact by the administrative law judge are supported by substantial evidence they are binding on the panel, leaving only conclusions of law to be fully reviewed.** The difference in the language of this section and that of comparable provisions of the Administrative Procedure Act exhibits a conscious legislative intent to abolish this section's previous distinction between evidentiary and ultimate findings. *May D & F v. Indus. Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988) (decided under law in existence prior to 1987 amendment).

Findings of fact by the ALJ are binding upon the panel if supported by substantial evidence. Conversely, if the ALJ's findings of fact are not supported by substantial evidence, or if the



ALJ's orders are not supported by the findings of fact or applicable law, then they are not binding upon the panel and may be corrected or set aside. *Matter of Death of Smithour*, 778 P.2d 302 (Colo. App. 1989).

**Under the substantial evidence standard established in subsection (8)**, the evidence supporting a finding is not substantial if it is overwhelmed by other evidence or if it constitutes a mere conclusion. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995).

**This section requires the panel to accept the ALJ's findings of ultimate facts as well as evidentiary facts**, if supported by substantial evidence in the record; however, both the panel and this court may review a conclusion of law for error. *Schrieber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993).

**Commission may rule de novo on weight and sufficiency of evidence.** The industrial commission, as the ultimate fact finder, is not bound by the referee's findings but may rule de novo on the weight and sufficiency of the evidence in a workmen's compensation case. *Casa Bonita Restaurant v. Indus. Comm'n*, 624 P.2d 1340 (Colo. App. 1981).

**Commission's findings are binding upon appellate review.** The industrial commission's findings, where supported by substantial evidence, are binding upon appellate review. *Casa Bonita Restaurant v. Indus. Comm'n*, 624 P.2d 1340 (Colo. App. 1981).

**Commission's order reversing the hearing officer's denial of benefits is interlocutory and not reviewable until issues of the extent of disability and duration of benefits are determined.** *Indus. Comm'n v. Fort Logan*, 682 P.2d 1185 (Colo. 1984).

**Commission determines proper characterization of employment relationship.** The determination of the proper characterization of the employment relationship depends upon the facts in each case. This determination must properly be made by the commission rather than the court, even though the facts are largely undisputed, because this matter is not within the court's scope of review. *Schultz v. Indus. Comm'n*, 34 Colo. App. 122, 523 P.2d 164 (1974).

**Commission authorized to make its own finding of ultimate conclusions of fact.** *City & County of Denver v. Indus. Comm'n*, 690 P.2d 199 (Colo. 1984); *State Comp. Ins. Fund v. Bldg. Sys.*, 713 P.2d 940 (Colo. App. 1985).

**Causation may in certain circumstances be an ultimate fact and in other circumstances be an evidentiary fact.** *Baca v. Helm*, 682 P.2d 474 (Colo. 1984); *Raisch v. Indus. Comm'n*, 721 P.2d 693 (Colo. App. 1986).

**Whether an injury "caused" a disability, i.e., had a role in the chain of events leading to the disability, is a question of evidentiary fact.** *Baca v. Helm*, 682 P.2d 474 (Colo. 1984).

**The determination of causation may involve an evidentiary fact or an ultimate fact** and an ultimate fact may involve a mixed question of law and fact or solely a question of law. If facts are undisputed and reasonable minds could draw but one inference from them, causation is a question of law for the court. *Smith v. State Compensation Ins. Fund*, 749 P.2d 462 (Colo. App. 1987); *Schrieber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993).

**Whether an evidentiary fact of causation justifies the legal conclusion that a disability was "proximately caused" by a work-related injury is an ultimate fact**, i.e., a question of statutory interpretation. *Baca v. Helm*, 682 P.2d 474 (Colo. 1984).

**Credibility of witnesses.** Resolution of the credibility of witnesses by the hearing officer is a question of evidentiary fact which is binding on review. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983); *Varsity Contractors & Home Ins. Co. v. Baca*, 709 P.2d 55 (Colo. App. 1985).

**There is a clear distinction between the terms "no evidence" and "no credible evidence"** and, where the record failed to support the finding that there was no evidence of causation regarding worker's claim to total disability benefits for occupational lung disease, the industrial claim appeals panel should have set the order aside and remanded the cause for additional findings. *Hall v. Indus. Claim Appeals Office*, 757 P.2d 1132 (Colo. App. 1988).

**The scope of the "quasi-course of employment doctrine", like the scope of the doctrine of duty**, can be a question of law involving public policy considerations and there was no error in Panel's failure to remand to the ALJ for an initial determination of that question of law. *Schrieber v. Brown and Root, Inc.*, 888 P.2d 274 (Colo. App. 1993).

## VI. PROCEDURAL REQUIREMENTS.

**The filing of the petition as provided by this section is jurisdictional.** *Indus. Comm'n v. Plains Utils. Co.*, 127 Colo. 506, 259 P.2d 282 (1953); *Brodeur v. Indus. Claim Appeals Office*, 159 P.3d 810 (Colo. App. 2007).

**Timely filing of a petition for certiorari is a jurisdictional requirement.** Accordingly, statutory provisions governing appellate review must be strictly enforced. *Picken v. Indus. Claim Appeals Office*, 874 P.2d 485 (Colo. App. 1994); *Schneider Nat'l Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817 (Colo. App. 1998).

**Mailing to attorney triggers 20-day period under subsection (2).** The claimant, represented by an attorney, was not required to receive her own separate copy of the order. *Brodeur v. Indus. Claim Appeals Office*, 159 P.3d 810 (Colo. App. 2007).

**General rule on time computation does not affect specific provision of subsection (10).** A party to a proceeding who received notice of the panel's order by mail was not entitled to the additional three days allowed by C.A.R. 26(c) for service by mail, in view of the fact that mailing time is already accounted for in this section. *Indus. Claim Appeals Office v. Zarlingo*, 57 P.3d 736 (Colo. 2002).

**General three-day mailing provision in C.R.C.P. 6(e) does not modify the 20-day time limit set forth in subsection (2).** *Speier v. Indus. Claim Appeals Office*, 181 P.3d 1173 (Colo. App. 2008).

**Filing deadline may not be extended for excusable neglect.** *Speier v. Indus. Claim Appeals Office*, 181 P.3d 1173 (Colo. App. 2008).

**Court of appeals lacked authority to extend time for filing of petition for writ of certiorari in workers compensation case.** Neither this statute nor C.A.R. 46.1 permit an extension of time within which to file petition. *Picken v. Indus. Claim Appeals Office*, 874 P.2d 485 (Colo. App. 1994).

**Failure to specify in detail in a petition the alleged errors committed is not jurisdictional** and the industrial claim appeals office has jurisdiction to consider such a petition if it elects to do so. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989).

**Failure to file a brief or the untimely filing of a brief under subsection (3) is not a jurisdictional defect.** *Ortiz v. Indus. Comm'n*, 734 P.2d 642 (Colo. App. 1986).

**A second ALJ did not lack jurisdiction under subsection (12)** to consider a petition to reopen because the first ALJ's order was on appeal. *Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996).

**Procedure for review must be followed.** In order to avail oneself of the provisions of the workmen's compensation act the procedure for review of findings or awards must be followed, and, unless followed, the order or award may not be reviewed. *Indus. Comm'n v. Plains Utils. Co.*, 127 Colo. 506, 259 P.2d 282 (1953); *Vigil v. Indus. Comm'n*, 160 Colo. 23, 413 P.2d 904 (1966); *Miller v. Indus. Comm'n*, 28 Colo. App. 462, 474 P.2d 177 (1970).

**The words "must" and "shall" as used in this section are not susceptible of any construction except as mandatory.** *Indus. Comm'n v. Plains Utils. Co.*, 127 Colo. 506, 259 P.2d 282 (1953); *Logan County Hosp. v. Slocum*, 165 Colo. 232, 438 P.2d 240 (1968).

**Thus, award "shall be final" unless challenged in manner prescribed.** Under the provisions of the statute, an award "shall be final" unless challenged in the particular manner and within the time provided by the act. *Stearns-Roger Mfg. Co. v. Casteel*, 128 Colo. 289, 261 P.2d 228 (1953).

The commission's order after consideration of the referee's award is final, except during the pendency before the commission of a petition for review. *Carver v. Indus. Comm'n*, 40 Colo. App. 126, 570 P.2d 256 (1977).

**Award will be res judicata.** The statute clearly contemplates that all objections to an award shall be raised, if at all, by specified procedures and shall be barred from later relitigation by virtue of the doctrine of res judicata. The whole policy of the law is against the retrial of issues already litigated by the parties. *State Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

**More specifically, a petition for review "shall be in writing and specify in detail the particular errors and objections".** *Gadbois v. Allan*, 105 Colo. 19, 94 P.2d 688 (1939); *Stearns-Roger Mfg. Co. v. Casteel*, 128 Colo. 289, 261 P.2d 228 (1953); *Williams v. New Amsterdam Cas. Co.*, 136 Colo. 458, 319 P.2d 1078 (1957).

**Phrase "any party dissatisfied",** as used in subsection (2), includes an independent claims adjustment service acting for a self-insured employer. *Tozer v. Scott Wetzel Servs., Inc.*, 883 P.2d 496 (Colo. App. 1994).

**Standing to request review of an ALJ's order** arises under this section only when a party is dissatisfied with an order which requires a party to pay a penalty or benefits and, therefore, insurer did not have standing to challenge an ALJ's determination as to the award of attorney fees which award did not impose a penalty upon the insurer, did not assess any additional benefits nor deny any benefit to the claimant, or place additional liability on the insurer. *Bradley v. Indus. Claim Appeals Office*, 841 P.2d 1071 (Colo. App. 1992).

**Sufficiency of writing and specificity of objections.** This section, providing that a petition for review of an award of the commission shall be in writing and specify in detail the particular errors or objections, is sufficiently complied with where a referee of the commission advises a claimant that a petition, filed by claimant, lacks detail, and extends the time within which to secure a transcript of the testimony and present a petition in compliance with the rules; the fact that the referee order is a more detailed statement and grants time within which to file it, cannot work a default or a forfeiture of a claimant's right to review. *Williams v. New Amsterdam Cas. Co.*, 136 Colo. 458, 319 P.2d 1078 (1957).

**Letter as petition for review.** A letter sent by counsel for petitioner, marked as being received, and entered as part of the record, which prompts the referee's order to hold a supplemental hearing, is in sufficient compliance with the requirements set forth by the statute and acts as a valid petition for review when it states specific reasons for necessity of amending the order. *Miller*



v. Indus. Comm'n, 28 Colo. App. 462, 474 P.2d 177 (1970).

**In addition, a petition for review must be submitted within 15 days (now 20 days)** after the referee's order, and unless filed within this allotted period the petition for review must be stricken and the order declared final. *Midget Consol. Gold Mining Co. v. Indus. Comm'n*, 69 Colo. 218, 193 P. 493 (1920); *Indus. Comm'n v. Bracken*, 83 Colo. 72, 262 P. 521 (1927); *Pollard v. Indus. Comm'n*, 95 Colo. 572, 37 P.2d 1093 (1934); *Zimmerman v. Indus. Comm'n*, 108 Colo. 552, 120 P.2d 636 (1941); *Miller v. Indus. Comm'n*, 28 Colo. App. 462, 474 P.2d 177 (1970); *Irrigation Motor & Pump Co. v. Indus. Comm'n*, 30 Colo. App. 289, 494 P.2d 144 (1971).

**A petition for review, whether it is denominated an appeal or a cross appeal**, must be filed within 20 days after the date of the certificate of mailing of the industrial claim appeals panel's final order and this deadline may not be extended. *Western Empire v. Indus. Claim Appeals Office*, 769 P.2d 1089 (Colo. App. 1989).

**Actions are not commenced in the court of appeals until they are actually received by the court**; they are not commenced on the day they are mailed. Therefore, petition was filed late where petitioner mailed it on the 20th day after the Industrial Claim Appeals Office entered its order. *Rice v. Indus. Claim Appeals Office*, 937 P.2d 893 (Colo. App. 1997).

**Claimant's petition for review of decision was timely filed despite fact that certificate of mailing did not indicate petition was mailed to ALJ** where cover letter attached to petition disclosed that petition was mailed within 20 days of order. *Rendon v. United Airlines*, 881 P.2d 482 (Colo. App. 1994).

**Twenty-day limit within which to file a petition for writ of certiorari set forth in this section and C.A.R. 46.1** is applicable to injuries occurring on or after July 1, 1991. *Picken v. Indus. Claim Appeals Office*, 874 P.2d 485 (Colo. App. 1994).

**Effect of failure to seek timely administrative review.** Where a claimant fails to seek, within the statutorily prescribed 15-day (now 20-day) period, administrative review of an order entered pursuant to a hearing, that failure deprives the court of appeals of jurisdiction to consider the merits of claimant's alleged denial of due process. *Wallace v. Indus. Comm'n*, 629 P.2d 1091 (Colo. App. 1981).

**Where further time was granted by the referee within 15 days (now 20 days)** after the date when the order was entered, the statute does not require that a subsequent granting of additional time must also be sought and obtained prior to the expiration of the extended time within which to file the petition for review. The supreme court is disinclined to judicially establish such a strict rule of procedure where the

request for additional time was filed before the expiration of the extended time theretofore granted by the referee. *City & County of Denver v. Phillips*, 166 Colo. 312, 443 P.2d 379 (1968).

**Furthermore, a transcript of the proceedings must be filed within 30 days (now 20 days)** after submission of the petition for review. *Logan County Hosp. v. Slocum*, 165 Colo. 232, 438 P.2d 240 (1968); *Vieweg v. B. F. Goodrich Co.*, 170 Colo. 71, 459 P.2d 759 (1969); *Miller v. Indus. Comm'n*, 28 Colo. App. 462, 474 P.2d 177 (1970).

**For without submission of the transcript of the first proceedings, the referee is without jurisdiction to hold a second hearing** on the matter, and the commission is correct in declaring the order of the second hearing a nullity, and in reinstating the order made after the first hearing. *Miller v. Indus. Comm'n*, 28 Colo. App. 462, 474 P.2d 177 (1970).

**Claimant's timely filed petition for review of hearing officer's order was sufficient despite failure simultaneously to order record and transcript of hearings.** *Martinez v. Indus. Comm'n*, 709 P.2d 49 (Colo. App. 1985).

**Order filed by administrative law judge more than 30 days after filing of briefs is void.** *Hillebrand Const. Co. v. Worf*, 780 P.2d 24 (Colo. App. 1989).

**Failure of commission to act within time period does not bar review.** Where petitioner timely files a motion for extension of the period for filing the transcript, pursuant to subsection (3), he does not lose his right to review simply because the commission does not rule on the motion until the 30-day period expires. *Hewgley v. Indus. Comm'n*, 657 P.2d 989 (Colo. App. 1982).

**Brief not required.** There is no requirement under this section that a brief be filed in support of a petition to review a referee's decision or an order of the commission. *Saxton v. Indus. Comm'n*, 41 Colo. App. 309, 584 P.2d 638 (1978).

**Withdrawal of attorney and claimant's ignorance of necessity for petition do not excuse noncompliance** with this section. *Suver v. Indus. Comm'n*, 80 Colo. 429, 252 P. 361 (1927).

**Procedural requirements may not be waived, enlarged, diminished, or destroyed by consent, and cannot be estopped.** *Vieweg v. B. F. Goodrich Co.*, 170 Colo. 71, 459 P.2d 759 (1969).

The procedural requirements for review under this act constitute limits on the commission's jurisdiction and cannot be waived or destroyed by consent. *Hasbrouck v. Indus. Comm'n*, 685 P.2d 780 (Colo. App. 1984).

**Failure to effect service upon an opposing party within the time limits of this section and § 8-53-119 is not jurisdictionally fatal.** Dept. of

Inst. v. Indus. Claim Appeals Office, 780 P.2d 72 (Colo. App. 1989).

**Where a claimant fails to deliver a petition for review to the office designated in the order of the administrative law judge**, and such failure results in an untimely filing, the petition is jurisdictionally defective and a review of the claim on the merits is barred. *Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991).

**Court not at liberty to imply a "mailing window" analogous to that provided under C.R.C.P. (6)(e) into the plain language of subsection (2).** *Digital Equip. Corp. v. Indus. Claim Appeals Office*, 894 P.2d 54 (Colo. App. 1995).

**Commission has no authority to grant an extension of time for filing a petition with court of appeals** and, therefore, failure to timely seek review deprives court of appeals of jurisdiction. *Cornstubble v. Indus. Comm'n*, 722 P.2d 448 (Colo. App. 1986) (decided prior to 1986 abolishment of industrial commission).

**Time at which awards become final where separate hearings had on two claims arising out of same accident.** Where claims are filed against the insurance carrier of a lessee and the lessor for compensation growing out of the same accident, each being heard and determined separately, the award becomes final in each case at the expiration of 15 days, and not at the expiration of 15 days from the time of the last award. *Indus. Comm'n v. Bracken*, 83 Colo. 72, 262 P. 521 (1927).

**Requirements for filing petition with court of appeals.** Prior to filing a petition for review with the court of appeals, the claimant must not only petition the referee and the commission to review the referee's order, but he must also petition the commission to review its own action on the referee's decision, so that any error may be corrected without the necessity of judicial review. *Maxon v. Indus. Comm'n*, 40 Colo. App. 196, 571 P.2d 319 (1977).

**Objection for failure to file in time may be waived.** An objection to a review under this section, because the petition therefor was not filed within the statutory or extended time, should be sustained, but the objection is waived if the hearing is had and the objecting party participates therein. *Tyler v. Hagerman*, 88 Colo. 60, 291 P. 1033 (1926).

**Parties are estopped to complain of non-compliance by taking part in supplemental proceedings.** Parties to a workmen's compensation proceeding by their conduct in applying for, and taking part in, supplemental proceedings before the director, held estopped to complain of noncompliance with this section. *Indus. Comm'n v. Employers' Liab. Assurance Corp.*, 78 Colo. 267, 241 P. 729 (1925).

**Parties thereby waive question of authority of director to enter additional award.** After original award by the director, on petition to

reopen the case, of which employer and insurance carrier have notice, if they appear and participate in further proceedings without objection, they will be deemed to have waived any question of the authority of the director to enter an additional award. *Indus. Comm'n v. State Ins. Comp. Fund*, 71 Colo. 106, 203 P. 215 (1922).

## VII. NOTICE.

**Presumably, a person's address is the place of his domicile and residence.** *Devore v. Indus. Comm'n*, 129 Colo. 10, 266 P.2d 774 (1954).

**Claimant has duty to provide place for delivery of notice.** For the purpose of receiving mail or notice, the address of a claimant is the designation of the place where delivery is desired. That place is best known to claimant and it is his duty to provide the place of residence or other designation of place for delivery of notice for inclusion in the files of his claim. *Devore v. Indus. Comm'n*, 129 Colo. 10, 266 P.2d 774 (1954).

**Filing period commences to run against party who receives actual notice.** An interpretation that until such time as all parties in interest are given due notice of the award, the statutory time within which a petition to review may be filed does not commence to run, even as against the party in interest who has in fact received actual notice, is not supported by the statute. *Davis v. Indus. Comm'n*, 161 Colo. 80, 420 P.2d 147 (1966).

**Effect of no notice or insufficient notice.** Where no notice or an insufficient notice of an award is given the parties in interest in a workmen's compensation case, the time within which a petition for review must be filed does not run. *Indus. Comm'n v. Martinez*, 102 Colo. 31, 77 P.2d 646 (1938).

**Ruling on merits impliedly accepts petitioner's notice allegation.** When the industrial commission rules upon a petition for administrative review, having before it the affidavits of petitioner's attorney and his two employees stating that notice of the commission's order had not in fact been received by them, the commission impliedly accepts petitioner's allegation that notice had not been received by her attorney, thereby making the filing of the petition timely. *Cline v. Indus. Comm'n*, 43 Colo. App. 123, 599 P.2d 973 (1979).

**Notice misstating date of entry of award insufficient.** Notice of an award which misstates the date of entry, resulting in a curtailment of time within which the petition for review may be filed, is insufficient. *Zimmerman v. Indus. Comm'n*, 108 Colo. 552, 120 P.2d 636 (1941).

**Supreme court not inclined to favor ruling which forecloses right to review.** Where the jurisdiction of the district court in a workmen's compensation case is questioned, unless the pro-



visions of this section concerning notice of an award have been strictly followed, the supreme court, in reviewing the judgment, will not be inclined to favor a ruling which would foreclose the right of a party to a judicial review of the

commission's action. *Zimmerman v. Indus. Comm'n*, 108 Colo. 552, 120 P.2d 636 (1941).

**Thus, review of an award without notice to the claimant is unlawful.** *Indus. Comm'n v. Nissen*, 84 Colo. 19, 267 P. 791 (1928).

**8-43-302. Corrected orders.** (1) The director, an administrative law judge, or the panel may issue a corrected order:

(a) At any time within thirty days after the entry of an order, to correct any clerical errors in the order. Clerical errors are grammatical or computational errors.

(b) At any time within thirty days of the entry of an order, to correct any errors caused by mistake or inadvertence.

(2) Any order corrected for clerical error, mistake, or inadvertence shall be labeled "corrected order" and mailed by the division. Any corrected order may be appealed in the manner provided in this article for any other order.

**Source: L. 90:** Entire article R&RE, p. 509, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-53-112 as it existed prior to 1990.

**8-43-303. Reopening.** (1) At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. Upon a prima facie showing that the claimant received overpayments, the award shall be reopened solely as to overpayments and repayment shall be ordered. In cases involving the circumstances described in section 8-42-113.5, recovery of overpayments shall be ordered in accordance with said section. If an award is reopened on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. Any order entered under this subsection (1) shall be subject to review in the same manner as other orders.

(2) (a) At any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable, the director or an administrative law judge may, after notice to all parties, review and reopen an award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. Upon a prima facie showing that the claimant received overpayments, the award shall be reopened solely as to overpayments and repayment shall be ordered. In cases involving the circumstances described in section 8-42-113.5, recovery of overpayments shall be ordered in accordance with said section. If an award is reopened under this paragraph (a) on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. Any order entered under this paragraph (a) shall be subject to review in the same manner as other orders.

(b) At any time within two years after the date the last medical benefits become due and payable, the director or an administrative law judge may, after notice to all parties, review and reopen an award only as to medical benefits on the ground of an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. If an award is reopened under this paragraph (b), medical benefits previously ordered may be ended, diminished, maintained, or increased. No such reopening shall affect the earlier award as to

moneys already paid. Any order entered under this paragraph (b) shall be subject to review in the same manner as other orders.

(3) In cases where a claimant is determined to be permanently totally disabled, any such case may be reopened at any time to determine if the claimant has returned to employment. If the claimant has returned to employment and is earning in excess of four thousand dollars per year or has participated in activities which indicate that the claimant has the ability to return to employment, such claimant's permanent total disability award shall cease and the claimant shall not be entitled to further permanent total disability benefits as a result of the injury or occupational disease which led to the original permanent total disability award. Any subsequent permanent partial disability benefits awarded for the same injury or occupational disease shall be decreased by the amount of permanent total disability benefits previously received by the employee.

(4) The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened.

**Source:** L. 90: Entire article R&RE, p. 509, § 1, effective July 1. L. 91: (3) added, p. 1323, § 34, effective July 1. L. 97: (1) and (2)(a) amended, p. 114, § 5, effective July 1. L. 2007: (4) added, p. 1474, § 8, effective May 30.

**Editor's note:** This section is similar to former § 8-53-113 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
  - A. In General.
  - B. Statute of Limitations.
- II. Discretionary Power of Review.
  - A. In General.
  - B. Abuse of Discretion.
- III. Change of Award.

### I. GENERAL CONSIDERATION.

#### A. In General.

**Law reviews.** For article, "One Year Review of Contracts", see 37 Dicta 1 (1960). For article, "One Year Review of Torts", see 37 Dicta 67 (1960). For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980). For article, "Brown and Root: When an ALJ's Order is an 'Award'", see 22 Colo. Law. 1927 (1993).

**Annotator's notes.** (1) The following annotations include cases decided under former provisions similar to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested power in the director of the division of labor previously exercised by the industrial commission or were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions to the industrial claim appeals panel.

**This section does not violate due process or equal protection** by placing time limits on a claimant's right to reopen an award, whereas an employer may reopen at any time after an in-

jured worker has resumed employment. Claimants and employers are not similarly situated, and there is a rational basis for the distinction. *Calvert v. Indus. Claim Appeals Office*, 155 P.3d 474 (Colo. App. 2006).

**Section 8-40-201 (16.5)(a) and subsection (3) of this section are distinguishable** because they affect persons who are not similarly situated to each other. The purpose of § 8-40-201 (16.5)(a) is to define permanent total disability for purposes of initially determining whether a claimant is eligible for permanent total disability benefits. In contrast, the purpose of subsection (3) of this section is to set a standard which employers must meet before a case can be reopened to determine whether an employee who has already been awarded permanent total disability benefits should continue to receive such benefits. *Christie v. Coors Transp. Co.*, 933 P.2d 1330 (Colo. 1997).

**The clear intent and purpose of this section** was to give the industrial commission, within six years from the date of the accident, authority to review the proceeding which resulted in the conclusion that compensation had been paid, whether it is designated an "order", "decision", "judgment", or "finding and award". *Brofman v. Indus. Comm'n*, 117 Colo. 248, 186 P.2d 584 (1947).

**Furthermore, the purpose of this statute is not to place arbitrary power in the hands of the commission**, but to give it power, on request, to make equitable adjustments increasing awards where time has shown a change of condition. *Mascitelli v. Giuliano & Sons Coal Co.*, 157 Colo. 240, 402 P.2d 192 (1965).

**Legislative intent.** The general assembly, in enacting this section, authorized the director to



review awards, sua sponte. *Gates Rubber Co. v. Indus. Comm'n*, 647 P.2d 244 (Colo. App. 1982).

**Where a claim has been closed, it is necessary to seek reopening under this section.** *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995).

Uncontested admission of liability became a "final" award, which could not be reopened except pursuant to statute, despite parties' assertion that fraud rendered award void ab initio. *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995).

**This section provides a procedure, not a benefit.** The ability to reopen an award is established under this article of the Workers' Compensation Act, which describes the procedures for notices, reports, settlement, hearings, petitions for review, enforcement, and penalties. It is not a benefit within the meaning of article 42 of the Act. *Landeros v. Indus. Claim Appeals Office*, 214 P.3d 544 (Colo. App. 2008).

**The reopening authority under the provisions of this section is indicative of a strong legislative policy that, in workers' compensation matters, the goal of achieving a fair and just result overrides the interest of litigants in obtaining a final resolution of their dispute.** *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

In the context of workers' compensation matters, a "final" award means only that the matter has been concluded subject to later reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

The division-sponsored independent medical examination (DIME) scheme and the reopening procedures under this section as they concern a determination of MMI are not inconsistent and irreconcilable. MMI marks the point at which a claimant's condition has stabilized, and no further treatment can be reasonably expected to improve the condition. MMI is also considered a matter of diagnosis. A mistake in diagnosis has previously been held sufficient to justify reopening. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005).

**Upon its own motion on the ground of error, mistake or change in condition, the commission may review any award,** and if the statutory conditions are present may reopen any award whether interim or final, and adjust compensation in accordance with the standards of the act. *Graden Coal Co. v. Ytuarralde*, 137 Colo. 527, 328 P.2d 105 (1958); *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**Even if a compensation agreement or statement has been entered between the parties** and thereafter there is a change in the condition of the employee, on proper application or petition the agreement or settlement may be re-

viewed, and compensation increased or diminished, or the payment of compensation may be suspended or terminated. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**However, the commission is limited in its review to "error, mistake, or a change in conditions."** *Coursey v. Indus. Comm'n*, 83 Colo. 490, 267 P. 202 (1928); *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 85 Colo. 237, 275 P. 910 (1929); *Independence Coffee & Spice Co. v. Taylor*, 97 Colo. 242, 48 P.2d 798 (1935).

**Collateral estoppel applies to all issues except "error, mistake, or a change in condition."** Despite the fact that collateral estoppel does not usually apply to the same case, and the case is considered reopened under this section, the procedural posture should be considered to be analogous to a new proceeding. Therefore, when the elements of collateral estoppel are met, and the issue is not one of those enumerated in this section, collateral estoppel applies to previously decided issues. *Cooper v. Indus. Claim Appeals Office*, 998 P.2d 5 (Colo. App. 1999).

**ALJ has no inherent authority to order repayment in cases of fraud,** but may terminate future payments. *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995).

**It is immaterial on the question of the validity of a review who moves for the review or whether anyone does.** *Indus. Comm'n v. Nissen*, 84 Colo. 19, 267 P. 791 (1928); *Serv. Supply Co. v. Vallejos*, 169 Colo. 14, 452 P.2d 387 (1969).

**And there is no restriction in this section as to the number of times a case may be reopened,** and when based upon new or different evidence no such limitation may be imposed by the courts, that being a matter for legislative expression. *Graden Coal Co. v. Ytuarralde*, 137 Colo. 527, 328 P.2d 105 (1958).

**So that a claimant is not precluded from filing a first and second petition to reopen** a compensation case, even though the award first entered has become final, since this section expressly grants the commission power to reopen any case within the time provided therein; there being no restrictions in the statute as to the number of times a case may be reopened based upon new or different evidence, no such limitation may be imposed by the courts. *Graden Coal Co. v. Ytuarralde*, 137 Colo. 527, 328 P.2d 105 (1958).

**Petition is merely a means of calling attention to right to reopen.** This section grants the exclusive right to reopen to the commission, and a claimant's petition is merely a means of calling attention to the fact such action should be taken. *Univ. of Denver v. Indus. Comm'n*, 138 Colo. 505, 335 P.2d 292 (1959).

**"Change in condition"** means a change in the claimant's physical or mental condition and does not include a change in his economic con-

ditions. *Lucero v. Climax Molybdenum Co.*, 710 P.2d 1191 (Colo. App. 1985), *aff'd*, 732 P. 2d 642 (Colo. 1987); *Brasher v. Indus. Comm'n*, 717 P.2d 990 (Colo. App. 1986), *aff'd sub nom. Lucero v. Climax Molybdenum Co.*, 732 P. 2d 642 (Colo. 1987).

The phrase "change in condition" in this section refers to a change in the physical condition of claimant and not to changes in economic circumstances alone. *George v. Indus. Comm'n*, 720 P.2d 624 (Colo. App. 1986).

**"Change in condition" exception applies to the physical condition of an injured worker and is inapplicable** where the injured worker dies and the disability benefits are replaced by death benefits payable to the decedent's dependents. *Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996).

**"Change in condition" refers to the underlying condition**, not to a change in the medication used to treat it. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000).

**The word "mistake", as used in this section, means any mistake**, whether of law or fact. *State Comp. Ins. Fund v. Indus. Comm'n*, 80 Colo. 130, 249 P. 653 (1926); *Gregorich v. Indus. Comm'n*, 117 Colo. 423, 188 P.2d 886 (1948).

**A "mistake of law" which justifies reopening of a workers' compensation matter** under this section may be established if an original order is inconsistent with a subsequent judicial interpretation of a controlling statutory provision. Further, it is immaterial to the reopening analysis under the foregoing statutory criteria whether the prior order premised on a mistake of law has been upheld by an appellate court. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996); *Cesario v. Bldg. Servs. Sys. Inc.*, 962 P.2d 292 (Colo. App. 1997).

**Mistake of fact may result when the state of the medical art advances** to the point that new evidence becomes available, and such new evidence was not and could not have been previously available to the treating physician. *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989).

**Mistake in diagnosis held sufficient to justify reopening a claim.** *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005).

**Parties' mistaken belief that claimant was ineligible for dependent benefits constituted sufficient basis for reopening the case.** *Exeter Drilling v. Indus. Claim Appeals Office*, 801 P.2d 20 (Colo. App. 1990).

**"Mistake" includes fraud.** *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995).

**But the words "due and payable" present a slight ambiguity** as here used, because the general assembly has not stated whether it applies to commuted payments or to periodic payments or

to a combination of such payments. *Univ. of Denver v. Indus. Comm'n*, 138 Colo. 505, 335 P.2d 292 (1959).

**In any event, a payment of compensation cannot be "due and payable" when it never has been considered or ordered.** *Dr. Pepper Bottling Co. v. Indus. Comm'n*, 134 Colo. 238, 301 P.2d 710 (1956).

**Payment in full does not bar the review under this section.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 83 Colo. 315, 265 P. 99 (1928); *Employers' Mut. Ins. Co. v. Jacoe*, 102 Colo. 515, 81 P.2d 389 (1938).

**Nor does the failure to award claimant any compensation.** The failure of the commission to award claimant any compensation did not operate to prevent that body, by a supplemental or subsequent award, if it had jurisdiction to make a supplemental award, from providing compensation in such sum as it deemed the evidence warranted. This would be proper under this section because an award of a substantial sum would be a larger sum than no award at all. *Indus. Comm'n v. Employers' Liab. Assurance Corp.*, 78 Colo. 267, 241 P. 729 (1925).

**A reopening under subsection (1) reopens an award not just specific issues raised by claimant in a petition to reopen.** *Avalanche Indus. v. Indus. Claim Appeals Office*, 166 P.3d 147 (Colo. App. 2007), *aff'd on other grounds*, 198 P.3d 589 (Colo. 2008).

**Reopening a case is not warranted if, once reopened, no additional benefits may be awarded.** *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000).

**Commission not required to give reason for reopening case.** *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 85 Colo. 237, 275 P. 910 (1929).

**Likewise, it is not obligated to state the reasons for refusal to reopen a case.** *Kokel v. Indus. Comm'n*, 111 Colo. 188, 139 P.2d 259 (1943); *Beckley v. Indus. Comm'n*, 112 Colo. 135, 146 P.2d 990 (1944); *Maryland Cas. Co. v. Kravig*, 153 Colo. 282, 385 P.2d 669 (1963); *Hoover v. Indus. Comm'n*, 156 Colo. 147, 397 P.2d 223 (1964); *Serv. Supply Co. v. Vallejos*, 169 Colo. 14, 452 P.2d 387 (1969).

**Since the question of the right to reopen a workmen's compensation case is jurisdictional**, a denial of the petition to reopen requires no findings. *Maryland Cas. Co. v. Kravig*, 153 Colo. 282, 385 P.2d 669 (1963); *Hoover v. Indus. Comm'n*, 156 Colo. 147, 397 P.2d 223 (1964).

**To warrant a reopening of a case, it is not necessary to make a showing that a worker's industrial disability has increased** because a reopening is also appropriate where additional medical and temporary disability benefits are warranted. *Dorman v. B & W Const. Co.*, 765 P.2d 1033 (Colo. App. 1988).

**An authorized treating physician's finding of increased impairment does not require re-**



**opening as a matter of law.** *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008).

**Even if the evidence does not support the denial**, no error occurs because in this type of reopening, being jurisdictional, no findings are required. *Hoover v. Indus. Comm'n*, 156 Colo. 147, 397 P.2d 223 (1964).

**Only if a petition to reopen is granted are specific findings mandatory** as to the particular error, mistake, or change of condition. *Sherratt v. Rocky Mt. Fuel Co.*, 94 Colo. 369, 30 P.2d 270 (1934); *Rocky Mt. Fuel Co. v. Canivez*, 96 Colo. 198, 40 P.2d 618 (1935); *Rocky Mt. Fuel Co. v. Sherratt*, 96 Colo. 463, 45 P.2d 643 (1935); *Mishmish v. Hayden Coal Co.*, 98 Colo. 373, 56 P.2d 21 (1936); *Century Indem. Co. v. Klipfel*, 99 Colo. 213, 61 P.2d 842 (1936); *Nat'l Lumber & Creosoting Co. v. Kelly*, 99 Colo. 442, 63 P.2d 457 (1936); *Allan v. Gadbois*, 100 Colo. 141, 66 P.2d 331 (1937); *Kokel v. Indus. Comm'n*, 111 Colo. 188, 139 P.2d 259 (1943); *Maryland Cas. Co. v. Kravig*, 153 Colo. 282, 385 P.2d 669 (1963); *Hoover v. Indus. Comm'n*, 156 Colo. 147, 397 P.2d 223 (1964).

**When acting on a petition to reopen**, the industrial commission is required to include findings concerning workers' compensation claimant's request for vocational rehabilitation in its order where claimant was potentially entitled to vocational rehabilitation based on industrial disability. *George v. Indus. Comm'n*, 720 P.2d 624 (Colo. App. 1986).

**Finding of director on employee's application for admission to major medical fund was not binding** on hearing officer concerning employee's petition to reopen and in determining whether employee was entitled to additional benefits. *Brothers v. Indus. Comm'n*, 733 P.2d 1217 (Colo. App. 1987).

**For once having reopened a case the commission is obligated to decide the issues presented** in all respects, as upon original hearing. *Cain v. Indus. Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

**After reopening, an order dismissing application to reopen will not be upheld.** Where the commission reopens a case, holds a hearing and takes evidence, an order providing that a claimant's application to reopen the case is dismissed will not be upheld. *Cain v. Indus. Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

**Furthermore, an order denying a petition to reopen a claim entered without hearing or notice to the claimant is invalid** and the director of the division of labor has jurisdiction to correct the error. *James v. Irrigation Motor & Pump Co.*, 180 Colo. 195, 503 P.2d 1025 (1972).

**Likewise, once an award is reopened, the commission is required to give notice of a hearing** to the parties interested, and to make specific findings of fact as to the error or mistake or change of condition, whether it modifies the

original award or affirms it. *Serv. Supply Co. v. Vallejos*, 169 Colo. 14, 452 P.2d 387 (1969).

**Director must give notice of claims.** The director who reopens the case on his own motion must necessarily give the opposing parties notice as of the claims they will be required to defend. *Berkley Moving & Storage Co. v. Eubank*, 193 Colo. 334, 566 P.2d 359 (1977).

When the director reopens a case on his own motion, notice must be given to opposing parties of the claims they would be required to defend. *Gates Rubber Co. v. Indus. Comm'n*, 647 P.2d 244 (Colo. App. 1982).

**Notice to interested parties.** The essential requirement of this section is that the claimant give the commission notice of his intention to reopen the award. *State Comp. Ins. Fund v. Indus. Comm'n*, 697 P.2d 807 (Colo. App. 1985).

**After an award becomes final, the only way the case may be reopened is by the commission upon its own motion.** *Clayton Coal Co. v. Zak*, 94 Colo. 171, 29 P.2d 374 (1933); *Indus. Comm'n v. Kokel*, 108 Colo. 353, 116 P.2d 915 (1941).

**Since the courts have no authority to order a reopening.** *Wintoroth v. Indus. Comm'n*, 93 Colo. 38, 22 P.2d 865 (1933).

**In absence of formal award, the approval of an admission of liability coupled with payments constitutes award.** Although no formal award was ever ordered, the commission does not retain continuing jurisdiction, since the action which the commission took when it approved the insurance carrier admission of general liability together with the payment to the claimant of benefits constituted an award for all intents and purposes under the statute. *Harlan v. Indus. Comm'n*, 167 Colo. 413, 447 P.2d 1009 (1968); *Irrigation Motor & Pump Co. v. Indus. Comm'n*, 30 Colo. App. 289, 494 P.2d 144 (1971).

**Last payment operates to close matter of award.** Under the clear provision of this section it is the last payment of benefits which is significant and which operates to close the matter of an award. *Harlan v. Indus. Comm'n*, 167 Colo. 413, 447 P.2d 1009 (1968).

**But order reopening award is not final award.** An order reopening an award for purpose of determining whether mistake, error, or change of condition is present is not a final order and is not reviewable by the courts, only awards which are final being reviewable. *Stanley Hotel v. Thomas*, 153 Colo. 503, 387 P.2d 27 (1963).

**If an order grants or denies temporary benefits and does not address the issue of permanent benefits, but expressly reserves jurisdiction over the latter subject**, no award has been entered, and thus, no petition for reopening is required, until a proper order closing the matter is entered. *Brown & Root v. Indus. Claim Appeals Office*, 833 P.2d 780 (Colo. App.

1991); *El Paso County DSS v. Donn*, 865 P.2d 877 (Colo. App. 1993).

**The commission retains jurisdiction to deal with any further disability appearing** that can be directly traced to the original injury if such appears for consideration within the six-year period of limitations provided by this section. It makes no difference if the disability manifests itself at first or at a later time. Compensation is to be allowed for such further disability, within the limitation period, even though it was not contemplated in the first award. *Safeway Stores v. Newman*, 123 Colo. 362, 230 P.2d 168 (1951).

**Evidentiary hearing required upon petition to reopen.** A petition to reopen, under this section, based on alleged error, mistake or change in condition after a final order of the commission, requires the referee (now hearing officer) to hold a further evidentiary hearing. *Eisnach v. Indus. Comm'n*, 633 P.2d 502 (Colo. App. 1981).

**Testimony of medical experts and lay witnesses is competent as to changes in claimant's physical condition** and the weight to be given to such testimony is a matter for the commission. *Wierman v. Tunnell*, 108 Colo. 544, 120 P.2d 638 (1941).

**Continued medical treatment is not inconsistent with award of permanent partial disability.** Though worker may reach maximum medical improvement, continued medical treatment may be necessary to prevent deterioration in worker's physical condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988).

**Use of word "award" by commission to designate the decision not to reopen a case** under the provisions of this section is not to be commended, since that word properly designates only a decision upon the merits of a presented claim. *Indus. Comm'n v. Kokel*, 108 Colo. 353, 116 P.2d 915 (1941).

**Error by ALJ referring to claimant meeting her "burden of proof in establishing a worsening of condition" was harmless** where ALJ focused on causation between the industrial injury and claimant's back condition. *El Paso County DSS v. Donn*, 865 P.2d 877 (Colo. App. 1993).

**Administrative law judge's order that reserved jurisdiction over permanent disability benefits is not an award under this section.** Thus, a petition to reopen claim to pursue such benefits is not required until an order is entered that closes the matter. *Brown & Root v. Indus. Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1992).

**Determination of whether a prior order constitutes an "award" within the meaning of this section** requires an analysis of the prior order itself and cannot be made by application of a "same issue" or "res judicata" analysis.

*L.E.L. Const. v. Goode*, 849 P.2d 876 (Colo. App. 1992).

**A medical utilization review order** under § 8-43-501 is not an award within the scope of this section and the director is not authorized to reopen such an order. *Cramer v. Indus. Claim Appeals Office*, 885 P.2d 318 (Colo. App. 1994).

**In considering the propriety of reviewing an award** the commission is not required to conduct a hearing to determine the validity of the facts recited in the petition therefor where in its opinion such facts, if accepted as alleged, would present no basis for reopening the final award. *Contes v. Metros*, 113 Colo. 1, 153 P.2d 1000 (1944).

**Excusable neglect is not a ground for reopening.** *Klosterman v. Indus. Comm'n*, 694 P.2d 873 (Colo. App. 1984).

**The word "work" in this section has not been interpreted to mean "all work".** Instead, where a claimant possesses residual unimpaired job skills, the critical inquiry is whether these skills are such as to enable the claimant to obtain suitable, remunerative employment. *Osborne v. Indus. Comm'n*, 725 P.2d 63 (Colo. App. 1986).

**The same inquiry is appropriate whether or not the claimant has used these residual skills to obtain employment.** Otherwise, any claimant who, because of necessity or efforts to make the best of his misfortune, has accepted unsuitable or unremunerative employment would be disqualified from vocational rehabilitation. *Osborne v. Indus. Comm'n*, 725 P.2d 63 (Colo. App. 1986).

**Settlement agreement in workers' compensation case may relinquish any no-fault auto benefit claims.** Settlement agreement in workers' compensation case which waived future medical and rehabilitation benefits under workers' compensation act resulted in relinquishment of claims for benefits under no-fault act as a result of § 10-4-707 (5). *Comiskey v. Valley Forge Ins. Co.*, 781 P.2d 188 (Colo. App. 1989).

**Administrative law judge properly found settlement was voidable** on ground claimant was mentally incompetent at time he entered into settlement agreement. *Powderhorn Coal Co. v. Weaver*, 835 P.2d 616 (Colo. App. 1992).

**Applied in** *Colo. Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966); *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983); *Chavez v. Indus. Comm'n*, 714 P.2d 1328 (Colo. App. 1985); *Swerdfeger v. Swerdfeger*, 793 P.2d 618 (Colo. App. 1990).

## B. Statute of Limitations.

**Statutes of limitation are remedial in nature.** The application of a remedial statute of limitation to an existing claim for relief does not violate the prohibition against retrospective legislation. *Vetten v. Indus. Claim Appeals Office*, 986 P.2d 983 (Colo. App. 1999).



**Time limits on the ability to reopen are necessary** to avoid inherent administrative and practical difficulties such as the proof problems associated with old injuries, the need to preserve full case records indefinitely, and the inability of insurance carriers to predict their future liability. *Calvert v. Indus. Claim Appeals Office*, 155 P.3d 474 (Colo. App. 2006).

The time limits set forth in this section operate as a statute of limitations and apply when complications develop directly from the original injury, even if the claimant attempts to classify the condition as a new disability. *Calvert v. Indus. Claim Appeals Office*, 155 P.3d 474 (Colo. App. 2006).

**Review barred by lapse of time.** Where more than six years have elapsed from the date of an accident before claimant's "petition to reopen" is filed, and more than two years have expired after the approval of the statutory amendment, declining to reopen the case under this section is correct. *Brofman v. Indus. Comm'n*, 117 Colo. 248, 186 P.2d 585 (1947).

**The statute of limitations does not begin to run until the award is in fact made.** *Dr. Pepper Bottling Co. v. Indus. Comm'n*, 134 Colo. 238, 301 P.2d 710 (1956).

**Distinction between triggering events.** Aside from the general six-year limitation period in subsection (1), there is a two-year limitation period under subsection (2)(b) that is specifically applicable to medical benefits. *Calvert v. Indus. Claim Appeals Office*, 155 P.3d 474 (Colo. App. 2006).

**The six-year period of limitation begins running on the date of injury.** The limitation period is not extended when changes of condition manifest themselves after the period has expired. *Thye v. Vermeer Sales & Serv.*, 662 P.2d 188 (Colo. App. 1983).

**Statute of limitation for reopening workers' compensation claim begins to run from the date of the onset of disability, and not from the date of the last exposure to the occupational disease.** Because claimant's petition to reopen was filed more than six years after the date of the onset of disability, that claim is barred from being reopened under this section. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

**The "last injurious exposure rule" governs the apportionment of liability for an occupational disease between multiple employers or insurers, but does not determine the date on which a claimant has sustained a compensable occupational disease.** *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

**For purposes of this section, the onset of disability occurs** when the occupational disease impairs the claimant's ability effectively and properly to perform his or her regular employment, or rendered the claimant incapable of returning to work except in a restricted capacity.

*Ricks v. Indus. Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991); *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

**Time within which commission can reopen fixed as of date of final award.** The time provided by this section within which the commission can reopen a case on any of the statutory grounds becomes fixed as of the date of a final award regardless of whether the sum is paid periodically or later commuted. *Univ. of Denver v. Indus. Comm'n*, 138 Colo. 505, 335 P.2d 292 (1959).

**If only one claim for dependency benefits has been filed, the time period for filing a petition to reopen is governed by the payment of compensation to any dependent listed in the initial claim.** *Exeter Drilling v. Indus. Claim Appeals Office*, 801 P.2d 20 (Colo. App. 1990).

**In case of full payment, statute of limitations based on termination date if paid periodically.** Where a claimant under the workmen's compensation statute has been awarded compensation and has received a lump sum in settlement and executed a receipt therefor acknowledging it to be received in full payment of the award for all injuries or disablement, the statutory period of time under this section, relating to the time within which the commission may reopen the case due to a change in condition begins to run, not from, the date of the payment, but from the date when periodic payments would terminate if such payments were made in monthly installments as originally ordered. *Univ. of Denver v. Indus. Comm'n*, 138 Colo. 505, 335 P.2d 292 (1959).

**However, where award operates retroactively, statute runs from date award ordered.** Where an award of compensation is made to operate retroactively, the statute of limitations governing such claim under the workmen's compensation act runs from the date on which the commission orders the award to be made, rather than from the date the last payment would have been made had there been continuous monthly payments during the time covered by the final award. *Dr. Pepper Bottling Co. v. Indus. Comm'n*, 134 Colo. 238, 301 P.2d 710 (1956).

**Thus, the statute of limitations applies differently** where no compensation has been paid than it does where compensation has been paid. *James v. Irrigation Motor & Pump Co.*, 180 Colo. 195, 503 P.2d 1025 (1972).

**The time limitation of this section is not a limitation of authority or jurisdiction.** *Ball v. Indus. Comm'n*, 30 Colo. App. 583, 503 P.2d 1040 (1972).

**Rather, the limitation is a legal defense which may be pled as a bar to a claim.** *Ball v. Indus. Comm'n*, 30 Colo. App. 583, 503 P.2d 1040 (1972).

**And if it were held that the time limit in this section was jurisdictional, it would be denying assistance to workers who are unable**

to act within the statutory period for reasons commonly recognized as sufficient to prevent the barring of a cause of action. *Ball v. Indus. Comm'n*, 30 Colo. App. 583, 503 P.2d 1040 (1972).

**Petition to reopen received before the time for review expires** tolls the statute pending final determination of the petition. *Irrigation Motor & Pump Co. v. Indus. Comm'n*, 30 Colo. App. 289, 494 P.2d 144 (1971); *James v. Irrigation Motor & Pump Co.*, 180 Colo. 195, 503 P.2d 1025 (1972).

**Failure to notify claimant's attorney** of admission of liability tolls the two-year statute of limitations. *Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986).

**Statute of limitations remains tolled until final disposition of appeal and subsequent proceedings directed as a result thereof**, where prior action which determines the propriety of a petition to reopen remains unresolved, and where such prior claim was timely and limitation period expired during substantial delay unattributable to claimant. *Valdez v. United Parcel Serv.*, 728 P.2d 340 (Colo. App. 1986).

**Voluntary authorization of additional medical treatment by former employer after order closing case** was issued effectively extended the time within which the claimant could file a petition to reopen the case for additional medical benefits. *Garrett v. Arrowhead Imp. Ass'n*, 815 P.2d 979 (Colo. App. 1991).

**Once the statute of limitations is raised as an affirmative defense, the burden shifts to the plaintiff to show that the statute has been tolled.** *Garrett v. Arrowhead Imp. Ass'n*, 826 P.2d 850 (Colo. 1992).

**Equity will toll a statute of limitations** if a party fails to disclose information that the party is legally required to reveal when such failure results in prejudice to the opposing party. *Garrett v. Arrowhead Imp. Ass'n*, 826 P.2d 850 (Colo. 1992).

**Determination as to whether two-year statute of limitations on a petition to reopen the issue of permanent disability should have been equitably tolled** requires factual finding as to whether claimant was prejudiced by failure of employer to furnish claimant with a copy of a medical report disclosing a worsened medical condition. *Garrett v. Arrowhead Imp. Ass'n*, 826 P.2d 850 (Colo. 1992).

**And once a claimant properly files his notice within the statutory period, he is within its protection.** *Mascitelli v. Giuliano & Sons Coal Co.*, 157 Colo. 240, 402 P.2d 192 (1965).

**Filing a notice to have a claim reopened before the end of the period effectively tolls the running of the statute.** Claimant's petition to reopen his claim was not time barred, and the six-year period to reopen a claim is tolled on the date claimant files a petition to reopen. *Fed.*

*Express v. Indus. Claim Appeals Office*, 51 P.3d 1107 (Colo. App. 2002).

**Determination of jurisdiction is only a determination that statute has not run.** A determination by the commission that it has jurisdiction to decide whether there was error, mistake, or a change in a claimant's condition, and to enter an award of further compensation if it finds that such error, mistake, or change of condition is present, is a determination by the commission only that the six-year statute of limitations has not run of the particular case before it. As such it was not a final order of the commission. *Stanley Hotel v. Thomas*, 153 Colo. 503, 387 P.2d 27 (1963).

**Effect of disability of claimant on statute of limitations.** The time limitation of the statute which allows the director to change previous awards within six years of an accident is tolled by § 13-81-103 which provides that if a person who has a right of action and is under disability is represented by legal representative appointed after the right accrues, the representative has not less than two years from his appointment to bring action for the disabled person even though the two-year period expires after the expiration of the six-year period. *Ball v. Indus. Comm'n*, 30 Colo. App. 583, 503 P.2d 1040 (1972).

If injured employee was under disability at time his right to compensation occurred and continued to be under disability at time he filed petition to reopen, the statute of limitations could not run against employee for whom a legal representative had not been appointed. *James v. Brookhart Lumber Co.*, 727 P.2d 1119 (Colo. App. 1986).

**A DIME is not a medical benefit, therefore it does not extend the statute of limitations period to reopen an award set forth in subsection (2)(b).** *Jones v. Indus. Claim Appeals Office*, 216 P.3d 619 (Colo. App. 2009).

**The defense of laches is not available where the award is made under this provision.** *Employers' Mut. Ins. Co. v. Jacoe*, 102 Colo. 515, 81 P.2d 389 (1938).

**Review of invalid award is without legal effect.** Where a review under § 8-53-106 (now § 8-53-111) is void because no petition therefor was filed in apt time, a subsequent review upon the commission's own motion, pursuant to this section, conducted without notice to the employer or insurance carrier, does not validate the award made on the first review, and the entire proceedings are without legal effect. *Tyler v. Hagerman*, 88 Colo. 60, 291 P. 1033 (1930).

**Industrial commission was not proper forum in which to raise or decide the issue of whether workers' compensation claimant was under a disability for purposes of tolling workers' compensation statute of limitations.** An interested person must petition the court for a specific finding as to the existence of a legal disability. *James v. Brookhart Lumber Co.*, 727



P.2d 1119 (Colo. App. 1986) (decided prior to 1986 abolishment of industrial commission).

## II. DISCRETIONARY POWER OF REVIEW.

### A. In General.

**Under this section the commission has power to review any award.** *Coursey v. Indus. Comm'n*, 83 Colo. 490, 267 P. 202 (1928).

**The reopening authority under the provisions of this section is permissive and is in the sound discretion of the administrative law judge.** The appropriate inquiry is whether the claimant has suffered a deterioration in his condition that justifies additional benefits. Maximum medical improvement evidence would be relevant, but the original determination is not questioned. Therefore, the opinion of a division-sponsored independent medical examination carries no special weight and need not be overcome by clear and convincing evidence. The opinions of such a physician have only been given presumptive effect when expressly required by the statute. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

**Effect of settlements on reopening.** In view of prior cases, the beneficial purposes of the act and the language of § 8-51-108 and this section, the conclusion is inescapable that the general assembly has given the director authority to reopen a case within requisite time limitations regardless of whether there was a settlement. *Padilla v. Indus. Comm'n*, 696 P.2d 273 (Colo. 1985) (decided prior to 1985 amendment).

**A judgment of the district court that an award of the commission is in full force and effect gives it no additional virtue;** it is still an award subject to modification or vacation by it, under the powers conferred by this section. *Coursey v. Indus. Comm'n*, 83 Colo. 490, 267 P. 202 (1928).

**A bona fide settlement is the equivalent of an award or judgment reached upon evidence.** In the absence of proof that fraud was practiced or that a fundamental mistake occurred without the fault of the claimant, it is presumed that the facts upon which a compensation settlement is based were fully presented to each other by the contracting parties. *Independence Coffee & Spice Co. v. Taylor*, 97 Colo. 242, 48 P.2d 798 (1935).

**And may be held conclusive.** An amicable, bona fide settlement between an employer and an employee of a claim for injuries sustained in the course of employment by the latter, and which is approved by the commission, held conclusive under the circumstances of the case, and the action of the commission in reopening the case on its own motion and making an award of compensation for permanent injuries 10 years after the happening of the accident under inves-

tigation, is set aside. *Independence Coffee & Spice Co. v. Taylor*, 97 Colo. 242, 48 P.2d 798 (1935), distinguishing *London Guarantee & Accident Co. v. Sauer*, 92 Colo. 565, 22 P.2d 624 (1933).

**However, parties cannot by contract abrogate requirements of conditions affecting public policy.** While in the usual contractual sense, the payment of an award in a lump sum leaves nothing further due and payable to a claimant, parties cannot by private contract abrogate statutory requirements of conditions affecting the public policy of the state. *Univ. of Denver v. Indus. Comm'n*, 138 Colo. 505, 335 P.2d 292 (1959).

**The power given to the commission to review an award of its own motion is discretionary.** *State Comp. Ins. Fund v. Indus. Comm'n*, 80 Colo. 130, 249 P. 653 (1926); *Mantor v. Indus. Comm'n*, 89 Colo. 90, 299 P. 11 (1931); *Indus. Comm'n v. Lockard*, 90 Colo. 333, 9 P.2d 286 (1932); *Winteroth v. Indus. Comm'n*, 93 Colo. 38, 22 P.2d 865 (1933); *Pollard v. Indus. Comm'n*, 95 Colo. 572, 37 P.2d 1093 (1934).

**This section confers ample power upon the commission to reopen a case in its sound discretion for a supplemental hearing whenever any natural development of an industrial injury, uninfluenced by an independent intervening cause, becomes apparent.** *Post Printing & Publ'g Co. v. Erickson*, 94 Colo. 382, 30 P.2d 327 (1934); *Employers Mut. Ins. Co. v. Jacoe*, 102 Colo. 515, 81 P.2d 389 (1938).

**Discretion of commission is absolute.** When a matter is before the commission, on its own motion to reopen on the ground of error, mistake or change of condition after a notice of hearing to the interested parties, the problem of making a prima facie showing and thereby shifting the burden of proof to the defendants does not arise. The discretion of the commission, in the absence of fraud or a clear abuse of discretion, has been held to be absolute. *Hoover v. Indus. Comm'n*, 156 Colo. 147, 397 P.2d 223 (1964).

**And this section is a permissive statute.** It permits, but does not require, the commission to reopen a case upon certain grounds. *Mantor v. Indus. Comm'n*, 89 Colo. 90, 299 P. 11 (1931); *Indus. Comm'n v. Cutshall*, 164 Colo. 240, 433 P.2d 765 (1967).

**This section is a permissive statute.** This section is purely permissive and vests broad discretion to reopen or not to reopen a case in the commission of the division of labor, subject to review by the commission. *Wallace v. Indus. Comm'n*, 629 P.2d 1091 (Colo. App. 1981).

**But the commission cannot change its findings and award, once made, through caprice or without stated reasons;** but there will be no interference with its discretion to review its findings and change its award — unless there is an abuse of discretion or a showing of fraud —

when there is evidence which will reasonably support a change. *Rocky Mt. Fuel Co. v. Canivez*, 96 Colo. 198, 40 P.2d 618 (1935).

**Referee's (now hearing officer's) mistake of law provides ample cause for reopening claimant's case.** *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399 (Colo. App. 1981).

#### B. Abuse of Discretion.

**The discretion of the director in reopening claims is absolute unless there is fraud or a clear abuse of discretion.** In *re Brunetti v. Indus. Comm'n*, 670 P.2d 1246 (Colo. App. 1983); *Osborne v. Indus. Comm'n*, 725 P.2d 63 (Colo. App. 1986); *Wilson v. Jim Snyder Drilling*, 747 P.2d 647 (Colo. 1987).

**The court will not interfere with the commission's (now director's) actions except in case of fraud or abuse of discretion.** *State Comp. Ins. Fund v. Indus. Comm'n*, 80 Colo. 130, 249 P. 653 (1926); *Mantor v. Indus. Comm'n*, 89 Colo. 90, 299 P. 11 (1931); *Indus. Comm'n v. Lockard*, 89 Colo. 428, 3 P.2d 416 (1931); *Lockard v. Indus. Comm'n*, 91 Colo. 212, 13 P.2d 1117 (1932); *Pollard v. Indus. Comm'n*, 95 Colo. 572, 37 P.2d 1093 (1934); *Indus. Comm'n v. Kokel*, 108 Colo. 353, 116 P.2d 915 (1941); *Kokel v. Indus. Comm'n*, 111 Colo. 188, 139 P.2d 259 (1943); *Beckley v. Indus. Comm'n*, 112 Colo. 135, 146 P.2d 990 (1944); *Contes v. Metros*, 113 Colo. 1, 153 P.2d 1000 (1944); *Cain v. Indus. Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957); *Indus. Comm'n v. Vigil*, 150 Colo. 356, 373 P.2d 308 (1962); *Indus. Comm'n v. Cutshall*, 164 Colo. 240, 433 P.2d 765 (1967); *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399 (Colo. App. 1981); *Osborne v. Indus. Comm'n*, 725 P.2d 63 (Colo. App. 1986).

**Evidence failing to show abuse of discretion in refusing to reopen.** Where employee failed to mention to the original attending physicians an alleged ankle injury in addition to a knee injury for which he was allowed compensation, upon which his request for a reopening was based, and none of those physicians discovered any simultaneous injury to the ankle on the very leg examined by them shortly after the accident to the knee, the evidence failed to show that the commission abused its discretion in refusing to reopen the case for purpose of showing injury to the ankle. *Indus. Comm'n v. Kokel*, 108 Colo. 353, 116 P.2d 915 (1941); *Kokel v. Indus. Comm'n*, 111 Colo. 188, 139 P.2d 259 (1943).

Where a doctor's report was sufficient to assist the division in determining whether claimant could present a prima facie case of changed condition, the failure of the hearing officer to deny claimant's petition to reopen for failure to comply with a commission rule requiring the doctor's report to contain an estimate of the

percentage of impairment and the additional periods of temporary disability, if any, did not constitute an abuse of discretion. *Osborne v. Indus. Comm'n*, 725 P.2d 63 (Colo. App. 1986).

**And to justify a court in interfering the showing of fraud or of an abuse of discretion must be very clear indeed.** *Pollard v. Indus. Comm'n*, 95 Colo. 572, 37 P.2d 1093 (1934); *Contes v. Metros*, 113 Colo. 1, 153 P.2d 1000 (1944).

**But courts may require the commission to exercise its discretion in a proper case.** *Lockard v. Indus. Comm'n*, 91 Colo. 212, 13 P.2d 1117 (1932).

**And this is true where the refusal is based upon the erroneous view that the commission has no jurisdiction.** *Indus. Comm'n v. Lockard*, 89 Colo. 428, 3 P.2d 416 (1931); *Gregorich v. Indus. Comm'n*, 117 Colo. 423, 118 P.2d 886 (1948).

**If fraud or abuse of discretion is shown, the case should be remanded to the commission for further proceedings.** *Indus. Comm'n v. Lockard*, 90 Colo. 333, 9 P.2d 286 (1932).

**But no abuse of discretion when right to review lost by inaction.** The fact that the director refused to reopen a case to permit him to substitute action under this section for the right to review granted him by § 8-53-106 (now § 8-53-111) which he lost by inaction, does not amount to an abuse of discretion. *Indus. Comm'n v. Cutshall*, 164 Colo. 240, 433 P.2d 765 (1967); *Colo. Dept. of Agric. v. Wayne*, 30 Colo. App. 311, 493 P.2d 683 (1971).

**And court cannot demand statement of commission's reasons for refusing to review.** On review by district court of proceedings before the commission, an order of court calling for a statement of the reasons for the refusal to reopen the case for further proceedings on its own motion is erroneous. *Indus. Comm'n v. Lockard*, 90 Colo. 333, 9 P.2d 286 (1932).

### III. CHANGE OF AWARD.

**Where commission changes award it is assumed that commission concluded that it had previously erred.** Where the commission on its own motion enters a supplemental award of compensation for permanent disability, the original award being for temporary disability only, it will be assumed on review that the commission concluded that it had previously erred, and an award correcting the error will not be disturbed. *Clayton Coal Co. v. Zak*, 94 Colo. 171, 29 P.2d 374 (1933).

**Example of error by commission.** If the commission was led or induced to find from the showing on a hearing that a claimant's injury was not suffered in the course of his employment, but was due to diseases from which he suffered long before, and if the evidence then produced before the commission upon which



such finding was made was false or perjured testimony, the commission might, according to the plain terms of this section, set aside its award or order and enter a different award if the showing before it was sufficient to prove that the finding was based upon false testimony. It certainly was an error or mistake upon the part of the commission, if it was led by the false testimony of a witness to believe, and so find, that the injury sustained by the claimant was not received in the course of his employment. *Indus. Comm'n v. Employers' Liab. Assurance Corp.*, 78 Colo. 267, 241 P. 729 (1925).

**Issues on reopening are whether original award in conformity with law and supported by evidence.** Where the commission reopens a case on its own motion, sets a date for a hearing, and holds a hearing pursuant thereto, the issues are then the same as those presented in any other action for a review of a decision of the commission, namely, whether the award was entered in conformity with the law and supported by competent evidence. *Cain v. Indus. Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

**A subsequent award will affect an earlier award as to moneys already paid only if the claimant is required actually to pay back moneys from the initial award.** *Kuziel v. Pet Fair, Inc.*, 948 P.2d 103 (Colo. App. 1997).

**Awards which change or modify the effect of the original award must be based upon specific findings supported by competent evidence.** *Sherratt v. Rocky Mt. Fuel Co.*, 94 Colo. 269, 30 P.2d 270 (1934).

**And if not they cannot be affirmed by the courts.** *Sherratt v. Rocky Mt. Fuel Co.*, 94 Colo. 269, 30 P.2d 270 (1934).

**For example, a finding that a "mistake in all probability existed in the receipt of testimony at original hearing" does not meet the mandatory requirements** of a specific finding of error, mistake, or change of condition justifying the reopening of an award. *Maryland Cas. Co. v. Kravig*, 153 Colo. 282, 385 P.2d 669 (1963).

**Sufficiency of commission's reason for change.** The finding "that on prior reviews, the commission improperly weighed the evidence", would be a sufficient statement of a conclusion upon which to grant a rehearing, and on such rehearing — if the same conclusion persisted — to change the award, there being a sufficient statement of reasons for the change, but to enter an award upon the simple statement that the evidence had been improperly weighed on prior reviews, and to do so without additional hearings, or evidence, and this upon the heels of consistent contrary findings, establishes with crystal clearness that the prohibited "change of mind" without stated reasons, occurred. *Allan v. Gadbois*, 100 Colo. 141, 66 P.2d 331 (1937).

**Sufficient evidence to justify extended award.** Where new evidence is to the effect that

claimant's injury is more extensive than had appeared from an earlier inquiry, not that his condition had "become worse", as the commission recited, the import of the finding is that from the beginning claimant's condition justified the extended award. The evidence warranted that determination, and the law authorized it. The procedure was apt. *Rocky Mt. Fuel Co. v. Canivez*, 96 Colo. 198, 40 P.2d 618 (1935); *Moffat Coal Co. v. Podbelsk*, 96 Colo. 355, 42 P.2d 1001 (1935); *Century Indem. Co. v. Klipfel*, 99 Colo. 213, 61 P.2d 842 (1936).

**Findings by the hearing officer were supported by substantial evidence** and therefore not subject to alteration by the commission. *Matter of Death of Corbin*, 724 P.2d 677 (Colo. App. 1986).

**Effect of change of award on moneys already paid.** Where claimant's final receipt for temporary disability was approved "subject to any future claim for disability as provided by law", and upon further hearing, it was determined that claimant was totally and permanently disabled, that such disability was due to the accident, and accordingly he was awarded compensation for his lifetime, it was held that the "moneys already paid" were for temporary disability only, whereas the moneys ordered paid on the subsequent hearing were for permanent disability only; hence the prohibition of this section did not apply. *Russell Coal Co. v. Zinge*, 112 Colo. 171, 147 P.2d 365 (1944); *Moffat Coal Co. v. Giankos*, 112 Colo. 585, 152 P.2d 681 (1944).

**Where rehearing of change of award allowed.** There being no evidence whatever concerning error in the prior award, or any finding pointing out the possibility of such error, it is apparent that plaintiffs, affected by an increased award, had no way of anticipating it; that they were surprised thereby and were entitled to the rehearing for which they petitioned in due time. *Nat'l Lumber & Creosoting Co. v. Kelly*, 99 Colo. 442, 63 P.2d 457 (1936).

**Award on review may be retroactive.** This section does not provide that no review shall have a retroactive effect, or that no review shall affect a prior award as to any period for which payment has been made. The only limitation is that no review shall affect "moneys already paid". This limitation precludes the commission from finding that moneys already paid to a claimant under a previous award are not the property of the claimant and must be returned to the insurer. It does not preclude the commission from giving an award on review a retroactive effect so as to require the payment of additional compensation for a period before the previous award was reviewed. *Morrison v. Clayton Coal Co.*, 116 Colo. 501, 181 P.2d 1011 (1947).

**To warrant a reopening of a case, it is not necessary to make a showing that a worker's industrial disability has increased** because a

reopening is also appropriate where additional medical and temporary disability benefits are warranted. *Dorman v. B & W Const. Co.*, 765 P.2d 1033 (Colo. App. 1988).

**Neither this section nor § 8-42-107.5 addresses the situation of further temporary total disability benefits being awarded after the limit on combined temporary total and permanent**

partial benefits has been paid. But in view of underlying policies, in this situation the employer should be entitled to offset any permanent partial disability benefits paid against temporary total disability benefits. *Donald B. Murphy Contractors v. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995).

**8-43-304. Violations - penalty - offset for benefits obtained through fraud - rules.**

(1) Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112 (7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

(1.5) (a) (I) An insurer who knowingly or repeatedly violates any provision of articles 40 to 47 of this title shall be subject to a fine as determined by the director. If necessary, the director may conduct a hearing or may refer the matter to the office of administrative courts for the entry of findings of fact. The director shall promulgate rules that specify, with respect to an insurer's willful or repeated violations that are subject to this subsection (1.5):

(A) The circumstances pursuant to which the director may issue an order imposing a fine; and

(B) Criteria for determining the amount of the fine.

(II) If the division determines, as part of a compliance audit of an insurer or self-insured pool, that an injury or occupational disease was not reported to the division within the time specified in sections 8-43-101 and 8-43-103 because the insurer or self-insured pool did not have notice or knowledge of the injury, occupational disease, or fatality within a period of time that would allow the information to be reported to the division within the time specified in sections 8-43-101 and 8-43-103, the director shall not impose a fine for late reporting under this subsection (1.5). The director may impose a fine under this subsection (1.5) for late reporting under sections 8-43-101 and 8-43-103 as part of findings from a compliance audit if the director finds that the late reporting constituted a knowing or repeated pattern of noncompliance with the reporting requirements of sections 8-43-101 and 8-43-103 and was not caused by the insurer or self-insured pool's lack of notice or knowledge of the injury, occupational disease, or fatality within a period of time that would allow the information to be reported to the division within the time specified in sections 8-43-101 and 8-43-103.

(b) Fines imposed pursuant to this subsection (1.5) shall be transmitted to the state treasurer, who shall credit seventy-five percent of such fines to the general fund and twenty-five percent to the workers' compensation cash fund, created in section 8-44-112.

(2) An insurer or self-insured employer may take a credit or offset of previously paid workers' compensation benefits or payments against any further workers' compensation benefits or payments due a worker when the worker admits to having obtained the previously paid benefits or payments through fraud, or a civil judgment or criminal conviction is entered against the worker for having obtained the previously paid benefits through fraud. Benefits or payments obtained through fraud by a worker shall not be included in any data used for rate-making or individual employer rating or dividend calculations by any insurer or by Pinnacol Assurance.

(3) The director and each administrative law judge shall report to the division each time a penalty is imposed pursuant to this section. Each such report shall include the amount of



the penalty, the name of the administrative law judge awarding the penalty, if applicable, and the name of the offending party.

(4) In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

(5) A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty.

**Source:** **L. 90:** Entire article R&RE, p. 510, § 1, effective July 1. **L. 91:** Entire section amended, p. 1323, § 35, effective July 1. **L. 92:** (1) amended, p. 1828, § 1, effective May 19. **L. 94:** (3), (4), and (5) added, p. 1878, § 11, effective June 1. **L. 97:** (3) amended, p. 1474, § 9, effective June 3. **L. 2002:** (2) amended, p. 1883, § 30, effective July 1. **L. 2005:** (1.5) added, p. 199, § 2, effective July 1. **L. 2006:** IP(1.5)(a) amended, p. 1489, § 6, effective June 1. **L. 2010:** (1) amended, (SB 10-012), ch. 287, p. 1340, § 1, effective August 11. **L. 2012:** (1.5)(a) amended, (HB 12-1033), ch. 43, p. 147, § 1, effective August 8.

**Editor's note:** (1) This section is similar to former § 8-53-116 as it existed prior to 1990.

(2) Section 2 of chapter 43, Session Laws of Colorado 2012, provides that the act amending subsection (1.5)(a) applies to fines resulting from compliance audits of workers' compensation insurers and self-insured pools on or after August 8, 2012.

## ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Colorado Workers' Compensation Law", see 30 Colo. Law. 129 (July 2001). For article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 32 Colo. Law. 87 (March 2003). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 83 (April 2004).

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Subsection (1) does not violate a claimant's constitutional rights.** A claimant's share of the penalty imposed on an employer may be reduced without effecting an unconstitutional taking of claimant's property. *Moland v. Indus. Claim Appeals Office*, 111 P.3d 507 (Colo. App. 2004).

The plain language of subsection (1) defines and limits a penalty and a resultant benefit in favor of a claimant, and the general assembly has the power and authority to set and limit benefits. *Moland v. Indus. Claim Appeals Office*, 111 P.3d 507 (Colo. App. 2004).

**Subsection (1) applies only in the absence of another, more specific penalty provision.** *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo.

App. 1997), overruled in *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001).

**For purposes of the penalty provision in subsection (1), failure to comply with a procedural rule is a failure to obey a lawful order.** *Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007).

Where an employer does not obey a procedural rule requiring written notice and permission from the administrative law judge (ALJ) prior to taking a witness' deposition, the ALJ may impose a fine of up to \$500 per day upon finding the employer's action to be unreasonable. *Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

**Penalties under subsection (1) for failing, neglecting, or refusing to obey "any lawful order made by the director or panel or any judgment or decree made by any court as provided by [the Workers' Compensation Act]" are available even though penalties for such conduct are elsewhere specifically provided in the Workers' Compensation Act.** *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001) (overruling *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo. App. 1997)).

**Penalties under subsection (1) do not apply to the Colorado insurance guaranty association (CIGA)** by virtue of the immunity provided to CIGA in § 10-4-517, which is both more recent and more specific than this section. *Mosley v. Indus. Claim Appeals Office*, 119 P.3d 576 (Colo. App. 2005).

**Under the rules of statutory construction**, the phrase “for which no penalty has been specifically provided” defines “fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel”. The use of the disjunctive conjunction “or” demarcates four different acts within this section that give rise to penalties. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001) (overruling *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo. App. 1997)).

The limiting clause “for which no penalty has been specifically provided” also applies to acts and omissions contrary to articles 40 to 47 of this title. *Pena v. Indus. Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2004).

**Subsection (1) was applicable** to an insurer that refused to provide medically necessary transportation and, thus, refused medical treatment, although no bill for medical benefits was submitted and the insurer did not delay or stop payment of such a bill, which would have invoked the specific penalty set forth in § 8-43-401 (2)(a). *Pena v. Indus. Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2004).

**Subsection (1) penalizes only those persons with the authority to bind an insurer** with respect to actions required by a lawful order and whose actions violate the order. An attorney who lacked the authority to bind an insurer did not violate subsection (1) by advising an insurer to violate a lawful order. *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003).

**An ALJ may impose additional penalties pursuant to this section** even though a specific penalty is provided by § 8-43-404. *Kennedy v. Indus. Claim Appeals Office*, 100 P.3d 949 (Colo. App. 2004).

**This section does not extend to a claim against an attorney who allegedly acts with fraud or malice in advising an insurer to violate a lawful order.** *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003).

**An order of an ALJ is an order “made by the director or panel”;** violation of such order provides an independent basis for the imposition of a penalty for the refusal to perform a duty for which no penalty has been specifically provided, and may be in addition to a penalty imposed under § 8-43-401. *Giddings v. Indus. Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

**If the general assembly intended to create two penalties for the late payment of medical benefits,** § 8-43-401 (2) would have provided

that it is in addition to the penalty authorized by subsection (1) of this section. *Holliday v. Indus. Claim Appeals Office*, 997 P.2d 1212 (Colo. App. 1999), vacated and claimant’s appeal dismissed, 23 P.3d 700 (Colo. 2001).

**ALJ has authority to issue penalty.** Penalty for failure to obey a lawful order need not be entered by “court of competent jurisdiction”, but may be entered by ALJ. *CCIA v. Indus. Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

**Penalty may be imposed based on an objective standard of negligence**, which is determined by the reasonableness of the insurer’s actions and does not require the insurer’s knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997).

Where an employer disputes that it must respond to an IME pursuant to § 8-42-107.2 (4) and that such dispute is a rational argument based on law or fact, the employer must establish a higher burden greater than proving that the employer neglected to act as a reasonable employer would have acted in response to an IME pursuant to § 8-42-107.2. The court may impose penalties pursuant to subsection (1) of this section when the employer is unable to prove this higher burden. *City Market, Inc. v. Indus. Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

**No penalty for offset preceding ALJ’s order.** Although § 8-42-105 (1) sets the rate for temporary total disability benefits, that section does not mandate a legal duty upon the employer to pay that rate without regard to any claimed offset prior to the ALJ’s determination of benefits. *Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

**No penalty during time review of award is sought.** This section and § 8-53-127 (now § 8-53-117) should not be construed to impose a penalty during the time that an employer, acting under statutory permission, is seeking in good faith to have a judicial review of an award. *Indus. Comm’n v. Cont’l Inv. Co.*, 85 Colo. 475, 277 P. 303 (1929).

**Subsection (5) requires a request for penalties to be filed within one year after the requesting party first becomes aware of the circumstances that constitute a violation and support the imposition of a penalty**, even if that violation was ongoing. *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002).

**Penalties may be assessed under former § 8-53-116 against an insurer neglecting to take action that a reasonable insurer would take to comply with either a lawful order or a provision of the Workers’ Compensation Act.** *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996) (decided under law in effect prior to 1992 repeal and reenactment).



Where insurance authority failed to abide by rule requiring insurer to send certain information to the provider or injured employee within 45 days after receipt of a bill if payment was not possible within that period, penalties were properly assessed against insurance authority. Pueblo Sch. Dist. No. 70 v. Toth, 924 P.2d 1094 (Colo. App. 1996) (decided under law in effect prior to 1992 repeal and reenactment).

**Insurance authority lacked standing to assert that former § 8-53-116 violated its procedural due process rights** where the authority was an “arm of the state” and its engagement in private corporate functions did not affect its governmental and political character. Pueblo Sch. Dist. No. 70 v. Toth, 924 P.2d 1094 (Colo. App. 1996) (decided under law in effect prior to 1992 repeal and reenactment).

**Even if insurance authority was entitled to procedural due process protection, adequate procedural protections were afforded to the authority** where the rule provided notice of the standard of conduct that was expected of the authority and the authority had opportunity to present evidence concerning the reasonableness of its actions. Pueblo Sch. Dist. No. 70 v. Toth, 924 P.2d 1094 (Colo. App. 1996) (decided under law in effect prior to 1992 repeal and reenactment).

**Insurance authority lacked standing to assert that fines imposed under former § 8-53-116 violated the excessive fines clause of § 20 of article II of the state constitution** where the authority was an “arm of the state” and where,

even if the authority had standing, the \$6540 fine imposed for delay in reimbursing workers’ compensation claimant for medical bill was not excessive. Pueblo Sch. Dist. No. 70 v. Toth, 924 P.2d 1094 (Colo. App. 1996) (decided under law in effect prior to 1992 repeal and reenactment); Diversified Veterans Corporate Ctr. v. Hewuse, 942 P.2d 1312 (Colo. App. 1997).

**Treating physician’s letter was a “medical report”** the withholding of which was not predicated on a rational argument in law or fact, hence the imposition of a penalty under subsection (1) was proper. Diversified Veterans Corporate Ctr. v. Hewuse, 942 P.2d 1312 (Colo. App. 1997).

**Cure provision in subsection (4) is substantive**, hence, not applicable in a case in which the injury occurred prior to its effective date. Diversified Veterans Corporate Ctr. v. Hewuse, 942 P.2d 1312 (Colo. App. 1997).

**The 1991 amendment to subsection (1) that raised the penalty from \$100 to \$500 and awarding the penalty to the injured claimant**, did not directly state or imply that this award precludes a claimant’s common law bad faith claim against his workers’ compensation insurance carrier. Vaughan v. McMinn, 945 P.2d 404 (Colo. 1997).

**Although subsection (1) was amended in 1991, 1992, 1994, and 1997**, the legislature never explicitly abrogated the common law tort of bad faith despite many opportunities to do so. Vaughan v. McMinn, 945 P.2d 404 (Colo. 1997).

**Applied** in Coursey v. Indus. Comm’n, 82 Colo. 311, 259 P. 514 (1927).

**8-43-304.5. Penalties in rate-making.** For purposes of rate-making under sections 10-4-401, 10-4-402, and 10-4-403, C.R.S., insurers shall not include, nor shall the insurance commissioner consider, any penalties paid under section 8-43-304 or any damages awarded in suits founded upon breach of duty in handling a claim for compensation under section 8-41-102.

**Source: L. 91:** Entire section added, p. 1324, § 36, effective July 1.

**8-43-305. Each day separate offense.** Every day during which any employer or insurer, or officer or agent of either, or any employee, or any other person fails to comply with any lawful order of an administrative law judge, the director, or the panel or fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof. In any action brought to enforce the same or to enforce any penalty provided for in said articles, such violation shall be considered cumulative and may be joined in such action.

**Source: L. 90:** Entire article R&RE, p. 510, § 1, effective July 1. **L. 94:** Entire section amended, p. 1879, § 12, effective June 1.

**Editor’s note:** This section is similar to former § 8-53-117 as it existed prior to 1990.

**8-43-306. Collection of fines, penalties, and overpayments.** (1) A certified copy of any final order of the director or an administrative law judge ordering the payment of any penalty or repayment of overpayments pursuant to articles 40 to 47 of this title may be filed

with the clerk of the district court of any county in this state at any time after the period of time provided by articles 40 to 47 of this title for appeal or seeking review of the order has passed without appeal or review being sought or, if appeal or review is sought, after the order has been finally affirmed and all appellate remedies and all opportunities for review have been exhausted. The party filing the order shall at the same time file a certificate to the effect that the time for appeal or review has passed without appeal or review being undertaken or that the order has been finally affirmed with all appellate remedies and all opportunities for review having been exhausted. The clerk of the district court shall record the order and the filing party's certificate in the judgment book of said court and entry thereof made in the judgment docket, and it shall thenceforth have all the effect of a judgment of the district court, and execution may issue thereon out of said court as in other cases. Any such order may be filed by and in the name of the director or by and in the name of the party in the worker's compensation action who was injured by the violation of any provision of articles 40 to 47 of this title or who was found to be entitled to repayment of overpayments under said articles.

(2) All such penalties when collected shall be payable to the division and transmitted through the state treasurer for credit to the subsequent injury fund, created in section 8-46-101.

**Source:** L. 90: Entire article R&RE, p. 510, § 1, effective July 1. L. 97: (1) amended, p. 115, § 6, effective July 1.

**Editor's note:** This section is similar to former § 8-53-118 as it existed prior to 1990.

**8-43-307. Appeals to court of appeals.** (1) The final order of the director or the panel shall constitute the final order of the division. Any person in interest, including Pinnacol Assurance, being dissatisfied with any final order of the division, may commence an action in the court of appeals against the industrial claim appeals office as defendant to modify or vacate any such order on the grounds set forth in section 8-43-308.

(2) All such actions shall have precedence over any civil cause of a different nature pending in such court, and the court of appeals shall always be deemed open for the trial thereof, and such actions shall be tried and determined by the court of appeals in the manner provided for other civil actions.

(3) (Deleted by amendment, L. 95, p. 235, § 3, effective April 17, 1995.)

(4) In any case before the court of appeals pursuant to this section, the court may apply the sanctions of rule 38 of the Colorado appellate rules if the court finds such application to be appropriate.

**Source:** L. 90: Entire article R&RE, p. 511, § 1, effective July 1. L. 91: (1) and (3) amended and (4) added, p. 1324, § 37, effective July 1. L. 95: (1) and (3) amended, p. 235, § 3, effective April 17. L. 2002: (1) amended, p. 1883, § 31, effective July 1.

**Editor's note:** This section is similar to former § 8-53-119 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**Failure to state the commission's name** in the caption of a petition for review does not, in itself, violate the terms of this statute. *Newman v. McKinley Oil Field Serv.*, 696 P.2d 238 (Colo. 1984).

**Limiting review of workers' compensation case denied by industrial claim appeals office to certiorari is unconstitutional** denial of ac-

cess to the courts. *Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113 (Colo. 1994).

**Right of parties to have disputes considered by judges subject to popular vote** is protected by authorization of judicial review by direct appeal to the court of appeals. *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

**Requirement of "final order".** Although an order no longer needs to dispose of all issues pending before the agency in order to be re-



ceived by the court of appeals, there still must be agency action which administratively resolves the issue in dispute and which may be considered a "final order" for purposes of this statute. *CF&I Steel Corp. v. Indus. Comm'n*, 731 P.2d 144 (Colo. App. 1986).

**Final order is lacking and decision by industrial claim appeals office is not yet subject to review** where penalty was imposed and matter was remanded to administrative law judge for further determination. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989).

**Order remanding for further proceedings on the merits of the penalty issue was not a final order** and was not ripe for appellate review. *U.S. Fidelity Guar., Inc. v. Kourlis*, 868 P.2d 1158 (Colo. App. 1994).

The amount of the penalty must be determined before the ruling as to the penalties is final for judicial review. *UPS, Inc. v. Indus. Claim Appeals Office*, 988 P.2d 1146 (Colo. App. 1999).

**Employer's agreement to pay one of claimant's expenses does not alter the industrial claim appeals office order** to remand the matter to the administrative law judge for determination of the benefits and compensation payable to the claimant and does not constitute an award of benefits by the office or the judge. Therefore, the office's decision is not a final order and is not ripe for review. *Flint Energy Servs., Inc. v. Indus. Claim Appeals Office*, 194 P.3d 448 (Colo. App. 2008).

**Colorado appellate rules govern service of petition for review under this section** and, accordingly, service upon the industrial commission may be effectuated by serving the attorney general. *Butkovich v. Indus. Comm'n*, 723 P.2d 1306 (Colo. 1985).

**Failure to effect service upon an opposing party within the time limits of this section** and § 8-53-111 and this section is not jurisdictionally fatal. *Dept. of Inst. v. Indus. Claim Appeals Office*, 780 P.2d 72 (Colo. App. 1989).

**Director correctly reopened case on basis of mistake.** Where order is ambiguous, the director correctly determined that a "good faith dispute exists between the parties as to the meaning of the order," regarding the proper amount of benefits owed to claimant. *Edlund v. Indus. Comm'n*, 725 P.2d 75 (Colo. App. 1986),

rev'd on other grounds, 759 P.2d 7 (Colo. 1988) (decided prior to 1986 amendment).

**Petitioner's failure to name employer in petition for review** of industrial commission order does not constitute a jurisdictional defect under subsection (1). *Pittsinger v. Indus. Comm'n*, 711 P.2d 707 (Colo. App. 1985) (decided prior to 1986 abolishment of industrial commission).

**Court will not address issue raised in answer brief absent respondent's petition for review.** *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987).

**Industrial claim appeals office order setting aside award of permanent partial disability benefits** is not subject to judicial review. *Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989).

**Notice of appeal** sufficient to satisfy requirements of this section and to invoke the jurisdiction of the Court of Appeals where the document complied with the requirements of C.A.R. 3.1(d) and this section but merely failed to bear the caption "Petition for Review". *Hawkins v. State Comp. Ins. Auth.*, 790 P.2d 893 (Colo. App. 1990).

**1991 amendments to the Workers' Compensation Act, which took effect on July 1, 1991**, and specifically to this section authorizing the imposition of sanctions under C.A.R. 38 could not be applied retroactively to cases in which a work injury occurred prior to July 1, 1991, since the amendments to the Act apply to cases in which a worker's injury occurred on or after that date. *Martinez v. Reg'l Transp. Dist.*, 832 P.2d 1060 (Colo. App. 1992).

**Subsection (4), allowing sanctions under C.A.R. 38, cannot be applied retroactively.** Even if it is assumed that the statute is procedural, it does not automatically follow that the statute can be applied retroactively. Although a change in procedural law is generally applicable to existing causes of action, this rule is inapposite when the general assembly has expressed a contrary intent. *Martinez v. Reg'l Trans. Dist.*, 832 P.2d 1060 (Colo. App. 1992).

**The administrative and judicial review provisions of the Act are complete, definitive, and organic**, without the need of supplementation from other legislative acts or the procedural relief afforded by C.R.C.P. 16. *Gardner v. Friend*, 849 P.2d 817 (Colo. App. 1992).

**Applied in F.R. Orr Construction v. Rinta**, 717 P.2d 965 (Colo. App. 1985).

**8-43-308. Causes for setting aside award.** Upon hearing the action, the court of appeals may affirm or set aside such order, but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the court of appeals.

**Source: L. 90:** Entire article R&RE, p. 511, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-53-120 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Scope of Review.
  - A. In General.
  - B. Acts Not Supported by Law.
  - C. Findings of Fact.

### I. GENERAL CONSIDERATION.

**Annotator's notes.** (1) The following annotations include cases decided under former provisions similar to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1973 amendment which vested in the director of the division of labor fact-finding powers previously exercised by the industrial commission or were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission.

**Neither the district court nor the supreme court can usurp the functions of the commission.** *Hatterman v. Indus. Comm'n*, 171 Colo. 370, 467 P.2d 820 (1970).

**And the commission is vested with the widest possible discretion.** In determining the extent or degree of disability of an injured workman upon the facts of each case, it is axiomatic that the commission is vested with the widest possible discretion with the exercise of which the courts will not interfere. Also the presumption exists that in making an award the commission considered and gave due weight to all of the factors therein enumerated. *New Jersey Zinc Co. v. Indus. Comm'n*, 165 Colo. 482, 440 P.2d 284 (1968).

**For the commission is the fact finder,** and it must be the one to evaluate the evidence and draw conclusions therefrom. *Passini v. Indus. Comm'n*, 64 Colo. 349, 171 P. 369 (1918); *Weaver v. Indus. Comm'n*, 72 Colo. 79, 209 P. 642 (1922); *Rogers v. Indus. Comm'n*, 94 Colo. 56, 28 P.2d 343 (1933); *Empire Zinc Co. v. Indus. Comm'n*, 94 Colo. 98, 28 P.2d 337 (1933); *Poole v. Indus. Comm'n*, 94 Colo. 163, 28 P.2d 809 (1934); *Hayden Bros. Coal Corp. v. Indus. Comm'n*, 94 Colo. 211, 29 P.2d 637 (1934); *Central Sur. & Ins. Corp. v. Indus. Comm'n*, 94 Colo. 341, 30 P.2d 253 (1934); *Boulder Valley Coal Co. v. Shipka*, 94 Colo. 394, 30 P.2d 852 (1934); *Jabot v. Indus. Comm'n*, 94 Colo. 424, 30 P.2d 871 (1934); *C.S. Card Iron Works Co. v. Radovich*, 94 Colo. 426, 30 P.2d 1108 (1934); *Allen v. Gettler*, 94 Colo. 528, 30 P.2d 1117 (1934); *United States Fid. & Guar. Co. v. Indus. Comm'n*, 96 Colo. 571, 45 P.2d 895 (1935); *Adolph Coors Co. v.*

*Hollaus*, 108 Colo. 360, 117 P.2d 822 (1941); *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958); *Indus. Comm'n v. Klaczkowski*, 146 Colo. 11, 360 P.2d 104 (1961); *Skinner v. Indus. Comm'n*, 152 Colo. 97, 381 P.2d 253 (1963); *State v. Richards*, 158 Colo. 155, 405 P.2d 675 (1965); *Clodfelter v. Indus. Comm'n*, 160 Colo. 39, 413 P.2d 700 (1966); *Breit v. Indus. Comm'n*, 160 Colo. 205, 415 P.2d 858 (1966); *Levy v. Everson Plumbing Co.*, 171 Colo. 468, 468 P.2d 34 (1970); *Sena v. World of Sleep, Inc.*, 173 Colo. 348, 478 P.2d 671 (1970); *Indus. Comm'n v. Ewing*, 174 Colo. 133, 482 P.2d 981 (1971).

**Legislative intent that commission be fact finder apparent from section.** That the general assembly intended the commission should be a fact-finding body whose conclusions on disputed testimony should be binding on the courts of review is apparent from this section, which sets forth the only grounds upon which awards may be set aside by the district court. *United States Fid. & Guar. Co. v. Indus. Comm'n*, 96 Colo. 571, 45 P.2d 895 (1935).

**The commission as the fact finder is the sole judge of the credibility of witnesses** appearing before it. *Regal Coal Co. v. Jackvich*, 105 Colo. 479, 99 P.2d 196 (1940); *Moffat Coal Co. v. Indus. Comm'n*, 108 Colo. 388, 118 P.2d 769 (1941).

**And the weight to be given to medical testimony is a matter exclusively for the commission.** *Cordillo v. Indus. Comm'n*, 110 Colo. 581, 136 P.2d 671 (1943).

**Also, the weight to be given the opinion of a physician** is for the commission to determine. *White v. Dir. of Div. of Labor*, 30 Colo. App. 393, 493 P.2d 676 (1972).

**Furthermore, the commission has the duty and sole power to find the facts from conflicting evidence.** *Rogers v. Indus. Comm'n*, 94 Colo. 56, 28 P.2d 343 (1933); *Boulder Valley Coal Co. v. Shipka*, 94 Colo. 394, 30 P.2d 852 (1934); *Montgomery Ward & Co. v. Indus. Comm'n*, 105 Colo. 22, 94 P.2d 689 (1939).

**So that the findings of the commission on conflicting testimony are conclusive upon the courts.** *Olson-Hall v. Indus. Comm'n*, 71 Colo. 228, 205 P. 527 (1922); *Indus. Comm'n v. Ernest Irvine, Inc.*, 72 Colo. 573, 212 P. 829 (1923); *Bohmann v. Indus. Comm'n*, 76 Colo. 588, 233 P. 621 (1925); *Indus. Comm'n v. Robinson*, 85 Colo. 279, 275 P. 903 (1929); *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929); *Indus. Comm'n v. Diveley*, 88 Colo. 190, 294 P. 532



(1930); *Indus. Comm'n v. Coop. Oil Co.*, 93 Colo. 192, 24 P.2d 753 (1933); *Jabot v. Indus. Comm'n*, 94 Colo. 424, 30 P.2d 871 (1934); *Clarke v. Clarke*, 95 Colo. 409, 36 P.2d 461 (1934); *Indus. Comm'n v. Dorchak*, 97 Colo. 142, 47 P.2d 396 (1935); *Skjoldahl v. Indus. Comm'n*, 108 Colo. 140, 113 P.2d 871 (1941); *Black Forest Fox Ranch, Inc. v. Gerrett*, 110 Colo. 323, 134 P.2d 332 (1943); *Sommers v. Borgmann*, 111 Colo. 552, 144 P.2d 554 (1943); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Claimants in re Death of Bennett v. Durango Furn. Mart*, 136 Colo. 529, 319 P.2d 494 (1957); *United Util. & Specialties Corp. v. Indus. Comm'n*, 160 Colo. 518, 418 P.2d 896 (1966); *New Jersey Zinc Co. v. Indus. Comm'n*, 165 Colo. 482, 440 P.2d 284 (1968); *Indus. Comm'n v. Allen*, 28 Colo. App. 546, 478 P.2d 702 (1970).

**Findings of fact of the commission based on conflicting evidence are conclusive** on review. *Archer Freight Lines v. Horn Transp., Inc.*, 32 Colo. App. 412, 514 P.2d 330 (1973); *Safeway Stores v. Indus. Comm'n*, 678 P.2d 1078 (Colo. App. 1984).

**When supported by competent evidence.** Fact findings by the commission which are supported by competent evidence will not be disturbed on review. *Youngquist v. Indus. Comm'n*, 67 Colo. 187, 184 P. 381 (1919); *C.W. Kettering Mercantile Co. v. Fox*, 77 Colo. 90, 234 P. 464 (1925); *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Vaughan v. Indus. Comm'n*, 79 Colo. 257, 245 P. 712 (1926); *Newkirk v. Golden Cycle Mining & Reduction Co.*, 79 Colo. 298, 244 P. 1019 (1926); *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 83 Colo. 315, 265 P. 99 (1928); *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 85 Colo. 237, 275 P. 910 (1929); *Indus. Comm'n v. Robinson*, 85 Colo. 279, 275 P. 903 (1929); *New Jersey Fid. & Plate Glass Ins. Co. v. Richey*, 85 Colo. 376, 275 P. 937 (1929); *Beatrice Creamery Co. v. Standley*, 86 Colo. 290, 281 P. 110 (1929); *Indus. Comm'n v. Diveley*, 88 Colo. 190, 294 P. 532 (1930); *Hayden Bros. Coal Corp. v. Indus. Comm'n*, 94 Colo. 211, 29 P.2d 637 (1934); *C.S. Card Iron Works Co. v. Radovich*, 94 Colo. 426, 30 P.2d 1108 (1934); *Allan v. Gettler*, 94 Colo. 528, 30 P.2d 1117 (1934); *State Comp. Ins. Fund v. Indus. Comm'n*, 95 Colo. 309, 35 P.2d 849 (1934); *O.P. Skaggs Co. v. Nixon*, 97 Colo. 314, 50 P.2d 55 (1935); *Elleman v. Indus. Comm'n*, 100 Colo. 120, 66 P.2d 323 (1937); *Skjoldahl v. Indus. Comm'n*, 108 Colo. 140, 113 P.2d 871 (1941); *Great Am. Indem. Co. v. State Comp. Ins. Fund*, 108 Colo. 323, 116 P.2d 919 (1941); *Metros v. Denver Coney Island*, 110 Colo. 40, 129 P.2d 911 (1942); *Black Forest Fox Ranch v. Garrett*, 110 Colo. 323, 134 P.2d 332 (1943); *Warner v. Mullens*, 111 Colo. 60, 137 P.2d 420 (1943); *Indus. Comm'n v. Menegatti*, 111 Colo. 484, 143 P.2d 274 (1943); *State Comp. Ins.*

*Fund v. Batis*, 117 Colo. 1, 183 P.2d 891 (1947); *Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953); *United States Fid. & Guar. Co. v. Indus. Comm'n*, 128 Colo. 68, 259 P.2d 869 (1953); *Montgomery Ward & Co. v. Indus. Comm'n*, 128 Colo. 465, 263 P.2d 817 (1953); *Hamilton v. Indus. Comm'n*, 132 Colo. 408, 289 P.2d 639 (1955); *Indus. Comm'n v. Colo. Fuel & Iron Corp.*, 135 Colo. 307, 310 P.2d 717 (1957); *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958); *Lamirato v. O.C. Kinney, Inc.*, 142 Colo. 48, 349 P.2d 562 (1960); *Cole v. Indus. Comm'n*, 144 Colo. 183, 355 P.2d 537 (1960); *Stauss v. Indus. Comm'n*, 144 Colo. 288, 355 P.2d 1076 (1960); *Indus. Comm'n v. Klaczkowski*, 146 Colo. 11, 360 P.2d 104 (1961); *Huff v. Aetna Ins. Co.*, 146 Colo. 63, 360 P.2d 667 (1961); *Idarado Mining Co. v. Barnes*, 148 Colo. 166, 365 P.2d 36 (1961); *Jones v. Indus. Comm'n*, 148 Colo. 253, 365 P.2d 689 (1961); *Nat'l Sugar Mfg. Co. v. Bauer*, 148 Colo. 436, 366 P.2d 388 (1961); *Indus. Comm'n v. Hesler*, 149 Colo. 592, 370 P.2d 428 (1962); *Univ. of Denver-Colorado Sem. & Univ. Park Campus v. Johnston*, 151 Colo. 465, 378 P.2d 830 (1963); *Tri-State Ins. Co. v. Indus. Comm'n*, 151 Colo. 494, 379 P.2d 388 (1963); *Skinner v. Indus. Comm'n*, 152 Colo. 97, 381 P.2d 253 (1963); *Bowlus v. Indus. Comm'n*, 152 Colo. 535, 383 P.2d 789 (1963); *Sharmar Nursing Home v. Indus. Comm'n*, 160 Colo. 197, 416 P.2d 161 (1966); *Breit v. Indus. Comm'n*, 160 Colo. 205, 415 P.2d 858 (1966); *Indus. Comm'n v. Albo*, 167 Colo. 467, 447 P.2d 1006 (1968); *Claim of Crandall v. Watson-Wilson Transp. Sys.*, 171 Colo. 329, 467 P.2d 48 (1970); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Indus. Comm'n v. Allen*, 28 Colo. App. 546, 478 P.2d 702 (1970); *Indus. Comm'n v. Ewing*, 174 Colo. 133, 482 P.2d 981 (1971); *Tatum-Reese Dev. Corp. v. Indus. Comm'n*, 30 Colo. App. 149, 490 P.2d 94 (1971); *Ringsby Truck Lines v. Indus. Comm'n*, 30 Colo. App. 224, 491 P.2d 106 (1971); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

**Which evidence is respectable.** It is the function of the commission to find the facts in workmen's compensation cases, and such findings, having respectable evidentiary support, are controlling. *Indus. Comm'n v. White*, 97 Colo. 322, 49 P.2d 434 (1935).

**An appellate court does not decide the facts and may not substitute its judgment for that of the fact-finder.** *Martinez v. Reg'l Transp. Dist.*, 832 P.2d 1060 (Colo. App. 1992); *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

**Ample.** Courts are powerless to interfere with findings of the commission, in cases in which the facts are disputed, where such findings are amply supported by the evidence. *London Gold Mines Co. v. Custer*, 101 Colo. 477, 74 P.2d 679 (1937); *Martin v. Indus. Comm'n*, 101 Colo. 540, 74 P.2d 1243 (1937); *Montgomery Ward & Co. v. Indus. Comm'n*, 105 Colo. 22, 94 P. 2d 689 (1939); *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987).

**Or substantial.** Findings of the commission as to facts must be accepted by the courts if there is any substantial evidence to support them. *Platt-Rogers, Inc. v. Indus. Comm'n*, 101 Colo. 458, 74 P.2d 673 (1937); *Consolidated Coal & Coke Co. v. Lazaroff*, 109 Colo. 248, 124 P.2d 755 (1942); *Zuzich v. Leyden Lignite Co.*, 120 Colo. 21, 206 P.2d 833 (1949); *Raisch v. Indus. Comm'n*, 721 P.2d 693 (Colo. App. 1986).

Evidentiary and ultimate findings need be specific only as to persuasive and determinative matters. *Roe v. Indus. Comm'n*, 734 P.2d 138 (Colo. App. 1986).

The ALJ's determination must be upheld if supported by substantial evidence. *Christie v. Coors Transp. Co.*, 919 P.2d 857 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997); *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

Where substantial evidence supports the findings of the industrial claim appeals office the court is bound by that finding. *Pub. Serv. Co. v. Indus. Claim Appeals Office*, 979 P.2d 584 (Colo. App. 1999).

Substantial evidence is that which is probative, credible, and competent, such that it warrants a reasonable belief in the existence of a particular fact without regard to contradictory testimony or inference. *Allen Co. v. Indus. Comm'n*, 762 P.2d 677 (Colo. 1988); *Colo. State Bd. of Med. Exam'rs v. Davis*, 893 P.2d 1365 (Colo. App. 1995); *Loveland Police Dept. v. Indus. Claim Appeals Office*, 141 P.3d 943 (Colo. App. 2006).

**Even though the commission has never seen the witnesses.** From this section, it is apparent that even in a case where the commission has never seen the witnesses, it was the legislative intent that the findings of fact nevertheless should be binding on the district court and the supreme court. *United States Fid. & Guar. Co. v. Indus. Comm'n*, 96 Colo. 571, 45 P.2d 895 (1935); *Zuzich v. Leyden Lignite Co.*, 120 Colo. 21, 206 P.2d 833 (1949).

**And although three different findings are made.** In a workmen's compensation case, although three different findings of fact are made, this did not nullify the rule that fact findings based on conflicting evidence are binding on the courts, and the last finding is conclusive. *Indus.*

*Comm'n v. Aetna Life Ins. Co.*, 88 Colo. 82, 292 P. 229 (1930).

**But findings of fact are not conclusive unless supported by evidence.** Determinations of fact are not final and conclusive unless they are substantially supported by the evidence. *Indus. Comm'n v. W. A. Hover & Co.*, 82 Colo. 335, 259 P. 509 (1927); *London Guarantee & Accident Co. v. Indus. Comm'n*, 95 Colo. 306, 35 P.2d 1010 (1934).

**Or a reasonable and fair inference therefrom.** Findings which are not supported by the evidence, or a reasonable and fair inference therefrom, form no basis upon which to predicate an award. *Gates v. Central City Opera House Ass'n*, 107 Colo. 93, 108 P.2d 880 (1940).

**Undisputed evidence may be treated as findings of fact.** Where the evidence is short and undisputed, it may be treated on review as the findings of fact and considered accordingly. *Prouse v. Indus. Comm'n*, 69 Colo. 382, 194 P. 625 (1920); *Indus. Comm'n v. Big Six Coal Co.*, 72 Colo. 377, 211 P. 361 (1922); *Frink Dairy Co. v. Indus. Comm'n*, 78 Colo. 71, 239 P. 727 (1925); *Winteroth v. Indus. Comm'n*, 93 Colo. 38, 22 P.2d 865 (1933).

**And other undisputed facts may be considered with findings.** In an action involving an award, the district court has the right to consider, with the findings, other undisputed facts. *Indus. Comm'n v. Cornelius*, 81 Colo. 111, 253 P. 828 (1927).

**Furthermore, where the facts are undisputed, the entire question is one of law and courts are not bound** by the commission's conclusions of law. *Indus. Comm'n v. Int'l. Minerals & Chem. Corp.*, 132 Colo. 256, 287 P.2d 275 (1955); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957); *Indus. Comm'n v. London & Lancashire Indem. Co.*, 135 Colo. 372, 311 P.2d 705 (1957); *Indus. Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957); *Marotte v. State Comp. Ins. Fund*, 145 Colo. 99, 357 P.2d 915 (1960); *Johnson v. Indus. Comm'n*, 148 Colo. 561, 366 P.2d 864 (1961).

**Order which reached correct result was affirmed** even if wrong reasons for result given. *A & R Concrete Const. v. Lightner*, 759 P.2d 831 (Colo. App. 1988).

**Commission's jurisdiction limited to determining right to compensation and liability.** The jurisdiction of the commission is limited to a determination of the right of an employee to compensation and to a determination of who is liable for the award under the statute, and collateral issues relating to the contractual rights and liabilities between the employers are of no concern to the employee and should be resolved by a court in an independent proceeding in which the employee should not be required to



participate. *Archer Freight Lines v. Horn Transp., Inc.*, 32 Colo. App. 412, 514 P.2d 330 (1973).

No jurisdiction to enforce awards where claimant asks only that the court "assist" her in recovering the money she was awarded. Enforcement of awards is to be sought through the district courts pursuant to § 8-44-107 (3) (decided under former law). *Passaretti v. Indus. Comm'n*, 711 P.2d 1285 (Colo. App. 1985).

## II. SCOPE OF REVIEW.

### A. In General.

The orderly functioning of judicial review requires that the grounds upon which an administrative agency acts be clearly disclosed and adequately sustained. *Hall v. Indus. Claim Appeals Office*, 757 P. 2d 1132 (Colo. App. 1988).

The determination of the weight and sufficiency of the evidence is for the commission. *London Guarantee & Accident Co. v. Indus. Comm'n*, 72 Colo. 177, 210 P. 70 (1922); *Indus. Comm'n v. Big Six Coal Co.*, 72 Colo. 377, 211 P. 361 (1922); *Pub. Serv. Co. v. Indus. Comm'n*, 89 Colo. 440, 3 P.2d 799 (1931).

And the court can review questions of law only. *Olson-Hall v. Indus. Comm'n*, 69 Colo. 518, 194 P. 212 (1921).

This section restricts appellate review to a review of legal errors in workers' compensation cases. *Martinez v. Reg'l Transp. Dist.*, 832 P.2d 1060 (Colo. App. 1992).

For courts are without power to determine questions of fact in workmen's compensation cases. *Ellerman v. Indus. Comm'n*, 73 Colo. 20, 213 P. 120 (1923); *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 85 Colo. 237, 275 P. 910 (1929).

On review the court may consider only the legal question of whether there is evidence to support the findings. *McPhee & McGinnity Co. v. Indus. Comm'n*, 67 Colo. 86, 185 P. 268 (1919); *Kokotovich v. Indus. Comm'n*, 69 Colo. 572, 195 P. 646 (1921); *Indus. Comm'n v. Ernest Irvine, Inc.*, 72 Colo. 573, 212 P. 829 (1923); *Nat'l Lumber & Creosoting Co. v. Kelly*, 99 Colo. 442, 63 P.2d 457 (1936); *Wood v. Indus. Comm'n*, 100 Colo. 209, 66 P.2d 806 (1937); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Indus. Comm'n v. Navajo Freight Lines*, 149 Colo. 86, 367 P.2d 894 (1962); *Univ. of Denver Colo. Sem. & Univ. Park Campus v. Johnston*, 151 Colo. 465, 378 P.2d 830 (1963); *Steel Placers, Inc. v. Reese*, 169 Colo. 360, 455 P.2d 874 (1969).

And the court exceeds its jurisdiction if it attempts to pass upon the weight of the evidence introduced before the commission. *Indus. Comm'n v. Aetna Life Ins. Co.*, 88 Colo. 82, 292 P. 229 (1930).

Appellate court is bound by the administrative law judge's resolution of credibility

issues. *Riddle v. Ampex Corp.*, 839 P.2d 489 (Colo. App. 1992).

For under the provisions of the workmen's compensation act, reviewing courts are precluded from passing upon the weight or sufficiency of the evidence, or its probative effect, and if the findings of fact made by the commission are upheld by the evidence, they will be affirmed. *Weaver v. Indus. Comm'n*, 72 Colo. 79, 209 P. 642 (1922).

The weight and sufficiency of the evidence and the inferences drawn therefrom are matters solely within the prerogative of the industrial commission. *Archer Freight Lines v. Horn Transp., Inc.*, 32 Colo. App. 412, 514 P.2d 330 (1973).

Where findings support the award, it is not for the court to say whether the evidence justifies the commission's findings. *Lindsay v. Indus. Comm'n*, 77 Colo. 424, 236 P. 1005 (1925).

Furthermore, the court cannot review a case on the evidence where any of the facts are in dispute. *Billick v. Indus. Comm'n*, 69 Colo. 471, 195 P. 114 (1921).

Court may not substitute its findings. Where there is sufficient competent evidence to support the findings and award, they are binding on review, and courts are not at liberty, although they may disagree with the conclusions reached by the commission, to substitute therefor findings which to them may seem more compatible with the evidence. *Am. Mining Co. v. Zupet*, 101 Colo. 238, 72 P.2d 281 (1937); *Univ. of Denver-Colorado Sem. & Univ. Park Campus v. Johnston*, 151 Colo. 465, 378 P.2d 830 (1963).

Inferences and conclusions to be drawn from the evidence in workmen's compensation cases, are for the commission and not for the courts. *Indus. Comm'n v. Valdez*, 101 Colo. 482, 74 P.2d 710 (1937); *Consolidated Coal & Coke Co. v. Lazaroff*, 109 Colo. 248, 124 P.2d 755 (1942); *Indus. Comm'n v. Menegatti*, 111 Colo. 484, 143 P.2d 274 (1943); *Zuzich v. Leyden Lignite Co.*, 120 Colo. 21, 206 P.2d 833 (1949).

And the court cannot create a presumption, unsupported by the record, which would nullify the commission's findings. *Platt-Rogers v. Indus. Comm'n*, 101 Colo. 458, 74 P.2d 673 (1937).

Thus, judgment arbitrarily rejecting findings will be reversed. A judgment of the court arbitrarily rejecting the findings of the industrial commission, and plainly inconsistent with such findings, was reversed and the cause remanded with directions to approve such findings and enter judgment accordingly. *Indus. Comm'n v. Johnson*, 66 Colo. 292, 181 P. 977 (1919).

But courts may examine record to determine whether there is evidence to support the findings. What constitutes evidence is a question of law, and if there is no evidence to support the findings, it follows that the commission

acted in excess of its powers. *Colo. Contracting Co. v. Indus. Comm'n*, 74 Colo. 206, 219 P. 1075 (1923); *United States Fid. & Guar. Co. v. Indus. Comm'n*, 96 Colo. 571, 45 P.2d 895 (1935).

**Fact-findings based on conflicting evidence will not be disturbed** on review. *Nat'l Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937); *State Comp. Ins. Fund v. Russell*, 105 Colo. 274, 96 P.2d 846 (1939); *Olson v. Erickson*, 105 Colo. 489, 99 P.2d 199 (1940); *Barker v. Indus. Comm'n*, 108 Colo. 338, 117 P.2d 319 (1941); *Deline v. Indus. Comm'n*, 108 Colo. 351, 116 P.2d 916 (1941); *Rand v. Indus. Comm'n*, 110 Colo. 240, 132 P.2d 784 (1942); *Cordillo v. Indus. Comm'n*, 110 Colo. 581, 136 P.2d 671 (1943); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

The court is bound by the administrative law judge's factual determinations, even when the evidence is conflicting and would have supported a contrary result. *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993).

**Although the court may not agree with conclusions of the commission** which are based upon conflicting testimony in a workmen's compensation case, notwithstanding, if there is sufficient competent evidence to sustain the findings, they should not be disturbed on judicial review. *Coors Co. v. Hollaus*, 108 Colo. 360, 117 P.2d 822 (1941).

**But courts may draw own conclusions where evidence is without substantial conflict.** In workmen's compensation cases where the evidence as disclosed by the record is without substantial conflict as to the controlling issues involved, courts may properly draw their own conclusions therefrom and enter judgment accordingly, notwithstanding the determination may be contrary to the findings and award. *Indus. Comm'n v. Betz*, 111 Colo. 401, 142 P.2d 389 (1943); *Arvas v. McNeil Coal Corp.*, 119 Colo. 289, 203 P.2d 906 (1949).

**For when commission makes fact-finding contrary to the uncontradicted evidence, it acts in excess of its powers.** In such circumstances, a court in reviewing the action of the commission is passing upon a question of law and not making a finding of fact; consequently it is not usurping the fact-finding function. *O. P. Skaggs Co. v. Nixon*, 97 Colo. 314, 50 P.2d 55 (1935).

**When court authorized to direct a finding of fact.** There must be no competent evidence in the record that claimant's disability was not caused by the accident and uncontroverted competent evidence that it was so caused before a court is authorized to direct a finding of fact by the commission. *O. P. Skaggs Co. v. Nixon*, 97 Colo. 314, 50 P.2d 55 (1935); *Indus. Comm'n v. Wetz*, 100 Colo. 161, 66 P.2d 812 (1937); *Indus. Comm'n v. Menegatti*, 111 Colo. 484, 143 P.2d 274 (1943).

**Courts are forbidden to pass upon the referee's rulings at the hearing**, such as objections to the admission of testimony, the weight of evidence, credibility of witnesses and mere irregularities in procedure. *Zook v. Indus. Comm'n*, 75 Colo. 41, 223 P. 751 (1924); *Compstock v. Biven*, 78 Colo. 107, 239 P. 869 (1925).

**And an award cannot be reversed because of the admission of hearsay evidence.** *Vaughn v. Indus. Comm'n*, 79 Colo. 257, 245 P. 712 (1926).

**Court may not set aside or amend a finding of fact and order award amended accordingly.** *Indus. Comm'n v. General Accident, Fire & Life Assurance Corp.*, 71 Colo. 115, 204 P. 338 (1922).

**And judgment setting aside finding held to be error.** The commission in adopting and making his own the findings of the referee, that "claimant's condition is not the result of an accidental injury within the meaning of the workmen's compensation act; that said condition is in the nature of an occupational disease", determined by necessary inference that the condition from which claimant was suffering was not caused by accident, but was caused by the pressure on his knee incident to the character of the work in which he was engaged. There being evidence to support the finding it was binding upon the court, and it was error for the court to set aside such finding and order an award of compensation. *Indus. Comm'n v. Barton*, 98 Colo. 51, 52 P.2d 670 (1935).

**Judgment beyond court's jurisdiction.** Where commission awarded monthly payments to claimant in proceeding for compensation, the court was without jurisdiction to enter judgment for the maximum sum which might thereafter accrue under the award. *L. B. Cole Produce Co. v. Indus. Comm'n*, 123 Colo. 278, 228 P.2d 808 (1951).

**Correctness of legal conclusions matter for appellate court.** Correctness of a legal conclusion drawn by the industrial commission from undisputed facts is properly a matter for the appellate court. *Dorsch v. Indus. Comm'n*, 185 Colo. 219, 523 P.2d 458 (1974); *Gruntmeir v. Tempel & Esgar, Inc.*, 730 P.2d 893 (Colo. App. 1986).

**Evidence supported determination by panel that claimant was not an "employee" at time of accident.** *Younger v. City and County of Denver*, 796 P.2d 38 (Colo. App. 1990).

**ALJ's determination to use an alternate method to compute claimant's average weekly wage rather than by the piecework method set forth in subsection (2)(e)** was supported by substantial evidence and could not be disturbed on review where claimant's contract contemplated 10 to 12 hours per day for five days per week on a piecework basis and claimant had worked on a piecework basis for a short



period of time prior to injury. *Drywall Prods. v. Constuble*, 832 P.2d 957 (Colo. App. 1991).

**This section establishes the standard of appellate review for grants of summary judgment in workers' compensation claims.** *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007).

**ALJ's summary judgment order may be set aside upon review** where the appellate court finds in the record a disputed issue of material fact. *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007).

**Appellate court must accept ALJ's statements of undisputed facts** pertaining to a claimant's request for penalties against an employer if substantial evidence in the record supports that statement of facts, but must set aside the grant of summary judgment in an employer's favor if the court determines that conflicts in the evidence are not resolved in the record or the order is not supported by applicable law. *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007).

#### B. Acts Not Supported by Law.

**The findings of the director are binding unless set aside for one or more of the reasons named in this section.** *Indus. Comm'n v. London Guarantee & Accident Co.*, 66 Colo. 575, 185 P. 344 (1919).

**For instance, that the commission exceeded its lawful power**, in other words, acted without, or in excess of, its jurisdiction is one of the grounds upon which the courts are permitted to set aside awards under the workmen's compensation act. *Indus. Comm'n v. Employers' Liab. Assurance Corp.*, 78 Colo. 267, 241 P. 729 (1925).

**And where the decision of the commission is based upon improper application of the law, a district court may set aside the award.** *Western Cas. & Sur. Co. v. Swort*, 134 Colo. 421, 306 P.2d 661 (1957); *Indus. Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957); *Booher v. Las Animas County Sch. Dist. R-88*, 30 Colo. App. 233, 491 P.2d 104 (1971).

**As where it makes fact-finding contrary to uncontradicted evidence.** *O.P. Skaggs Co. v. Nixon*, 97 Colo. 314, 50 P.2d 55 (1935).

**Or where final award is revoked.** Where no contention is made that a lump-sum disability award was not validly entered in the first instance, or that its propriety was contested by the state compensation insurance fund at the time it was made or thereafter, the award becomes, at the time of entry, tantamount to a final judgment and a vested right which survived the employee's death. Revocation of the award was an invalid act on the part of the commission, and its order to such effect is reversed. *Schenfeld v. Shaffer*, 29 Colo. App. 425, 487 P.2d 818 (1971).

#### C. Findings of Fact.

**To sustain an award of compensation, the director must find all of the essential facts required by § 8-52-102**, i.e., that employer and employee are subject to the act; that the employee was performing services in the course of his employment when an accident occurred; that the injury was caused by an accident arising out of and in the course of the employment. An absence of any one of such essential facts defeats an award. *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958).

**Award to be set aside when no evidence to support it.** The award in a workmen's compensation case is to be treated like the verdict of a jury and set aside by the courts when there is not evidence to support it. *Indus. Comm'n v. Elkas*, 73 Colo. 475, 216 P. 521 (1923).

**And detailed findings of fact should be made** so that courts can determine whether award is supported by the facts. *Prouse v. Indus. Comm'n*, 69 Colo. 382, 194 P. 625 (1920); *Billick v. Indus. Comm'n*, 69 Colo. 471, 195 P. 114 (1921); *North Park Coal Co. v. Indus. Comm'n*, 90 Colo. 500, 10 P.2d 326 (1932); *Hayden Bros. Coal Corp. v. Indus. Comm'n*, 90 Colo. 503, 10 P.2d 325 (1932); *Duras v. Indus. Comm'n*, 90 Colo. 565, 11 P.2d 213 (1932).

**For otherwise court cannot say finding and awards supported by evidence.** If no findings of fact are made, it is absolutely impossible for the court to say whether the award is supported by the findings or whether there is any evidence to support the findings. *Hayden Bros. Coal Corp. v. Indus. Comm'n*, 90 Colo. 503, 10 P.2d 325 (1932).

**And award cannot be based upon speculation or conjecture.** There is no explanation as to how the employee met his death. There is not evidence in the record that any of these speculative events actually did occur. Awards in compensation cases cannot be based upon speculation or conjecture. *Indus. Comm'n v. London & Lancashire Indem. Co.*, 135 Colo. 372, 311 P.2d 705 (1957).

**Just as mere inferences will not suffice to uphold an award.** *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

**Thus, imperative for court to have complete statement of facts.** This section is not to be treated as without a purpose, and inasmuch as it prohibits the court from disturbing the findings of fact, it is imperative that the court have before it a sufficiently complete statement of the facts by the commission, as will enable it to render an independent conclusion as to the law to be applied. *Weaver v. Indus. Comm'n*, 69 Colo. 507, 194 P. 941 (1921).

**For unless the commission first finds the evidentiary and ultimate facts, it is futile for the reviewing court to examine the record**, for it cannot sit as a fact-finding body to ascertain

facts from the testimony in the first instance, and it cannot on review determine whether the testimony is sufficient to establish facts that have not been found by the commission. *Metros v. Denver Coney Island*, 110 Colo. 40, 129 P.2d 911 (1942); *Womack v. Indus. Comm'n*, 168 Colo. 364, 451 P.2d 761 (1969).

**And the sufficiency of the finding must appear upon its face.** *Womack v. Indus. Comm'n*, 168 Colo. 364, 451 P.2d 761 (1969).

**However, it is not any part of the commission's function to find that the claimant has not sustained the burden of proof** of any or all of the essential elements that he must establish to entitle him to compensation. If the commission is of the opinion, after weighing the evidence, that it does prove any element of claimant's case, he should find that element as a fact, and similarly, if of the opinion that claimant has failed to prove any element of his case he should find that element not to be a fact. *Metros v. Denver Coney Island*, 110 Colo. 40, 129 P.2d 911 (1942).

**Change of former award should contain specific findings of changed condition.** The award of the commission since it changed and increased the former award, should have contained specific findings, based upon the testimony, as to a changed condition, if such was found, as well as specific findings as to error in the former findings. Because the award does not contain such specific findings, it is attacked for insufficiency, the attack being based upon numerous decisions of this court which have clearly stated that it is the duty of the commission to make sufficiently detailed findings of fact so that the courts may determine whether the order or award is supported by the facts. *Nat'l Lumber & Creosoting Co. v. Kelly*, 99 Colo. 442, 63 P.2d 457 (1936).

**If commission fails to find specific facts cause will be remanded.** In a proceeding under the workmen's compensation act, it is the duty of the commission to make sufficient specific findings of fact, and where it fails to do so, a cause which has been brought to the supreme court for review will be remanded for further findings. *Olson-Hall v. Indus. Comm'n*, 69 Colo. 518, 194 P.212 (1921); *Crawford v. Indus. Comm'n*, 71 Colo. 378, 206 P. 1073 (1922); *Berkley v. Consolidated Lower Boulder Reservoir & Ditch Co.*, 73 Colo. 483, 216 P. 548 (1923); *Indus. Comm'n v. Carpenter*, 102 Colo. 22, 76 P.2d 418 (1938); *Metros v. Denver Coney Island*, 110 Colo. 40, 129 P.2d 911 (1942).

**Unless general finding is right and conclusion is reasonable inference from evidence.** An award will not be disturbed on review on the ground of insufficient findings, where the general finding is right and the conclusion is a reasonable inference from the evidence. *Picardi v. Indus. Comm'n*, 70 Colo. 266, 199 P. 420 (1921); *Central Sur. & Ins. Corp. v. Indus.*

*Comm'n*, 94 Colo. 341, 30 P.2d 253 (1934), see *Globe Indem. Co. v. Indus. Comm'n*, 67 Colo. 526, 186 P. 522 (1919); *Brock-Haffner Press Co. v. Indus. Comm'n*, 68 Colo. 291, 187 P. 44 (1920); *Prouse v. Indus. Comm'n*, 69 Colo. 382, 194 P. 625 (1920); *Hassell Iron Works Co. v. Indus. Comm'n*, 70 Colo. 386, 201 P. 894 (1921).

**If the evidence is conflicting, the commission's duty is to resolve the conflict,** determine what is true and what is false, and announce the fact in accordance with his findings. *Metros v. Denver Coney Island*, 110 Colo. 40, 129 P.2d 911 (1942); *United States Fid. & Guar. Co. v. Indus. Comm'n*, 128 Colo. 68, 259 P.2d 869 (1953); *Bowlus v. Indus. Comm'n*, 152 Colo. 535, 383 P.2d 789 (1963); *Alvin H. Watkins, Inc. v. Hamilton*, 159 Colo. 257, 411 P.2d 15 (1966); *Hirschfield v. Indus. Comm'n*, 159 Colo. 350, 411 P.2d 776 (1966); *Sena v. World of Sleep, Inc.*, 173 Colo. 348, 478 P.2d 671 (1970).

**However, where there is no conflict in the testimony and the award is based on unwarranted inferences or improper application of the law,** the court is at liberty to set aside the award. *Deines Bros. v. Indus. Comm'n*, 125 Colo. 258, 242 P.2d 600 (1952).

**Findings held to support award.** *London Guarantee & Accident Co. v. Indus. Comm'n*, 70 Colo. 256, 199 P. 962 (1921); *Canon Reliance Coal Co. v. Indus. Comm'n*, 72 Colo. 477, 211 P. 868 (1922); *Columbine Laundry Co. v. Indus. Comm'n*, 73 Colo. 397, 215 P. 870 (1923); *Ortiz v. Indus. Comm'n*, 734 P.2d 642 (Colo. App. 1987); *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999).

**Findings of fact were held not to support an award** denying compensation to employee kicked by horse which he was beating. *Indus. Comm'n v. Cornelius*, 81 Colo. 111, 253 P. 828 (1927).

**Findings not supported by evidence.** *Gruntmeir v. Tempel & Esgar, Inc.*, 730 P.2d 893 (Colo. App. 1986); *Hobbs v. Indus. Claim Appeals Office*, 804 P.2d 210 (Colo. App. 1990).

**Insufficient finding.** It is not a finding of the required facts for the commission to say "that if the occasion occurred as the claimant has testified, it would not constitute a compensable accident". This is in effect but a demurrer by the commission to claimant's evidence, and is not authorized by the compensation act. *Metros v. Denver Coney Island*, 110 Colo. 40, 129 P.2d 911 (1942).

**Error of the industrial commission in affirming an award based on findings not supported by evidence** in the record requires that the award be set aside. *Associated Grocers of Colo., Inc. v. Bendickson*, 36 Colo. App. 239, 538 P.2d 476 (1975).



There is a clear distinction between the terms “no evidence” and “no credible evidence” and the record failed to support the finding that there was no evidence of causation regarding worker’s claim to total disability benefits for occupational lung disease. *Hall v. Indus. Claim Appeals Office*, 757 P.2d 1132 (Colo. App. 1988).

**Findings of the ALJ sufficient to permit appellate review.** In concluding that claimant failed to prove that a whole person impairment

rating was applicable, the ALJ adopted the physicians’ opinions that claimant suffered a loss of range of motion in the upper extremity. This finding is sufficient to permit review. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997).

**Applied in** *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Cabela v. Indus. Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

**8-43-309. Actions in court tried within thirty days.** Any such action commenced in the court of appeals to set aside or modify any order shall be heard within thirty days after issue shall be joined, unless continued on order of the court for good cause shown. No continuance shall be for longer than thirty days at one time.

**Source:** L. 90: Entire article R&RE, p. 511, § 1, effective July 1.

**Editor’s note:** This section is similar to former § 8-53-121 as it existed prior to 1990.

#### ANNOTATION

**It is the general assembly’s intent that this section** be directory and not mandatory or jurisdictional.

*Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177 (Colo. App. 2009).

**8-43-310. Error disregarded unless prejudicial.** The appeal shall be upon the record returned to the court by the industrial claim appeals office. Upon the hearing of any such action, the court shall disregard any irregularity or error of the director or the panel unless it affirmatively appears that the party complaining was damaged thereby.

**Source:** L. 90: Entire article R&RE, p. 511, § 1, effective July 1.

**Editor’s note:** This section is similar to former § 8-53-122 as it existed prior to 1990.

#### ANNOTATION

**Annotator’s note.** The following annotations include cases decided under former provisions similar to this section.

**One of the purposes of the compensation act was to avoid the delay attending ordinary litigation.** *Kosmos v. Indus. Comm’n*, 96 Colo. 90, 39 P.2d 780 (1934).

**Thus, report of accident by employer need not be formally introduced in evidence** at a hearing in order that it may be considered. *New Jersey Fid. & Plate Glass Ins. Co. v. Patterson*, 86 Colo. 580, 284 P. 334 (1929).

**And reversal is not required because of untrue but unnecessary recitation in award.** Under the provisions of this section, the supreme court is not called upon to reverse the district court, which affirmed the commission’s award, simply because of an untrue, although unnecessary, recitation in the award itself, unless it affects the substantial rights of the parties. *Fuel & Iron Co. v. Indus. Comm’n*, 85 Colo. 237, 275 P. 910 (1929).

**Rules limiting introduction of evidence.** It was not the intention of the general assembly, in directing the courts by this section to disregard certain errors of irregularities of the commission (now the industrial claim appeals panel), to allow the latter to put into effect rules limiting the introduction of evidence, which the courts are without authority to adopt. *Western Auto Supply Co. v. Washburn*, 112 Colo. 430, 149 P.2d 804 (1944).

**The court cannot reverse an award simply because of the erroneous admission of incompetent or improper evidence;** an award may be reversed if there be no competent evidence to support it. *Game & Fish Dept. v. Pardoe*, 147 Colo. 363, 363 P.2d 1067 (1961).

**But it is not error to exclude original evidence at the trial in the district court.** *Nat’l Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950).

**If the decision turns on a legal question, any error in commission’s fact-finding pro-**

cess would not be prejudicial. Featherstone v. Loomix, Inc., 726 P.2d 246 (Colo. App. 1986).

Even if the commission's interpretation of the law is erroneous, its order will be sustained if a proper interpretation would produce the same legal result. Featherstone v. Loomix, Inc., 726 P.2d 246 (Colo. App. 1986).

No procedural irregularity affecting claimant's substantive rights was found where claimant, while not furnished a copy of the vocational evaluation report, was allowed to examine and present his objections to the report prior to entry of the hearing officer's order, where hearing officer elicited pertinent information from a pro se claimant or where claimant's attorney wrote to hearing officer that the parties were ready for an order. Smith v. Indus. Comm'n, 735 P.2d 921 (Colo. App. 1986).

Where hearing officer strictly followed medical opinion in determining the degree of claimant's industrial disability, it was not harmless error for the hearing officer to have excluded counselor's testimony on the degree of industrial disability merely because it embraced an ultimate issue to be decided by the trier of fact. Chambers v. CF & I Steel Corp., 757 P.2d 1171 (Colo. App. 1988).

**8-43-311. Court record transmitted to industrial claim appeals office - when.** It is the duty of the clerk of the court of appeals, without order of court or application of the panel, to transmit the record in any case to the industrial claim appeals office within twenty-five days after the order or judgment of the court unless in the meantime further appellate review is granted by the supreme court. If the supreme court grants further appellate review, the clerk shall return the record immediately upon receipt of remittitur from the supreme court, unless the order of the supreme court requires further action by the court of appeals, and then within twenty-five days after such further action.

**Source:** L. 90: Entire article R&RE, p. 511, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-53-123 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

This section operates as a short statute of limitations. Kosmos v. Indus. Comm'n, 96 Colo. 90, 39 P.2d 780 (1934).

It is an express mandate in form, its purpose is to secure speedy compensation for those in need, and to relieve from the law's delay those unable to bear it. General Chem. Co. v. Thomas, 71 Colo. 28, 203 P. 660 (1922).

And appellate review which is not granted within the time provided will be denied on motion. General Chem. Co. v. Thomas, 71 Colo. 28, 203 P. 660 (1922); Kosmos v. Indus. Comm'n, 96 Colo. 90, 39 P.2d 780 (1934).

Under this section an aggrieved party has only 25 days within which to obtain a grant of

Error by administrative law judge referring to claimant meeting her "burden of proof in establishing a worsening of condition" was harmless where ALJ focused on causation between the industrial injury and claimant's back condition. El Paso County DSS v. Donn, 865 P.2d 877 (Colo. App. 1993).

Where record does not indicate claimant's emotional condition was raised as an affirmative defense, record contains some evidence of claimant's mental impairment but such evidence was limited to claimant's medical records, claimant did not object to their admission, and second ALJ did not rely on them in determining whether claimant had sustained an industrial injury, claimant's substantial rights were not affected even if evidence of claimant's mental impairment was improperly allowed. Bodensieck v. Indus. Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008).

Applied in Puffer Mercantile Co. v. Arellano, 34 Colo. App. 434, 528 P.2d 966 (1974); Mountain Meadows Nursing Center v. Indus. Claim Appeals Office, 990 P.2d 1090 (Colo. App. 1999).

appellate review. Hull v. Denver Tramway Corp., 97 Colo. 523, 50 P.2d 791 (1935).

Even where the grant of appellate review is actually issued before the record is transmitted to the commission (now the industrial claim appeals office), the grant of appellate review will be denied for the words "in the meantime" mean within the 25 days, not before the issue of the grant of appellate review, and the delay of the clerk in transmitting the record, being a disobedience of the law, cannot avail. General Chem. Co. v. Thomas, 71 Colo. 28, 203 P. 660 (1922).

And inability to secure judge's signature to bill of exceptions is no excuse. The fact that the applicant was unable to secure the signature of the trial judge to the bill of exceptions afforded no legal excuse for delaying the application for



the grant of appellate review until after the expiration of the prescribed period. *Hull v. Den-*

*ver Tramway Corp.*, 97 Colo. 523, 50 P.2d 791 (1935).

**8-43-312. Court may remand case or order entry of award.** Upon setting aside of any order, the court may recommit the controversy and remand the record in the case for further hearing or proceedings by the director, administrative law judge, or panel, or it may order entry of a proper award upon the findings as the nature of the case shall demand. In no event shall such order for award be for a greater amount of compensation than allowed by articles 40 to 47 of this title, or in any manner conflict with the provisions thereof.

**Source:** L. 90: Entire article R&RE, p. 512, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-53-124 as it existed prior to 1990.

## ANNOTATION

**Annotator's notes.** (1) The following annotations include cases decided under former provisions similar to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1973 amendment which vested fact-finding powers in the director of the division of labor which were previously exercised by the industrial commission.

**The power of the trial court to remand the cause to the industrial commission is limited** by the statute. *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968).

**And court will not remand if evidence is uncontradicted.** If the evidence is short and uncontradicted, the court, upon review, may treat the record itself as the findings of fact and may consider it accordingly. *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968); *Tillman v. Capitol Hill Transf. & Storage Co.*, 165 Colo. 514, 440 P.2d 152 (1968).

**For the commission does not have jurisdiction to change its previous findings of fact fully and finally made.** The matter was not before it for further proceedings or additionally for different determination. The commission has limited power to alter, affirm, modify, amend, or rescind its finding only if there are issues not theretofore heard and considered by it, and then only after rehearing on those issues. *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548 (1968).

**Where the evidence would support either of contrary findings by the commission, the court may not set aside an award and remand it.** *Coors Porcelain Co. v. Grenfell*, 109 Colo. 39, 121 P.2d 669 (1942).

**But court may remand for additional evidence.** Where the court cannot decide a workmen's compensation case because of the lack of evidence, the commission could not properly have done so, and the entire case should be remanded for the taking of additional evidence. *Home Ins. Co. v. Hepp*, 91 Colo. 495, 15 P.2d 1082 (1932).

**And court may order commission to consider evidence he had rejected.** Upon setting aside any order or award, the trial court may recommit the controversy and remand the record in the case to the commission for further hearing or proceedings, as the nature of the case shall demand. The trial court may order the commission to consider evidence which it had erroneously rejected or to allow time to secure further reports and enter a new order, assigning reasons for its decisions. *Indus. Comm'n v. McKenna*, 106 Colo. 323, 104 P.2d 458 (1940); *Warrenburg v. Cline*, 108 Colo. 179, 114 P.2d 302 (1941); *Indus. Comm'n v. Fotis*, 112 Colo. 423, 149 P.2d 657 (1944); *Serv. Supply Co. v. Vallejos*, 169 Colo. 14, 452 P.2d 387 (1969).

**Furthermore, the court may remand for entry of proper award.** The trial court, having found as a matter of law, that there was uncontroverted evidence showing exertion and that exertion, under the circumstances, was an adequate cause of heart dilation which produced death, it was proper for the court to order the commission to enter the proper award. *Indus. Comm'n v. Wetz*, 100 Colo. 161, 66 P.2d 812 (1937).

**Although evidence would support finding, if commission has not made finding, it will be given opportunity.** The trial court's analysis of the medical evidence demonstrates that there is ample evidence here to support a finding of causation, if such a finding had been made. It does not appear that this evidence is so overwhelming as to justify a holding that causation was established as a matter of law. The commission, having made no finding as to causation, should be given the opportunity of making this determination of fact. *Indus. Comm'n v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

**Since not supreme court's function to make findings of fact.** Where the referee did not make the evidentiary findings necessary to support his ultimate findings, the court may remand since it is not the court's function to make findings of fact. *Womack v. Indus. Comm'n*, 168 Colo. 364, 451 P.2d 761 (1969).

**General recitation will not fulfill commission's duty to make findings of fact.** A general recitation that the commission had rated partial permanent disability at 12% after giving "due consideration" to age, education, and experience will not fulfill the duty to make sufficiently detailed findings of fact to enable the courts to determine whether the award was supported by the facts. *Steel Placers, Inc. v. Reese*, 169 Colo. 360, 455 P.2d 874 (1969).

**Award by commission on remand is part of original court review.** Where a compensation

case is remanded by a trial court to the commission for further hearing, with a duty to hear the issues so presented and to return its new or reaffirmed award to the court, such award when final is but a part of the original court review, and such action is not subject to dismissal by the employer, the jurisdiction of the court being a continuing one for all matters relating to a claimant's injuries. *Graden Coal Co. v. Ytuarralde*, 137 Colo. 527, 328 P.2d 105 (1958).

**Applied** in *Casias v. Indus. Comm'n*, 38 Colo. App. 261, 554 P.2d 1357 (1976).

**8-43-313. Summary review by supreme court.** Any affected party dissatisfied with the decision of the court of appeals may seek review by writ of certiorari in the supreme court. If the supreme court reviews the judgment of the court of appeals, such review shall be limited to a summary review of questions of law. Any such action shall be advanced upon the calendar of the supreme court, and a final decision shall be rendered within sixty days after the date the supreme court grants further appellate review. The director, an administrative law judge, the industrial claim appeals office, or any other aggrieved party shall not be required to file any undertaking or other security upon review by the supreme court.

**Source:** L. 90: Entire article R&RE, p. 512, § 1, effective July 1. L. 91: Entire section amended, p. 1325, § 38, effective July 1. L. 94: Entire section amended, p. 1879, § 13, effective June 1.

**Editor's note:** This section is similar to former § 8-53-125 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under former provisions similar to this section.

**In a workmen's compensation case, review by the supreme court is limited to a summary review of questions of law.** *James v. Irrigation Motor & Pump Co.*, 180 Colo. 195, 503 P.2d 1025 (1972).

**For the supreme court is not a fact-finding body** and can only affirm or reverse the judgment of a lower court or, if the circumstances require, order a remand for further findings. *Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958).

**And findings of fact are controlling on the supreme court on review.** *Indus. Comm'n v. Enyeart*, 81 Colo. 521, 256 P. 314 (1927).

**Thus, the supreme court will not on review disturb findings based upon conflicting evidence.** *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

**Especially, where there is sufficient competent evidence in the record to support the award,** it is the duty of the lower court to affirm such award; and it is the duty of the supreme court to affirm the judgment of the lower court. *Indus. Comm'n v. Royal Indem. Co.*, 124 Colo. 210, 236 P.2d 293 (1951); *Peter Kiewit Sons' Co. v. Indus. Comm'n*, 124 Colo. 217, 236 P.2d 296 (1951); *Continental Cas. Co. v. Indus. Comm'n*, 124 Colo. 295, 238 P.2d 196 (1951).

**Inferences drawn from the facts are not binding on the supreme court.** *Deines Bros. v. Indus. Comm'n*, 125 Colo. 258, 242 P.2d 600 (1952).

**And court not bound by conclusions of law.** Where the facts are undisputed the question is one of law and the supreme court on review of a case is not bound by the conclusions of law. *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735 (1925); *Deines Bros. v. Indus. Comm'n*, 125 Colo. 258, 242 P.2d 600 (1952); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957).

**Question whether evidence supports award is one of law.** While the supreme court is only permitted to consider questions of law in workmen's compensation cases, whether an award is supported by evidence, is such a question and may be considered on review. *Indus. Comm'n v. Elkas*, 73 Colo. 475, 216 P. 521 (1923).

**However, the supreme court may consider only the legal question of whether there is evidence to support the findings,** and not whether its probative effect has been misconstrued. The award is conclusive upon all matters of fact properly in dispute, where supported by evidence, or reasonable inference to be drawn therefrom. *Passini v. Indus. Comm'n*, 64 Colo. 349, 171 P. 369 (1918); *Indus. Comm'n v. Koppers Co.*, 66 Colo. 596, 185 P. 267 (1919);



Hassell Iron Works Co. v. Indus. Comm'n, 70 Colo. 386, 201 P. 894 (1921); Empire Zinc Co. v. Indus. Comm'n, 71 Colo. 251, 206 P. 158 (1922); Vanadium Corp. of Am. v. Sargent, 134 Colo. 555, 307 P.2d 454 (1957); Colo. Fuel & Iron Corp. v. Indus. Comm'n, 151 Colo. 18, 379 P.2d 153 (1962); Capital Chevrolet Co. v. Indus. Comm'n, 159 Colo. 156, 410 P.2d 518 (1966); Hatterman v. Indus. Comm'n, 171 Colo. 370, 467 P.2d 820 (1970).

**And it cannot reverse the findings on the weight of evidence.** Employer's Mut. Ins. Co. v. Morgulski, 69 Colo. 223, 193 P. 725 (1920); Armour & Co. v. Indus. Comm'n, 78 Colo. 569, 243 P. 546 (1926). See Employers' Mut. Ins. Co.

v. Indus. Comm'n, 83 Colo. 315, 265 P. 99 (1928).

**Giving erroneous reason for proper award will not prevent affirmance.** The reason given for a proper award, if erroneous, will not prevent an affirmance of the award by the supreme court on review. Indus. Comm'n v. Bonfils, 78 Colo. 306, 241 P. 735 (1925).

**Bill of appeal will lie only to final judgment of lower court.** A bill of appeal will lie to a judgment of the lower court entered upon the review of an order or award; but this means a final judgment, and not a mere interlocutory order. Continental Cas. Co. v. Connell, 87 Colo. 577, 290 P. 273 (1930).

**8-43-314. Fees - costs - duty of district attorneys and attorney general.** No fee shall be charged by the clerk of any court for the performance of any official service required by articles 40 to 47 of this title. On proceedings to review any order or award, costs as between the parties shall be allowed in the discretion of the court, but no costs shall be taxed against said director or industrial claim appeals office. In any action for the review of any order or award and upon any review thereof by the supreme court, it is the duty of the district attorney in the county wherein said action is pending, or of the attorney general if requested by the director or industrial claim appeals office, to appear on behalf of either or both, whether any other party defendant should have appeared or been represented in the action.

**Source: L. 90:** Entire article R&RE, p. 512, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-53-126 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** The following annotations include a case decided under a former provision similar to this section.

**Court of appeals has discretion to award cost.** Since the appellate courts are the only state

courts which have jurisdiction over industrial commission matters, the court of appeals has the discretion to award costs between parties. Bourn v. T & T Loveland Chinchilla Ranch, Inc., 32 Colo. App. 315, 514 P.2d 787 (1973).

**8-43-315. Witnesses and testimony - mileage - fees - costs.** The director or any agent, deputy, or administrative law judge of the division has the power to issue subpoenas to compel the attendance of witnesses or parties and the production of books, papers, or records and to administer oaths. Any person who serves a subpoena shall receive the same fee as the sheriff. Each witness who is subpoenaed on behalf of the director and who appears in obedience thereto shall receive for attendance the fees and mileage provided for witnesses in civil cases in the district court, which shall be audited and paid from the state treasury in the same manner as other expenses are audited and paid, upon the presentation of a proper voucher approved by the director. The director has the discretion to assess the cost of attendance and mileage of witnesses subpoenaed by either party to any proceeding against the other party to such proceeding when, in the director's judgment, the necessity of subpoenaing such witnesses arises out of the raising of any incompetent, irrelevant, or sham issues by such other party.

**Source: L. 90:** Entire article R&RE, p. 512, § 1, effective July 1. **L. 91:** Entire section amended, p. 1325, § 39, effective July 1.

**Editor's note:** This section is similar to former § 8-53-127 as it existed prior to 1990.

**Cross references:** For sheriff's fees, see § 30-1-104; for witness and mileage fees, see §§ 13-33-102 and 13-33-103.

## ANNOTATION

**Annotator's notes.** (1) The following annotations include cases decided under former provisions similar to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission.

**A compensation claimant is not a "witness"** within the meaning of the provision of this section for assessing the cost of attendance and mileage of a witness against a party to the proceeding when the necessity for subpoenaing the witness arises out of the raising of any incompetent, irrelevant, or sham issues by that party. *Maryland Cas. Co. v. Indus. Comm'n*, 116 Colo. 58, 178 P.2d 426 (1947).

**Expert witness fees cannot be assessed as part of award.** The workmen's compensation

act contains no provision empowering the assessment of costs against either party in proceeding. Not having such power, expert witness fees cannot be assessed as part of the award. *Arkin v. Indus. Comm'n*, 145 Colo. 463, 358 P.2d 879 (1961).

**Witness fees can be assessed only when the witness is subpoenaed to a proceeding.** There is no provision for assessment of witness fees when a witness appears voluntarily. *Compton v. Indus. Claim Appeals Office*, 13 P.3d 844 (Colo. 2000).

**An allowance of costs against the state compensation insurance fund is not against the "commission",** which latter term means the industrial commission. *State Comp. Ins. Fund v. Howington*, 133 Colo. 583, 298 P.2d 063 (1956).

**8-43-316. Appearance by officer for closely held corporation.** An officer of a closely held Colorado corporation as defined in section 13-1-127 (1) (a), C.R.S., may appear on behalf of any such corporation, which has obtained coverage as required by articles 40 to 47 of this title in proceedings authorized under the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, where the amount at issue does not exceed ten thousand dollars, except in proceedings before the industrial claim appeals office under this part 3, appeals to the court of appeals under section 8-43-307, and summary reviews by the supreme court under section 8-43-313.

**Source: L. 91:** Entire section added, p. 1285, § 2, effective April 14.

**8-43-317. Service of documents.** All documents that are required to be exchanged under articles 40 to 47 of this title shall be transmitted or served in the same manner or by the same means to all required recipients.

**Source: L. 2010:** Entire section added, (SB 10-163), ch. 66, p. 233, § 6, effective March 31.

## PART 4

## ENFORCEMENT AND PENALTIES

**8-43-401. District attorney or attorney of division to act for director or office - penalties for failure of insurer to pay benefits.** (1) Upon the request of the director or the industrial claim appeals office, the district attorney of any district or any attorney-at-law employed by the division shall institute and prosecute the necessary actions or proceedings for the enforcement of any of the provisions of articles 40 to 47 of this title, or any award or order of the director, an administrative law judge, or the industrial claim appeals office, or for the recovery of any money due to Pinnacol Assurance, or any penalty provided in said articles, and shall defend in like manner all suits, actions, or proceedings brought against the director, an administrative law judge, or the industrial claim appeals office.

(2) (a) After all appeals have been exhausted or in cases where there have been no appeals, all insurers and self-insured employers shall pay benefits within thirty days after any benefits are due. If any insurer or self-insured employer knowingly delays payment of medical benefits for more than thirty days or knowingly stops payments, such insurer or self-insured employer shall pay a penalty of eight percent of the amount of wrongfully



withheld benefits; except that no penalty is due if the insurer or self-insured employer proves that the delay was the result of excusable neglect. If any insurer or self-insured employer willfully withholds permanent partial disability benefits within thirty days of when due, the insurer or self-insured employer shall pay a penalty to the division of ten percent of the amount of such benefits due. The penalties shall be apportioned, in whole or part, at the discretion of the director or administrative law judge, among the aggrieved party, the medical services provider, and the workers' compensation cash fund created in section 8-44-112 (7) (a).

(b) All moneys collected as penalties by the division pursuant to this subsection (2) shall be transmitted to the state treasurer who shall credit the same to the workers' compensation cash fund created in section 8-44-112.

**Source:** **L. 90:** Entire article R&RE, p. 513, § 1, effective July 1. **L. 91:** Entire section amended, p. 1325, § 40, effective July 1. **L. 94:** (1) amended, p. 1879, § 14, effective June 1. **L. 2002:** (1) amended, p. 1883, § 32, effective July 1. **L. 2010:** (2)(a) amended, (SB 10-012), ch. 287, p. 1340, § 2, effective August 11. **L. 2012:** (1) amended, (SB 12-110), ch. 158, p. 560, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-53-128 as it existed prior to 1990.

**Cross references:** For Pinnacol Assurance and for the Pinnacol Assurance fund, see §§ 8-45-101 and 8-45-102.

## ANNOTATION

**Law reviews.** For article, "Recent Colorado Appellate Decisions in Workers' Compensation Cases", see 25 Colo. Law. 57 (April 1996). For article, "Update on Colorado Appellate Decisions in Colorado Workers' Compensation Law", see 30 Colo. Law. 129 (July 2001). For article, "Update on Colorado Appellate Decisions in Colorado Workers' Compensation Law", see 30 Colo. Law. 105 (August 2001). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 31 Colo. Law. 119 (January 2002). For article, "Update on Colorado Appellate Decisions In Workers' Compensation Law", see 32 Colo. Law. 87 (March 2003).

**Where specific penalty provision in subsection (2)(a) applies, general penalty provisions in § 8-43-304 (1) do not.** *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo. App. 1997), overruled in *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001).

**Under the rules of statutory construction,** the phrase "for which no penalty has been specifically provided" defines "fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel". The use of the disjunctive conjunction "or" demarcates four different acts within this section that give rise to penalties. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001) (overruling *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo. App. 1997)).

**General penalty in § 8-43-304 (1) was applicable** to an insurer that refused to provide medically necessary transportation and, thus, refused medical treatment, although no bill for

medical benefits was submitted and the insurer did not delay or stop payment of such a bill, which would have invoked the specific penalty set forth in subsection (2)(a). *Pena v. Indus. Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2004).

**If the general assembly intended to create two penalties for the late payment of medical benefits,** subsection (2) would have provided that it is in addition to the penalty authorized by § 8-43-304 (1). *Holliday v. Indus. Claim Appeals Office*, 997 P.2d 1212 (Colo. App. 1999), vacated and claimant's appeal dismissed, 23 P.3d 700 (Colo. 2001).

**A penalty imposed for the willful failure to timely pay benefits may be in addition to a penalty for violation of an order made by the director or panel under § 8-43-304.** *Giddings v. Indus. Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

**Deliberate intent is required** to trigger penalties under subsection (2)(a). *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo. App. 1997).

**Term "wrongfully" in subsection (2)(a) implies** that the withholding of benefits must be unlawful or unjust before penalties may be assessed. *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo. App. 1997); *Miller v. Indus. Claim Appeals Office*, 49 P.3d 334 (Colo. App. 2001).

**A finding that employer acted reasonably under the circumstances precludes a finding of willfulness.** *Sears v. Penrose Hosp.*, 942 P.2d 1345 (Colo. App. 1997).

**"Wrongful" withholding shown** where respondents knew or should have known their conduct was unreasonable, and, as a result, they

violated their obligation to provide necessary medical care. *Miller v. Indus. Claim Appeals Office*, 49 P.3d 334 (Colo. App. 2001).

**Claims asserted against the state attorney general must be dismissed** where the ground for the claim is that she is charged under Colorado law with enforcing Colorado's statutory provisions governing the business of insurance, including the enforcement of workers' compensation statutes, when in fact she is not responsible for enforcing either insurance or workers' compensation laws and may become involved in prosecuting related matters only at the request of

the commissioner of insurance or the director of workers' compensation. *Fuller v. Norton*, 881 F. Supp. 468 (D. Colo. 1995).

**There is no practical difference between failure to authorize treatment and failure to pay medical benefits.** It is not impossible to assess the penalty provided for in subsection (2)(a) when the dispute involves the failure to authorize treatment. *Holliday v. Indus. Claim Appeals Office*, 997 P.2d 1212 (Colo. App. 1999), vacated and claimant's appeal dismissed, 23 P.3d 700 (Colo. 2001).

**8-43-401.5. Financial incentives to deny or delay claim or medical care - prohibition - penalties.** (1) No insurer, employee or contractor of an insurer, self-insured employer, employee or contractor of a self-insured employer, health care provider, or employee or contractor of a health care provider treating an injured worker under the provisions of articles 40 to 47 of this title shall pay or receive any form of financial remuneration that is based on any of the following:

- (a) The number of days to maximum medical improvement;
- (b) The rate of claims approval or denial;
- (c) The number of medical procedures, diagnostic procedures, or treatment appointments approved; or
- (d) Any other criteria designed or intended to encourage a violation of any provision of articles 40 to 47 of this title.

(2) (a) Payment of remuneration in violation of this section constitutes an unfair act or practice in the business of insurance, and the insurer or self-insured employer who pays or directs the payment of the remuneration shall be subject to penalties in accordance with part 11 of article 3 of title 10, C.R.S.

(b) In addition to, or as an alternative to, any penalties imposed pursuant to paragraph (a) of this subsection (2), an insurer or self-insured employer who is found to have violated subsection (1) of this section may be subject to fines as determined by the director pursuant to section 8-43-304 (1.5).

(3) Nothing in this section:

- (a) Restricts or limits the ability of a claims adjuster or employee or contracted claims personnel to investigate, detect, or prevent fraud; or
- (b) Limits the payment or receipt of financial incentives for any other lawful purpose.

**Source: L. 2010:** Entire section added, (SB 10-011), ch. 302, p. 1432, § 2, effective May 27.

**8-43-402. False statement - felony.** If, for the purpose of obtaining any order, benefit, award, compensation, or payment under the provisions of articles 40 to 47 of this title, either for self-gain or for the benefit of any other person, anyone willfully makes a false statement or representation material to the claim, such person commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S., and shall forfeit all right to compensation under said articles upon conviction of such offense.

**Source: L. 90:** Entire article R&RE, p. 513, § 1, effective July 1. **L. 2002:** Entire section amended, p. 1467, § 20, effective October 1.

**Editor's note:** This section is similar to former § 8-53-129 as it existed prior to 1990.

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.



### ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 113 (October 2003). For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 33 Colo. Law. 117 (November 2004).

**Term "compensation" does not include medical benefits.** Accordingly, claimant who was convicted of a felony for making a false statement or representation material to a claim for recovery did not forfeit her right to ongoing medical benefits. *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174 (Colo. App. 1998).

**Benefits unrelated to false statements are not forfeited.** A conviction under this section requires forfeiture of only the compensation that was obtained as a result of false statements. *Wolford v. Pinnacol Assurance*, 107 P.3d 947 (Colo. 2005).

There must be a nexus between the false statements and the compensation forfeited. *Wolford v. Pinnacol Assurance*, 107 P.3d 947 (Colo. 2005).

**Statutory limitation period does not apply** because forfeiture under this section is a crimi-

nal sanction, automatic upon conviction. *Wolford v. Pinnacol Assurance*, 81 P.3d 1079 (Colo. App. 2003), rev'd on other grounds, 107 P.3d 947 (Colo. 2005).

**This section does not violate double jeopardy prohibitions.** *Wolford v. Pinnacol Assurance*, 81 P.3d 1079 (Colo. App. 2003), rev'd on other grounds, 107 P.3d 947 (Colo. 2005).

**Forfeiture under this section does not constitute an excessive fine.** *Wolford v. Pinnacol Assurance*, 81 P.3d 1079 (Colo. App. 2003), rev'd on other grounds, 107 P.3d 947 (Colo. 2005).

**This section does not require the person accused of false statements or representations to file or cause to be filed a claim.** The statute applies to "anyone [who] willfully makes a false statement or representation material to the claim". In using this language, the general assembly chose not to limit the statute to the filing of a claim or to false statements or representations made on a particular claim form. *People v. Witek*, 97 P.3d 240 (Colo. App. 2004).

**8-43-403. Attorney fees.** (1) No contingent fee shall be applied to any medical benefits that have been previously incurred and will be paid to the claimant or directly to the medical care provider, in a permanent disability award, either by admission or settlement. In the event that medical benefits are the only contested issue, the fee agreement shall provide for reasonable fees calculated on a per-hour basis or, subject to approval by the director, may provide for a contingent fee not to exceed the limitations imposed by this section. On unappealed contested cases, a contingent fee exceeding twenty percent of the amount of contested benefits shall be presumed to be unreasonable. At the request of either an employee or the employee's attorney, the director shall determine what portion of the benefits awarded were contested, or the reasonableness of the fee charged by such attorney, or both. At the request of the employer or its insurance carrier or the attorney for either of them, the director shall determine the reasonableness of the fee charged by the attorney for the insurance carrier. No request for determination of the reasonableness of fees shall be considered by the director if received later than one hundred eighty days after the issuance of the final order, judgment, or opinion disposing of the last material issue in the case and the expiration of any right to review or appeal therefrom. In making this determination, the director shall consider fees normally charged by attorneys for cases requiring the same amount of time and skill and may decrease or increase the fee payable to such attorney. If the director finds that a review by the industrial claim appeals office or an appeal to the court of appeals or to the supreme court was perfected or if the director finds that such attorney reasonably devoted an extraordinary amount of time to the case, the director may award or approve a contingent fee or other fee in a percentage or amount that exceeds twenty percent of the amount of contested benefits. In determining the reasonableness of fees charged by an attorney for an employer or employer's insurance carrier, the director shall compare the fees of such attorney with the fees charged by the claimant's attorney in the same case and shall not approve an amount substantially greater than the reasonable amount charged by the said claimant's attorney or, if the claimant did not prevail, the reasonable amount the said claimant's attorney would have charged had the claimant prevailed, unless the director finds, based on a showing by the attorney for the employer or carrier, that higher fees are objectively justifiable. Legal costs not found reasonable shall not be allowed as an expense in fixing premium rates by the commissioner of insurance.

(2) Any attorney who represents any party in a workers' compensation case shall

provide the party with a written fee agreement which sets forth, in full, the attorney's specific fee arrangement, including the criteria upon which the attorney bases his hourly or set fee and the circumstances in which any modifications or adjustments to such fee will be made, and specifying whether the client will be charged for the attorney's expenses or advances made by the attorney on behalf of the party, including without limitation costs of copying, research, telephone calls, postage, and any other expenses incident to the litigation which the attorney may be ethically bound to undertake on behalf of the party pursuant to law or pursuant to any court rule including the code of professional responsibility as adopted by the supreme court of Colorado. Contingent fee agreements shall be in conformity with all applicable provisions of the said code or of rules of the supreme court, and, in addition, such agreements shall set forth the provisions of this section in easy to understand language in at least ten-point bold-faced type. No such fee agreement may be enforced against any party unless it complies with the requirements of this section and is signed by both parties. Any attempt by an attorney who intentionally does not comply with this section and who seeks to enforce a fee agreement which does not comply with the requirements of this section shall be presumed to be a violation of the code of professional responsibility as adopted by the supreme court of Colorado.

(3) Repealed.

**Source:** L. 90: Entire article R&RE, p. 513, § 1, effective July 1. L. 91: Entire section amended, p. 1369, § 1, effective May 29.

**Editor's note:** (1) This section is similar to former § 8-52-115 as it existed prior to 1990.

(2) Subsection (3)(d) provided for the repeal of subsection (3), effective July 1, 1993. (See L. 91, p. 1369.)

#### ANNOTATION

**Supreme court is exclusive tribunal** for regulation of the practice of law, including reasonableness of fees, notwithstanding provision of this section allowing the director of the division of workers' compensation to determine reasonableness of fees in a workers' compensation

case. In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

**Agreement for excessive fee may be unenforceable under subsection (2).** In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

**8-43-404. Examination - refusal - personal responsibility - physicians to testify and furnish results - injured worker right to select treating physicians - injured worker right to third-party communications - definitions - rules.** (1) (a) If in case of injury the right to compensation under articles 40 to 47 of this title exists in favor of an employee, upon the written request of the employee's employer or the insurer carrying such risk, the employee shall from time to time submit to examination by a physician or surgeon or to a vocational evaluation, which shall be provided and paid for by the employer or insurer, and the employee shall likewise submit to examination from time to time by any regular physician selected and paid for by the division.

(b) (I) At least three business days in advance of an examination under paragraph (a) of this subsection (1), if requested by the claimant, the employer or insurer shall pay to the claimant the claimant's estimated expenses of attending the examination, including transportation, mileage, food, and hotel costs. Failure to provide payment in accordance with this subparagraph (I) constitutes grounds for the claimant to refuse to attend the examination.

(II) If an employer pays estimated expenses under this paragraph (b) and the claimant does not attend the examination, the employer or insurer may recover the costs paid for the employee's expenses from future indemnity benefits.

(2) (a) The employee shall be entitled to have a physician, provided and paid for by the employee, present at any such examination. If an employee is examined by a chiropractor at the request of the employer, the employee shall be entitled to have a chiropractor provided and paid for by the employee present at any such examination. After any examination conducted under this section, the examiner shall prepare a written report giving



a description of the examination performed, the written documents or any other materials reviewed, and all findings or conclusions of the examiner. The employee shall be entitled to receive from the examining physician or chiropractor a copy of any report that the physician or chiropractor makes to the employer, insurer, or division upon the examination, and the copy shall be furnished to the employee at the same time it is furnished to the employer, insurer, or division. The employee shall also be entitled to receive reports from any physician selected by the employer to treat the employee upon the same terms and conditions and at the same time the reports are furnished by the physician to the employer. All such examinations shall be recorded in audio in their entirety and retained by the examining physician until requested by any party. Prior to commencing the audio recording, the examining physician shall disclose to the employee the fact that the exam is being recorded. If requested, an exact copy of the recording shall be provided to the parties. Nothing in this subsection (2) shall be construed to prevent any party to the claim from making an audio recording of the examination. The division shall promulgate rules regarding such recordings that shall include provisions for the protection of the audio recordings and the privacy of information contained in such recordings. The employer shall be entitled to receive reports from any physician or chiropractor selected by the employee to treat or examine the employee in connection with such injury upon the same terms and at the same time the reports are furnished by the physician or chiropractor to the employee.

(b) The amendments made to paragraph (a) of this subsection (2) by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

(3) So long as the employee, after written request by the employer or insurer, refuses to submit to medical examination or vocational evaluation or in any way obstructs the same, all right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If the employee refuses to submit to such examination after direction by the director or any agent, referee, or administrative law judge of the division appointed pursuant to section 8-43-208 (1) or in any way obstructs the same, all right to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred. If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee.

(4) Any physician or chiropractor who makes or is present at any such examination may be required to testify as to the results thereof. Any physician or chiropractor having attended an employee in a professional capacity may be required to testify before the division when it so directs. A physician or chiropractor will not be required to disclose confidential communications imparted to said physician or chiropractor for the purpose of treatment and which are unnecessary to a proper understanding of the case.

(5) (a) (I) (A) In all cases of injury, the employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee. The two designated providers shall be at two distinct locations without common ownership. If there are not two providers at two distinct locations without common ownership within thirty miles of each other, then an employer may designate two providers at the same location or with shared ownership interests. Upon request by an interested party to the workers' compensation claim, a designated provider on the employer's list shall provide a list of ownership interests and employment relationships, if any, to the requesting party within five days of the receipt of the request. If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor. For purposes of this section, "corporate medical provider" means a medical organization in business as a sole proprietorship, professional corporation, or partnership.

(B) If there are fewer than four physicians or corporate medical providers within thirty miles of the employer's place of business who are willing to treat an injured employee, the employer or insurer may instead designate one physician or one corporate medical provider,

and subparagraphs (III) and (IV) of this paragraph (a) shall not apply. A physician is presumed willing to treat injured workers unless he or she indicates to the employer or insurer to the contrary.

(II) (A) If the employer is a health care provider or a governmental entity that currently has its own occupational health care provider system, the employer may designate health care providers from within its own system and is not required to provide an alternative physician or corporate medical provider from outside its own system.

(B) If the employer has its own on-site health care facility, the employer may designate such on-site health care facility as the authorized treating physician, but the employer shall comply with subparagraph (III) of this paragraph (a). For purposes of this sub-subparagraph (B), "on-site health care facility" means an entity that meets all applicable state requirements to provide health care services on the employer's premises.

(III) An employee may obtain a one-time change in the designated authorized treating physician under this section by providing notice that meets the following requirements:

(A) The notice is provided within ninety days after the date of the injury, but before the injured worker reaches maximum medical improvement;

(B) The notice is in writing and submitted on a form designated by the director. The notice provided in this subparagraph (III) shall also simultaneously serve as a request and authorization to the initially authorized treating physician to release all relevant medical records to the newly authorized treating physician.

(C) The notice is directed to the insurance carrier or to the employer's authorized representative, if self-insured, and to the initially authorized treating physician and is deposited in the United States mail or hand-delivered to the employer, who shall notify the insurance carrier, if necessary, and the initially authorized treating physician;

(D) The new physician is on the employer's designated list or provides medical services for a designated corporate medical provider on the list;

(E) The transfer of medical care does not pose a threat to the health or safety of the injured employee;

(F) An insurance carrier, or an employer's authorized representative if the employer is self-insured, shall track how often injured employees change their authorized treating physician pursuant to this subparagraph (III) and shall report such information to the division upon request.

(IV) (A) When an injured employee changes his or her designated authorized treating physician, the newly authorized treating physician shall make a reasonable effort to avoid any unnecessary duplication of medical services.

(B) The originally authorized treating physician shall send all medical records in his or her possession pertaining to the injured employee to the newly authorized treating physician within seven calendar days after receiving a request for medical records from the newly authorized treating physician.

(C) The originally authorized treating physician shall continue as the authorized treating physician for the injured employee until the injured employee's initial visit with the newly authorized treating physician, at which time the treatment relationship with the initially authorized treating physician shall terminate.

(D) The opinion of the originally authorized treating physician regarding work restrictions and return to work shall control unless and until such opinion is expressly modified by the newly authorized treating physician.

(E) The newly authorized treating physician shall be presumed to have consented to treat the injured employee unless the newly authorized treating physician expressly refuses in writing within five days after the date of the notice to change authorized treating physicians. If the newly authorized treating physician refuses to treat the injured employee, the employee may return to the employer to request an alternative authorized treating physician. If the employer does not provide an alternative authorized treating physician within five days after the employee's request, rules established by the division shall control.

(V) If the authorized treating physician moves from one facility to another, or from one corporate medical provider to another, an injured employee may continue care with the authorized treating physician, and the original facility or corporate medical provider shall provide the injured employee's medical records to the authorized treating physician within



seven days after receipt of a request for medical records from the authorized treating physician.

(VI) In addition to the one-time change of physician allowed in subparagraph (III) of this paragraph (a), upon written request to the insurance carrier or to the employer's authorized representative if self-insured, an injured employee may procure written permission to have a personal physician or chiropractor treat the employee. If permission is neither granted nor refused within twenty days, the employer or insurance carrier shall be deemed to have waived any objection to the employee's request. Objection shall be in writing and shall be deposited in the United States mail or hand-delivered to the employee within twenty days. An insurance carrier, or an employer's authorized representative if self-insured, shall track how often an injured employee requests to change his or her physician and how often such change is granted or denied and shall report such information to the division upon request. Upon the proper showing to the division, the employee may procure the division's permission at any time to have a physician of the employee's selection treat the employee, and in any nonsurgical case the employee, with such permission, in lieu of medical aid, may procure any nonmedical treatment recognized by the laws of this state as legal. The practitioner administering the treatment shall receive fees under the medical provisions of articles 40 to 47 of this title as specified by the division.

(b) Any private insurer or self-insured employer acting as its own insurance carrier as provided in section 8-44-201 providing workers' compensation coverage shall pay for chiropractic care as provided in paragraph (a) of this subsection (5).

(c) A treating physician shall not communicate with the employer or insurer of an injured worker regarding that injured worker unless:

(I) The injured worker is present for the communication; or

(II) The treating physician makes an accurate written record of the communication, containing all relevant and material information that was communicated, and provides the injured worker access to the writing in the same manner as medical records disclosures as required by director rules.

(6) Application or prosecution of a claim for benefits shall be a waiver of any privilege concerning communications relating to all medical issues raised by the claim, for the purposes of a utilization review conducted pursuant to section 8-43-501.

(7) An employer or insurer shall not be liable for treatment provided pursuant to article 41 of title 12, C.R.S., unless such treatment has been prescribed by an authorized treating physician.

(8) Upon request by an employee who has not reached maximum medical improvement and whose authorized treating physician is not level II accredited, an insurer or self-insured employer shall select a level II accredited physician as the authorized treating physician.

(9) (a) Health care services provided shall be deemed authorized if the claim is found to be compensable when:

(I) Compensability of a claim is initially denied;

(II) The services of the physician selected by the employer are not tendered at the time of the injury; and

(III) The injured worker is treated:

(A) At a public health facility in the state;

(B) At a public health facility within one hundred fifty miles of the residence of the injured worker; or

(C) Through a publicly funded program.

(b) A claimant shall not be liable for payment for treatment by the provider under this subsection (9) if the treatment is reasonably needed and related to the injury.

**Source:** **L. 90:** Entire article R&RE, p. 513, § 1, effective July 1; (6) amended, p. 1844, § 31, effective July 1. **L. 96:** (8) added, p. 271, § 3, effective April 8. **L. 2007:** (5)(a) amended, p. 763, § 1, effective January 1, 2008. **L. 2009:** (9) added, (SB 09-243), ch. 269, p. 1223, § 5, effective July 1; (2) amended, (SB 09-168), ch. 184, p. 807, § 5, effective August 5. **L. 2010:** (2) amended, (SB 10-163), ch. 66, p. 233, § 7, effective March 31; (5)(c) added, (SB 10-011), ch. 302, p. 1433, § 3, effective May 27. **L. 2011:** (1) amended, (SB 11-199), ch. 196, p. 760, § 3, effective May 23.

**Editor's note:** This section is similar to former § 8-51-110 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Employee's Refusal to be Treated.
- III. Employer's Right to Select Physician.
- IV. Employee's Refusal to Submit to Exam or Evaluation.

### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "A Significant Change in the Colorado Workmen's Compensation Act: 'Accidents', 'Injuries', and 'Heart Attack'", see 41 Den. L. Ctr. J. 189 (1964).

**Annotator's note.** (1) Since § 8-43-404 is similar to § 8-51-110 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to enforce the provisions of this section.

**Resumption of benefits after suspension.** This section permits a resumption of benefits after a period of suspension when the disqualifying condition has been removed. *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983).

Industrial claim appeals office finding that claimant had failed to remove the disqualifying condition was supported by substantial evidence and justified director's refusal to reinstate benefits. *Bacon v. Indus. Claim Appeals Office*, 746 P.2d 74 (Colo. App. 1987).

**Effective date of division's "permission" is date of ALJ's oral summary order.** Delaying change of physician until written order is issued would be contrary to statutory goal of assuring quick and efficient delivery of medical benefits. *Consolidated Landscape v. Indus. Claim Appeals Office*, 883 P.2d 571 (Colo. App. 1994).

**Administrative law judge properly excluded custody evaluation** from custody case as being outside the scope of the worker's compensation case and therefore not of aid to the understanding of the worker's compensation case. *Powderhorn Coal Co. v. Weaver*, 835 P.2d 616 (Colo. App. 1992).

**Applied** in *Safeway Stores v. Indus. Comm'n*, 678 P.2d 1078 (Colo. App. 1984).

### II. EMPLOYEE'S REFUSAL TO BE TREATED.

**Where risks do not justify claimant's refusal to submit to operation, no full compen-**

**sation.** While a claimant has the option to refuse corrective surgery, he may not do so and continue to receive full compensation where it appears that the risk involved in the recommended surgery is not such as to justify claimant's refusal thereof. *Hays v. Indus. Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958).

**The industrial commission must determine no unusual risks before denying relief.** Before the commission would be justified in denying relief to an applicant because of his refusal to submit to treatment or surgery it must appear that the proposed treatment or surgery is such as to be free of unusual risks and calculated to effect a cure. *Cain v. Indus. Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957); *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

**The reasonableness of claimant's refusal to submit to operative treatment is a question of fact** to be determined by the commission. *Overton v. City & County of Denver*, 106 Colo. 114, 102 P.2d 474 (1940); *Cain v. Indus. Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957); *Hays v. Indus. Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958); *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

**The burden of proof is on the employer** to establish that a tendered operation is simple, safe, and reasonably certain to effect a cure. *Cain v. Indus. Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

**So that evidence will not support the suspension of compensation where there is no showing** of a refusal to submit to surgery or that claimant persisted in any unsanitary or injurious practice which tended to imperil or retard his recovery. *Padillo v. F.H. Linneman Constr. Co.*, 29 Colo. App. 137, 479 P.2d 990 (1971).

**In any event, this section specifically gives the industrial commission discretion** in matters of this kind, and those seeking to attack the result must show that it abused its discretion. *Andrews v. Indus. Comm'n*, 73 Colo. 456, 216 P. 256 (1923); *Nat'l Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

**In the absence of an abuse of discretion, the decision of the industrial commission as to the reasonableness** of a claimant's refusal to submit to corrective surgery, is not subject to revision by the courts. *Hays v. Indus. Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958); *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

**Claimant not to be penalized for acting on advice of personal physician.** *Nat'l Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).



**A claimant who refuses corrective surgery because of his religious convictions cannot subject his employer to greater liability** than would obtain if claimant's faith permitted him to undergo surgery required. *Indus. Comm'n v. Vigil*, 150 Colo. 356, 373 P.2d 308 (1962).

**On the other hand the elements of fear and anxiety may be taken into consideration** by the commission as a proper basis for the award of compensation in a workmen's compensation case. *Nat'l Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

**Suspension of benefits not sanction.** Decision to suspend worker's compensation benefits was based on inference that worker's attempt to impede testing of his alleged disability was indicative of lack of disability, and was not based on statute allowing hearing officer to impose sanctions for failure to comply with discovery. *Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988).

**Vocational rehabilitation.** The right which accrues to a claimant because of the failure of the director to approve a vocational rehabilitation plan is the right not to begin complying with the plan. Once the plan is implemented and claimant voluntarily submits to it, and in the absence of the director's express disapproval, the lack of approval by the director does not excuse the claimant's failure to cooperate. *Bacon v. Indus. Claim Appeals Office*, 746 P.2d 74 (Colo. App. 1987).

Provisions of this statute applicable to refusal to undergo vocational rehabilitation do not require that claimant be directed to cooperate with vocational rehabilitation prior to the issuance of an order to suspend claimant's receipt of benefits. *Bacon v. Indus. Claim Appeals Office*, 746 P.2d 74 (Colo. App. 1987) (decided under law in effect prior to 1987 amendment).

**Applied** in *Walton v. Indus. Comm'n*, 738 P.2d 66 (Colo. App. 1987).

### III. EMPLOYER'S RIGHT TO SELECT PHYSICIAN.

**Law reviews.** For article, "A Review of Medical Issues in Worker's Compensation", see 19 Colo. Law. 667 (1990).

**The employer or insurer has the right in the first instance to select the physician** and services requisite to proper treatment of the employee. *State Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

This section authorizes the employer to select the treating physician "in the first instance". *Granite Constr. Co. v. Leonard*, 40 Colo. App. 20, 568 P.2d 500 (1977).

**Based on the plain language of subsection (5)(a) and cases interpreting that subsection,** an employer's right of first selection of a treating physician precludes an award of medical benefits for treatment received before the dece-

dent's workers' compensation claim was filed. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006).

**Where medical services are tendered to an injured employee in the first instance, the employee's secondary right of selection is lost.** *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

**Furthermore, an employer cannot give an employee carte blanche to select a different doctor,** especially when the employee's selection has resulted in surgical expense to not only the employer but also the fund. *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

**Employer or insurer may designate a medical care facility rather than an individual physician.** Although subsection (5)(a) refers to the right of the employer or insurer to select a "physician", the statute's use of the singular does not, without more, establish that only a single individual may be designated. *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

**Right to select physician is independent of the right to contest liability.** The employer or insurer may deny liability and still retain the right to select a treating physician in the event they later admit liability or are found liable for the injury. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

If a claimant wants to change physicians, he or she has a statutory obligation to request that change in accordance with subsection (5)(a). *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

**Where employer fails to exercise its right to select treating physician** and notifies employee that medical treatment will not be tendered, employee's right to select her own physician becomes vested. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Brickell v. Business Mach., Inc.*, 817 P.2d 536 (Colo. App. 1990).

**Claimant's use of another physician requires consent of the industrial commission before employer may be held liable.** *Fuel & Iron Corp. v. Indus. Comm'n*, 129 Colo. 353, 269 P.2d 1070 (1954); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Wishbone Restaurant v. Moya*, 162 Colo. 30, 424 P.2d 119 (1967).

**Employee is not required to obtain permission to consult physician chosen by employee,** where employer did not offer to provide medical treatment, and where employee initially consulted physician provided by employee's insurance plan who declined to treat employee because employee's injuries were work-related. *Ruybal v. Univ. Health Sciences Ctr.*, 768 P.2d 1259 (Colo. App. 1988).

**Notice and consent necessary to change or add physicians.** The workmen's compensation

act does not permit an injured employee to change physicians or to employ additional physicians without notice to his employer or its insurer and consent of the division of labor. *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

**A unilateral declaration of intent to change physicians is not a "request" to change physicians.** Subsection (5)(a) requires a claimant to request a new physician before switching physicians, but a declaration of intent to change physicians does not meet the requirement that the claimant request a new physician. *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000).

**Employer's failure to respond to worker's request for authorization to seek treatment from second physician waived any objection to second physician's treatment.** *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

**The act of the employee, in engaging his own surgeon, does not relieve the employer from all responsibility** for the payment of benefits provided by law for disability incurred by the employee in an industrial accident. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 129 Colo. 353, 269 P.2d 1070 (1954); *Vanadium Corp. of Am. v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Mennonite Hosp. v. Corley*, 28 Colo. App. 585, 476 P.2d 274 (1970).

**Where insurer refuses to pay expenses for operation reducing disability, insurer may not benefit.** If there has been a significant reduction in the percentage of permanent disability suffered by the employee due to an operation successfully performed by the employee's own physician, and the insurance carrier refuses to defray this expense, the insurer is not entitled to accept the benefits thereof which take the form of substantially reduced payments of compensation for permanent disability. *State Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964); *Wishbone Restaurant v. Moya*, 162 Colo. 30, 424 P.2d 119 (1967).

**Employer or insurer not liable for unauthorized medical expenses.** When an injured employee incurs unauthorized medical expenses, the employer or its insurer is not liable for such expenses. *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

**An employee may engage medical services** if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion, or, with full knowledge over a sustained period of time, has failed to object to claimant's change of physician. *Greager v. Indus. Comm'n*, 701 P.2d 168 (Colo. 1985).

**Also insurer's refusal to pay claimant's unauthorized medical expenses does not entitle claimant to compensation for a higher degree of permanent disability than that which**

she actually suffered. *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

**Claimant's letter, which did not unambiguously set forth a request to have own physician treat claimant, did not require rejection by insurer as a request to be treated by claimant's own physician.** Insurer's action of informing claimant, who was represented by counsel, that insurer could not communicate directly with claimant was appropriate and did not constitute a failure to respond within the meaning of § 8-43-110 (5) (a). *Brown & Root v. Indus. Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1991).

**However, employer's or carrier's objection to treatment by a second physician is not waived** where claimant, who was represented by counsel, sent an ambiguous letter to the claims service requesting permission to obtain additional information about her condition and other doctors for more opinions, and was sent a response from the claims service informing the claimant that she would have to correspond with the claims service through her attorney. The industrial claims panel erred in setting aside the administrative law judge's finding that treatment of the claimant by an orthopedic surgeon was not authorized by default under this section. *Brown & Root v. Indus. Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1992).

**This section requires only that a claimant request permission for alternative care** from the employer or the insurer. It does not restrict the request to the insurer if an employer is separately insured. *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

**Initial denial by insurer of claimant's request for a change of physician did not negate its obligation to respond to subsequent requests for a change of physician** and failure to do so pursuant to subsection (5)(a) within 20 days of request rendered denial waived. *Jacoby v. Metro Taxi, Inc.*, 851 P.2d 245 (Colo. App. 1993).

**No authority exists for an employer to appoint an agent**, other than an insurer, and unilaterally vest it with the rights and responsibilities assigned either to employers or insurers by the Workmen's Compensation Act. *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

**Emergency creates exception to requirements of subsection (5)(a)**, relieving employee of duty to notify employer or await employer's choice of physician before seeking medical attention. *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

**Once emergency has ended, employee must notify employer of need for further treatment** and employer may select physician, or services are not compensable. *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).



**Panel properly construed subsection (5)(a) to require that an insurer respond to an authorization request within 20 days of mailing of the written request.** *Gianetto Oil v. Indus. Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

**Claimant was entitled to a change in physicians after having reached maximum medical improvement** to the extent that the change was for purposes of obtaining future medical treatment to relieve the effects of her industrial injury or to prevent future deterioration of her work-related condition. *Story v. Indus. Claims Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

**A claimant's physician, as an accredited provider, does not possess an express or implied statutory right** to treat any claimant for his or her work-related injury or to provide further treatment. *Carlson v. Indus. Claim Appeals Office*, 950 P.2d 663 (Colo. App. 1997).

#### IV. EMPLOYEE'S REFUSAL TO SUBMIT TO EXAM OR EVALUATION.

**An administrative law judge may impose additional penalties pursuant to § 8-43-304** even though this section provides a specific penalty. *Kennedy v. Indus. Claim Appeals Office*, 100 P.3d 949 (Colo. App. 2004).

**It was proper for benefits to be restored after a suspension** when an employee initially refused to submit to an examination but the employee and the employer later stipulated to an examination and no order was entered requiring the employee to submit to an examination. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

**8-43-405. Payment as discharge of liability - conflicting claims.** Payment of death benefits to one or more dependents shall protect and discharge to that extent all compensation under articles 40 to 47 of this title unless and until any other person claiming to be a dependent has given the division notice of said person's claim and until the division has notified the employer or the employer's insurance carrier of such claim. In such case, the director or an administrative law judge shall determine the respective rights of said rival claimants, and thereafter such death benefits shall be paid to such dependents as the director or the administrative law judge may find so entitled under the provisions of said articles.

**Source:** **L. 90:** Entire article R&RE, p. 515, § 1, effective July 1. **L. 94:** Entire section amended, p. 1880, § 15, effective June 1.

**Editor's note:** This section is similar to former § 8-50-117 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-43-405 is similar to § 8-50-117 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**The purpose of this section is**, of course, to enable the employer, when an award has been made, to rest upon it and make his payments in

safety, secure that other dependents could not appear and say he had paid the wrong person. *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 74 Colo. 228, 220 P. 498 (1923).

**And the employer is not bound to search out the dependents. The dependents must appear and make their rights known.** *Colo. Fuel & Iron Co. v. Indus. Comm'n*, 74 Colo. 228, 220 P. 498 (1923).

**8-43-406. Compensation in lump sum.** (1) At any time after six months have elapsed from the date of injury, the claimant may elect to take all or any part of the compensation awarded in a lump sum by sending written notice of the election and the amount of benefits requested to the carrier or the noninsured or self-insured employer. The carrier or self-insured employer shall file the calculation of the lump sum due and notice that the lump sum has been paid to the claimant within ten days after the election. When the claimant is unrepresented, the director shall calculate amounts to be paid based on the present worth of partial payments, considering interest at four percent per annum, and less a deduction for the contingency of death. The director shall make the method of calculation of lump sums available to all parties at all times, including posting the information on the division's web site. Neither the director nor an administrative law judge shall in any way

attempt to condition the lump sum payment on the claimant waiving the right to pursue permanent total disability benefits.

(2) The aggregate of all lump sums granted to a claimant who has been awarded compensation shall not exceed sixty thousand dollars.

**Source:** **L. 90:** Entire article R&RE, p. 515, § 1, effective July 1. **L. 91:** (1) amended, p. 1352, § 6, effective May 29; (2) amended, p. 1326, § 41, effective July 1. **L. 2007:** Entire section amended, p. 1474, § 9, effective May 30. **L. 2010:** (1) amended, (SB 10-187), ch. 310, p. 1459, § 8, effective July 1.

**Editor's note:** This section is similar to former § 8-52-103 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** (1) Since § 8-43-406 is similar to § 8-52-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the director of the division of labor.

**Subsection (1) is not unconstitutionally vague and does not constitute an unconstitutional delegation of power to an administrative agency.** A "best interests" standard has been relied on by the general assembly in other instances to govern the resolution of conflicting interests. *Warren v. Southern Colo. Excavators*, 862 P.2d 966 (Colo. App. 1993).

**Since the general assembly may place valid limitations upon any remedy**, the section does not violate § 6 of article II of the Colorado Constitution. *Warren v. Southern Colo. Excavators*, 862 P.2d 966 (Colo. App. 1993).

**This section is to be construed liberally for the protection of the employee.** *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 65 Colo. 283, 176 P. 314 (1918).

**And there is no fixed rule as to the allowance of a lump sum.** No fixed rule can be laid down for determining whether weekly compensation or a lump sum should be allowed a claimant under this section. In most cases the controlling factor must be the character, capacity, and business ability of the claimant. *Kokotovich v. Indus. Comm'n*, 69 Colo. 572, 195 P. 646 (1921); *Rinehart v. Indus. Comm'n*, 719 P.2d 729 (Colo. App. 1986).

**For the allowance of a lump sum award is left to the discretion of the commission.** The award may be in part a lump sum, and if the commission thinks it is for the best interest of the parties, the balance due may be ordered to be

paid monthly. The matter is left to the discretion of the commission and not subject to review. *Indus. Comm'n v. Big Six Coal Co.*, 72 Colo. 377, 211 P. 361 (1922); *Rinehart v. Indus. Comm'n*, 719 P.2d 729 (Colo. App. 1986).

Where claimant's primary purpose in requesting a partial lump sum settlement was to pay his attorney fees in a single payment, the commission did not act in excess of its statutory authority in considering the reasonableness of the attorney fees in concluding that it should deny a lump sum settlement. *Rinehart v. Indus. Comm'n*, 719 P.2d 729 (Colo. App. 1986) (decided prior to 1986 abolishment of industrial commission).

**Also, within commission's discretion to determine amount and manner of payment of lump sum.** *Indus. Comm'n v. Big Six Coal Co.*, 72 Colo. 377, 211 P. 361 (1922).

**Furthermore, a lump sum award becomes a vested right which survives.** *McBride v. Indus. Comm'n*, 97 Colo. 166, 49 P.2d 386 (1935).

**Phrase "the aggregate of all lump sums granted" as used in subsection (2) requires** that the aggregate of all lump sum payments, whether they be for permanent total disability and/or permanent partial disability, be considered in determining the limitation. *Ritter v. Indus. Comm'n*, 44 Colo. App. 32, 615 P.2d 40 (1980).

**To interpret subsection (2) retrospectively could create chaos** in the operations of workmen's compensation insurers whose premium rates and loss reserves are computed on their potential liability inherent in the statutory scheme that was in effect upon issuance of the insurance. *Eight Thousand W. Corp. v. Stewart*, 37 Colo. App. 372, 546 P.2d 1281 (1976).

**The limit on the aggregate of all lump sums granted to a claimant in subsection (2) of this section, as amended, is procedural and prospective and, thus, applies to transactions that occur after its enactment even though the claimant applied for and was granted a lump-sum payment before subsection (2) was amended in 2007.** *Nelson v. Indus. Claim Ap-*



peals Office, 219 P.3d 416 (Colo. App. 2009),  
aff'd sub nom. Specialty Rests. Corp. v. Nelson,  
231 P.3d 393 (Colo. 2010).

**Statute as basis for jurisdiction.** See  
Tavenor v. Royal Indem. Co., 84 Colo. 521, 272  
P. 3 (1928).

**8-43-407. Election to waive vocational rehabilitation benefits and become subject to permanent partial disability provisions.** In all cases arising under articles 40 to 47 of this title prior to July 1, 1987, the employee, the employer, and, if insured, the insurance carrier may elect, upon unanimous agreement, in writing to waive vocational rehabilitation which was awarded pursuant to section 8-49-101 as it existed prior to July 1, 1987, and become subject to the permanent partial disability provisions pursuant to section 8-42-110, as said section existed prior to July 1, 1991. Such election shall be made in a form prescribed by the director and shall not affect payments made prior to the filing of such agreement. Failure to agree to the options available under the provisions of this section shall not be evidence of bad faith in any future litigation by either party.

**Source:** **L. 90:** Entire article R&RE, p. 515, § 1, effective July 1. **L. 92:** Entire section amended, p. 2165, § 2, effective June 2.

**Editor's note:** This section is similar to former § 8-51-108.5 as it existed prior to 1990.

**8-43-408. Default of employer - additional liability.** (1) In any case where the employer is subject to the provisions of articles 40 to 47 of this title and at the time of an injury has not complied with the insurance provisions of said articles, or has allowed the required insurance to terminate, or has not effected a renewal thereof, the employee, if injured, or, if killed, the employee's dependents may claim the compensation and benefits provided in said articles, and in any such case the amounts of compensation or benefits provided in said articles shall be increased fifty percent.

(2) In all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado. The bond shall be in such form and amount as prescribed and fixed by the director and shall guarantee the payment of the compensation or benefits as awarded. The filing of any appeal, including a petition for review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge.

(3) A certified copy of any award of the director, administrative law judge, or panel ordering the payment of compensation entered in such case may be filed with the clerk of the district court of any county in this state at any time after the order of the administrative law judge awarding compensation, and the same shall be recorded by said clerk in the judgment book of said court and entry thereof made in the judgment docket, and it shall thenceforth have all the effect of a judgment of the district court, and execution may issue thereon out of said court as in other cases. Upon the reversal, setting aside, modification, or vacation of said order or award and upon payment to the trustee or furnishing of bond in accordance with the terms of this section, then, upon certification thereof by the director, administrative law judge, or panel, said record in the judgment book and the entry in the judgment docket shall be vacated, and any execution thereon shall be recalled.

(4) Any employer who fails to comply with a lawful order or judgment issued pursuant to subsection (2) or (3) of this section is liable to the employee, if injured, or, if killed, said employee's dependents, in addition to the amount in the order or judgment, for an amount equal to fifty percent of such order or judgment or one thousand dollars, whichever is greater, plus reasonable attorney fees incurred after entry of a judgment or order.

**Source:** **L. 90:** Entire article R&RE, p. 516, § 1, effective July 1. **L. 92:** (2) and (3) amended, p. 2166, § 3, effective June 2.

**Editor's note:** This section is similar to former § 8-44-107 as it existed prior to 1990.

## ANNOTATION

- I. General Consideration.
- II. Fifty Percent Penalty.
- III. Requirement of Bond.
- IV. Entry of Judgment.

### I. GENERAL CONSIDERATION.

**Annotator's note.** Since § 8-43-408 is similar to § 8-44-107 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**The penalty provisions included in this section extend only to the failure to secure insurance** and do not apply to the violation of other insurance-related provisions. *U.S. Fidelity & Guar., Inc. v. Kourlis*, 868 P.2d 1158 (Colo. App. 1994).

**The plain language of subsection (1) recognizes that there are statutory limitations on various types of workers' compensation, however, it is also a provision for additional compensation for the amounts already provided.** *Merchants Oil, Inc. v. Anderson*, 897 P.2d 895 (Colo. App. 1995).

**This section is designed to encourage cooperation with the mandatory insurance requirements and to provide for additional compensation when the employer neglects or refuses to purchase insurance.** *Merchants Oil, Inc. v. Anderson*, 897 P.2d 895 (Colo. App. 1995).

**Because employer secured compensation for claimant, employer's failure to give the notice described in § 8-44-101 (1)(b) is not grounds for the imposition of penalties under subsection (1) of this section.** *McManus v. Indus. Claim Appeals Office*, 81 P.3d 1074 (Colo. App. 2003).

**Applied in** *Smart v. Radetsky*, 86 Colo. 93, 278 P. 609 (1929); *Melnick v. Indus. Comm'n*, 656 P.2d 1318 (Colo. App. 1982).

### II. FIFTY PERCENT PENALTY.

**This section provides for 50% increase in compensation in event of employer's failure to comply with insurance provisions of the act.** *Index Mines Corp. v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (1927); *DeBeque Producers' Ass'n v. Indus. Comm'n*, 83 Colo. 158, 262 P. 1019 (1928); *Connell v. Continental Cas. Co.*, 87 Colo. 573, 290 P. 274 (1930); *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959); *Tri-State Ins. Co. v. Indus. Comm'n*, 151 Colo. 494, 379 P.2d 388 (1963).

**And courts have no discretion in the imposition of the penalty of 50% imposed for failure to carry compensation insurance.** *Kamp v. Disney*, 110 Colo. 518, 135 P.2d 1019 (1943).

**The liability imposed by this section is not determined by good faith or willful neglect.** The only question is: Has the employer insurance? Where the employer has none, its liability for the additional compensation necessarily follows. *McKune v. Indus. Comm'n*, 94 Colo. 523, 31 P.2d 322 (1934); *Anderson v. Dutch Maid Bakeries*, 106 Colo. 201, 102 P.2d 740 (1940).

**Where a subcontractor is uninsured, and the primary contractor is insured, the contractor is the only employer contemplated by this section.** *Herriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970).

**And where the primary contractor is insured, the 50% penalty does not apply, regardless of the fact that the subcontractor is uninsured.** *Herriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970).

**Section does not violate Colo. Const., art. II, § 20.** This section, providing a 50% increase in awards where no insurance is carried by the employer, is not unconstitutional as violative of Colo. Const., art. II, § 20. The section is not penal in its nature, but simply provides additional compensation in the class of cases mentioned. *Flick v. Indus. Comm'n*, 78 Colo. 117, 239 P.2d 1022 (1925).

**Moreover, it is not "class legislation" and is not unconstitutional on that ground.** *Flick v. Indus. Comm'n*, 78 Colo. 117, 239 P. 1022 (1925).

**But this section does not provide for 50% increase in medical payments.** *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**And the words "compensation or benefits" in this section cannot be construed as including medical expenses.** *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**For § 8-49-101 imposes upon an employer the duty of furnishing medical, surgical, nursing and hospital treatment and supplies and apparatus for a fixed time and to a fixed minimum regardless of the compensation allowed, and where such bills are not paid but are included in the award they are paid direct to those who have rendered the service or furnished the supplies.** *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957).

**No election of remedies where claimant has no legal action.** Where claimant has no legal cause of action under this section against the subcontractor in whose employ the deceased



was at the time of injury, the bringing of an action does not constitute an election of remedies, and the claimant is not estopped by reason thereof from recovering compensation. *Hartford Accident & Indem. Co. v. Clifton*, 117 Colo. 547, 190 P.2d 909 (1948).

**For where an employer has workmen's compensation insurance coverage, an employee has no election to make under this section.** *Sharman Nursing Home v. Indus. Comm'n*, 160 Colo. 197, 416 P.2d 161 (1966).

**But an employee whose employer's workmen's compensation insurance coverage has lapsed, has alternative remedies due to his employer's noncompliance with the act:** He can sue at common law or he can claim workmen's compensation benefits plus a 50% penalty for the noncompliance of his employer. *Sharman Nursing Home v. Indus. Comm'n*, 160 Colo. 197, 416 P.2d 161 (1966).

**The concept of primary reimbursement does not impliedly grant a cause of action to third parties against an uninsured employer.** Absent a specific provision in the act governing no-fault insurance or in the Workers' Compensation Act, the general assembly may not be deemed to have created a private tort remedy favoring no-fault carriers for an employer's failure to obtain workers' compensation coverage. *United Security Ins. Co. v. Sciarrotta*, 885 P.2d 273 (Colo. App. 1994).

**The term "election" in the present context connotes a conscious choice between one of two or more distinct and separate alternatives.** It applies to a situation where different remedies are provided for a given wrong upon one and the same set of facts. *Sharman Nursing Home v. Indus. Comm'n*, 160 Colo. 197, 416 P.2d 161 (1966).

**Factual question as to election of remedies.** Where plaintiff contends that employer coerced plaintiff to believe that defendant was insured at the time of workmen's compensation filing and acceptance of benefits, and that plaintiff filed a civil action as soon as he became aware that civil relief was available, the plaintiff presented a factual question as to whether he made a valid election to pursue his workmen's compensation remedy. *Baker v. Redystick Prods. Co.*, 674 P.2d 1011 (Colo. App. 1983).

**Pursuit of one remedy bars the other.** If an employee of a nursing home whose workmen's compensation insurance coverage has lapsed elects to pursue one of the remedies under this section, recovery via the other is barred. *Sharman Nursing Home v. Indus. Comm'n*, 160 Colo. 197, 416 P.2d 161 (1966).

**Deduction of compensation for violation of a safety rule made after the addition under this section.** Under § 8-52-104 50% of the compensation to which an injured employee is entitled may be deducted for the violation of a reasonable safety rule, and where the compen-

sation is increased 50% for failure of employer to carry insurance, under this section, deduction for violation of the safety rule is to be made after the addition of the 50% for failure to insure. *McKune v. Indus. Comm'n*, 94 Colo. 523, 31 P.2d 322 (1934).

**Insurance company's failure to cover liability as promised does not affect employee's right to recover from employer.** The fact that an insurance company assured an employer that his workmen's compensation insurance policy would be made to cover injuries to employees engaged in work at a distant location by notation on its books, which notation was not made, does not affect the rights of an employee to recover from the employer compensation for injuries received, the employer's remedy, if any, being by an action against the insurance company. *Connell v. Continental Cas. Co.*, 87 Colo. 573, 290 P. 274 (1930).

**Realty company's construction activities not within insurance coverage.** A real estate company's home construction operation is an unrelated business activity not included within its insurance policy with the state compensation insurance fund. *Evergreen Inv. & Realty Co. v. Baca*, 666 P.2d 166 (Colo. App. 1983).

**Fifty percent increase in benefits pursuant to subsection (1) not penal in nature, but rather simply a provision for additional compensation.** *Eachus v. Cooper*, 738 P.2d 383 (Colo. App. 1986).

### III. REQUIREMENT OF BOND.

**Requirement of bond is for advantage of employer and he is not obliged to give such bond unless he elects to do so.** *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925).

### IV. ENTRY OF JUDGMENT.

**Claim within section's purview absent determination of claimant's eligibility for compensation.** Since a claim arises at the time of the accident for purposes of the workmen's compensation act, it is a claim within the purview of § 15-12-803, notwithstanding the fact that a department of labor referee has not made a determination in a workmen's compensation proceeding concerning the claimant's eligibility for compensation nor an order entered pursuant to subsection (3) of this section. *First Nat'l Bank v. Long*, 44 Colo. 317, 616 P.2d 180 (1980).

**Reduction to judgment of award.** The award having become final by reason of respondent's failure to pursue administrative review, it is proper for the claimant to reduce the award to judgment. *Hard v. Indus. Comm'n*, 174 Colo. 51, 482 P.2d 353 (1971).

**Entry of judgment by clerk constitutional.** Entry of judgment by a clerk of the district court on an award does not violate § 1 of art. VI,

Colo. Const. Ontario Mining Co. v. Indus. Comm'n, 86 Colo. 206, 280 P. 483 (1929).

**For the act of a clerk in entering judgment on an award is a ministerial act and not the exercise of a judicial function. The judgment so**

entered is not a judgment rendered, but a judgment of the industrial commission, which thenceforth has the effect of a judgment of the district court. Ontario Mining Co. v. Indus. Comm'n, 86 Colo. 206, 280 P. 483 (1929).

**8-43-409. Defaulting employers - penalties - enjoined from continuing business - fines - procedure - definition.** (1) An employer subject to the terms and provisions of articles 40 to 47 of this title who fails to insure or to keep the insurance required by such articles in force, allows the insurance to lapse, or fails to effect a renewal of the insurance shall not continue business operations while such default in effective insurance continues. Upon receiving information that an employer is in default of its insurance obligations, the director shall investigate and, if the information can be substantiated, shall notify the employer of the opportunity to request a prehearing conference on the issue of default. As part of the director's investigation, the director may verify that all employees of that employer are insured through the employer's workers' compensation plan. The director may forward any workers' compensation coverage issue to the employer's workers' compensation carrier for further investigation by the carrier. Thereafter, if necessary, the director may set the issue of the employer's default for hearing in accordance with hearing time schedule and procedures set forth in articles 40 to 47 of this title and rules promulgated by the director. Upon a finding that the employer is in default of its insurance obligations, the director shall take either or both of the following actions:

(a) Order the employer in default to cease and desist immediately from continuing its business operations during the period such default continues;

(b) For every day that the employer fails or has failed to insure or to keep the insurance required by articles 40 to 47 of this title in force, allows or has allowed the insurance to lapse, or fails or has failed to effect a renewal of such coverage, impose a fine of:

(I) Not more than two hundred fifty dollars for an initial violation; or

(II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and any subsequent violation. For purposes of this subparagraph (II) only, if an employer has been fined pursuant to subparagraph (I) of this paragraph (b) and the director determines that substantially the same people or entities were involved in forming a subsequent employer, the initial violation referred to in subparagraph (I) of this paragraph (b) shall be deemed to have already occurred with regard to violations committed by the subsequent employer.

(2) A cease-and-desist order issued or fine imposed by the director under subsection (1) of this section shall include specific findings of fact that reflect:

(a) The employer received notice of a hearing, when applicable;

(b) The employer employs employees for whom it must carry workers' compensation insurance under the provisions of articles 40 to 47 of this title;

(c) The employer does not or did not have a policy of workers' compensation insurance in effect; and

(d) The employer continues or continued to operate its business in the absence of such coverage.

(3) Notwithstanding any other provision of articles 40 to 47 of this title, after the entry of a cease and desist order and upon the request of the director, the attorney general shall immediately institute proceedings for injunctive relief against the employer in the district court of any county in this state where such employer does business. In any such district court proceeding, a certified copy of any cease and desist order entered by the director in accordance with the provisions of subsection (1) of this section based upon evidence in the record shall be prima facie evidence of the facts found in such record. Such injunctive relief may include the issuance of a temporary restraining order under rule 65 of the Colorado rules of civil procedure, which order shall enjoin the employer from continuing its business operations until it has procured the required insurance or has posted adequate security with the court pending the procurement of such insurance. The court, in its discretion, shall determine the amount that shall constitute adequate security.



(4) The issuance of an order to cease and desist, the imposition of a fine pursuant to subsection (1) of this section, or the issuance of an order for injunctive relief against an employer for failure to insure or to keep insurance in force as required by articles 40 to 47 of this title shall be the penalty for such failure within the meaning of section 8-43-304 (1) and such penalty shall be in addition to the increase in benefits that section 8-43-408 requires.

(5) The director or administrative law judge shall report to the division each time a fine is imposed pursuant to subsection (1) of this section. Each such report shall include the amount of the fine and the name of the offending party.

(6) A certified copy of any final order of the director ordering the payment of a fine imposed pursuant to subsection (1) of this section may be filed with the clerk of the district court of any county in this state at any time after the period of time provided by articles 40 to 47 of this title for appeal or seeking review of the order has passed without appeal or review being sought or, if appeal or review is sought, after the order has been finally affirmed and all appellate remedies and all opportunities for review have been exhausted. The party filing the order shall at the same time file a certificate to the effect that the time for appeal or review has passed without appeal or review being undertaken or that the order has been finally affirmed with all appellate remedies and all opportunities for review having been exhausted. The clerk of the district court shall record the order and the filing party's certificate in the judgment book of the court and entry thereof made in the judgment docket, and it shall thereafter have all the effect of and constitute a judgment of the district court, and execution may issue thereon from said court as in other cases. Any such order may be filed by and in the name of the director.

(7) Fines collected pursuant to this section shall be transmitted to the state treasurer, who shall credit twenty-five percent of such fine to the workers' compensation cash fund, created in section 8-44-112, which shall be used to offset the premium surcharge. The state treasurer shall credit the remainder of the fine to the general fund.

(8) For the purposes of this section, "construction site" means a location where a structure that is attached or will be attached to real property is constructed, altered, or remodeled.

**Source:** L. 90: Entire article R&RE, p. 516, § 1, effective July 1. L. 91: Entire section amended, p. 1326, § 42, effective July 1. L. 93: Entire section amended, p. 1279, § 1, effective June 6. L. 98: (1), (2), and (4) amended and (5) to (7) added, p. 161, § 1, effective April 6. L. 2004: IP(1) amended and (8) added, p. 614, § 1, effective August 4. L. 2005: (1), IP(2), (2)(c), (2)(d), and (7) amended, p. 198, § 1, effective July 1. L. 2009: IP(2) and (2)(a) amended, (SB 09-070), ch. 49, p. 176, § 4, effective August 5.

**Editor's note:** This section is similar to former § 8-52-110 as it existed prior to 1990.

#### ANNOTATION

**Subsection (1) does not violate an employer's right to due process by requiring that the employer timely request a prehearing conference as a prerequisite to an administrative hearing.** The statute, as clarified by the notice to show compliance, provides an employer with the opportunity to respond and present support-

ing evidence of the employer's compliance or exempt status. Therefore, it affords the necessary procedural protections and does not violate the employer's right to due process. *Kuhndog, Inc. v. Indus. Claim Appeals Office*, 207 P.3d 949 (Colo. App. 2009).

**8-43-410. Right to compensation operates as lien - interest on award.** (1) The right of compensation granted by articles 40 to 47 of this title and any awards made thereunder shall have the same preference or lien without limit of amount against the assets of the employer or the employer's insurer or both as may be allowed by law for a claim for unpaid wages for labor.

(2) Every employer or insurance carrier of an employer shall pay interest at the rate of eight percent per annum upon all sums not paid upon the date fixed by the award of the

director or administrative law judge for the payment thereof or the date the employer or insurance carrier became aware of an injury, whichever date is later. Upon application and satisfactory showing to the director or administrative law judge of the valid reasons therefor, said director or administrative law judge, upon such terms or conditions as the director or administrative law judge may determine, may relieve such employer or insurer from the payment of interest after the date of the order therefor; and proof that payment of the amount fixed has been offered or tendered to the person designated by the award shall be such sufficient valid reason.

**Source:** L. 90: Entire article R&RE, p. 517, § 1, effective July 1. L. 94: (2) amended, p. 1880, § 16, effective June 1.

**Editor's note:** This section is similar to former § 8-52-109 as it existed prior to 1990.

### ANNOTATION

**Law reviews.** For article, "Collecting Pre- and Post-Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986). For article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado", see 15 Colo. Law. 990 (1986).

**Annotator's note.** Since § 8-43-410 is similar to § 8-52-109 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Interest is a matter of statutory right** and is not discretionary with the director. *Bourn v. T & T Loveland Chinchilla Ranch, Inc.*, 32 Colo. App. 315, 514 P.2d 787 (1973); *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987).

**Interest on unpaid sums as well as the basic award is not due and payable until the award is final;** however, the amount of interest is calculated from "the date fixed by the award of the director for the payment thereof". *Bourn v. T & T Loveland Chinchilla Ranch, Inc.*, 32 Colo. App. 315, 514 P.2d 787 (1973).

**Interest is to be paid on each payment from the date that each payment was due.** *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987).

**Good faith belief that one will prevail in pending litigation is insufficient to warrant**

**waiver of interest.** *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987).

**The subsequent injury fund is an "employer or insurance carrier of an employer"** under the provisions of subsection (2) and is liable for interest on compensation. Providing subsequently injured workers with the full value of their benefits requires payment of interest when payment of benefits is delayed. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

**Relief from interest discretionary.** Only portion of this statute which is discretionary is whether, upon application and satisfactory showing, the director sees fit to relieve the employer or the insurer from interest payments. *Bourn v. T & T Loveland Chinchilla Ranch, Inc.*, 32 Colo. App. 315, 514 P.2d 787 (1973).

Upon application and satisfactory showing, the director has discretionary authority to relieve the employer or insurer from interest payments. *Harrison W. Corp. v. Hicks' Claimants*, 185 Colo. 142, 522 P.2d 722 (1974).

**Interest assessed pursuant to this section is not a penalty** but is a method to insure that the claimant receives the full value of the compensation to which he or she is entitled. *Subsequent Injury Fund v. Indus. Claim Appeals Office*, 859 P.2d 276 (Colo. App. 1993); *Subsequent Injury Fund v. Indus. Claim Appeals Office*, 899 P.2d 220 (Colo. App. 1994).

**Applied in** *In re Brandt v. Indus. Comm'n*, 648 P.2d 676 (Colo. App. 1982).

### PART 5

#### UTILIZATION REVIEW PROCESS - INDEPENDENT MEDICAL EXAMINATIONS

**8-43-501. Utilization review process - legislative declaration - cash fund.** (1) The general assembly hereby finds and determines that insurers and self-insured employers should be required to pay for all medical services pursuant to this article which may be reasonably needed at the time of an injury or occupational disease to cure and relieve an employee from the effects of an on-the-job injury. However, insurers and self-insured



employers should not be liable to pay for care unrelated to a compensable injury or services which are not reasonably necessary or not reasonably appropriate according to accepted professional standards. The general assembly, therefore, hereby declares that the purpose of the utilization review process authorized in this section is to provide a mechanism to review and remedy services rendered pursuant to this article which may not be reasonably necessary or reasonably appropriate according to accepted professional standards.

(2) (a) An insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider. Requests for utilization review shall be submitted on forms promulgated by the director by rule. At the time of submission of a review request, the requester shall pay the division a fee prescribed by the director by rule. Such fee shall cover the division's administrative costs and the costs of compensating utilization review committee members. If a claimant is successful in a utilization review case brought pursuant to this section, the division shall reimburse the fee charged pursuant to this paragraph (a) and assess it against the insurer or self-insured employer. The state treasurer shall credit fees collected pursuant to this section to the utilization review cash fund, which fund is hereby created. Moneys in the utilization review cash fund are continuously appropriated to the division for the purpose of administering the utilization review program and may not revert to the general fund at the end of any fiscal year. The division shall mail to any claimant, insurer, or self-insured employer a notice that a case is to be reviewed and that the claimant may be examined as a result of such review. The claimant, insurer, or self-insured employer has thirty days from the date of mailing of such notice to examine the medical records submitted by the party who requested the review and may add medical records to the utilization review file that the party believes may be relevant to the utilization review. The division shall maintain a special file for utilization review cases. Such file shall be accessible only to interested parties in a utilization review case and shall not otherwise be open to any person.

(b) Prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review.

(c) A claimant may request a utilization review pursuant to this section if the claimant has been refused a request pursuant to section 8-43-404 (5) to have a personal physician or chiropractor attend the claimant. A claimant requesting a utilization review pursuant to this paragraph (c) shall file the request on forms promulgated by the director by rule and shall pay the fee required by paragraph (a) of this subsection (2).

(d) For purposes of this section only, "medical records" means documents and transcripts of information obtained from a patient or his or her medical professional that are related to the patient's medical diagnosis, treatment, and care.

(e) When an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to section 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate.

(f) Once a utilization review proceeding has become final and no longer subject to appeal, the final disposition of the issues in such proceeding shall be binding on the parties and preclude a contrary ruling on such issues in a subsequent hearing under section 8-43-207 unless a preponderance of evidence is shown.

(3) (a) The director, with input from the medical director serving pursuant to section 8-42-101 (3.6) (n), shall appoint members of utilization review committees for purposes of this section and section 8-42-101 (3.6). The director shall establish committees based on the different areas of health care practice for which requests for utilization review may be made. The director shall establish the qualifications for members of the different committees and the areas of health care practice in which each such committee shall conduct requested utilization reviews. Cases of requested utilization review shall be referred to committees appointed pursuant to this subsection (3) by the director based upon the areas of health care practice for which each committee is appointed.

(b) Each committee established pursuant to paragraph (a) of this subsection (3) shall be composed of three members. Committee members shall be compensated for their time by

the division out of moneys in the utilization review cash fund, created in paragraph (a) of subsection (2) of this section. Any member of a committee appointed pursuant to this subsection (3) shall be immune from criminal liability and from suit in any civil action brought by any person based upon an action of such a committee, if such member acts in good faith within the scope of the function of the committee, has made reasonable effort to obtain the facts of the matter as to which action is taken, and acts in the reasonable belief that the action taken is warranted by the facts. The immunity provided by this paragraph (b) shall extend to any person participating in good faith in any investigative proceeding pursuant to this section.

(c) (I) For each case, a committee may recommend by majority vote of such committee that no change be ordered or that a change of provider be ordered.

(II) A committee may also, by unanimous vote, recommend that the director order that payment for fees charged for services in the case be retroactively denied.

(III) A committee may also, by unanimous vote, recommend that the director order that a physician's accreditation status under section 8-42-101 (3.6) be revoked.

(d) In preparing and issuing an order in any case, the director shall review and give great weight to the reports and recommendations of the committee.

(e) In appropriate cases pursuant to this section and section 8-42-101 (3.6), the director may order that an insurer, employer, or self-insured employer be permitted to deny reimbursement to a provider for any medical care or services rendered to a claimant; and such order may be effective for up to three years. Bills for services rendered during the effective period of any such order shall be unenforceable and shall not result in any debt of the claimant. In deciding whether to issue any such order, the director shall give great weight to the fact that:

(I) The provider has, within any two-year period, been the subject of two or more orders removing the provider from the role of authorized treating physician; or

(II) The provider has, within any two-year period, been the subject of two or more orders retroactively denying the payment of the provider's fees; or

(III) The provider has, within any two-year period, been the subject of two or more orders either retroactively denying the payment of the provider's fees or removing the provider from the role of authorized treating physician.

(4) If the director orders pursuant to subsection (3) of this section that a change of provider be made in a case or that the physician's accreditation status be revoked, the claimant, insurer, or self-insured employer shall have seven days from receipt of the director's order in which to agree upon a level I provider. If the claimant, insurer, or self-insured employer can not reach agreement within the seven day time period, the director shall select three providers. A new provider shall be chosen from the three providers so selected by the party who was successful in the request for review. If no appeal is filed, the successful party shall notify the division of the name of the new provider within seven days of the selection of the three potential providers. If the new health care provider is not selected within such seven days, the director shall select the provider.

(5) (a) Any party, including the health care provider, may appeal to an administrative law judge for review of an order specifying that no change occur or that a change of provider be made with respect to a case. Such review shall be limited to the record on appeal. The findings of a utilization review committee regarding the change of provider in a case shall be afforded great weight by the administrative law judge in any proceeding. A party disputing the finding of such utilization review committee shall have the burden of overcoming the finding by clear and convincing evidence.

(b) If the director has entered an order specifying that the payment of fees in the case be retroactively denied, or permitting an insurer, employer, or self-insured employer to deny payments for medical services or care rendered pursuant to subsection (3) (e) of this section, the health care provider may request a de novo hearing before an administrative law judge by filing an application for hearing within thirty days from the date of the certificate of mailing of the order. In a hearing held pursuant to this paragraph (b), the record upon which the director based the order shall be admissible in evidence. The findings of the utilization review committee regarding the retroactive denial of payment of fees in a case shall be afforded great weight by the administrative law judge in any proceeding. A party disputing



the finding of such utilization review committee shall have the burden of overcoming the finding by clear and convincing evidence.

(c) Any appeal filed pursuant to this subsection (5) must be filed within forty days from the date of the certificate of mailing of the director's order.

(d) Any party dissatisfied with an order entered by an administrative law judge pursuant to paragraph (a) of this subsection (5) may file a petition to review the order pursuant to section 8-43-301.

(e) (Deleted by amendment, L. 91, p. 1326, § 43, effective July 1, 1991.)

**Source:** **L. 90:** Entire article R&RE, p. 517, § 1, effective July 1. **L. 91:** (2)(a), (2)(b), (3)(c), (5)(a), and (5)(b) amended and (5)(c) to (5)(e) added, p. 1355, § 1, effective May 29; entire section amended, p. 1326, § 43, effective July 1. **L. 92:** (5)(c) amended, p. 1802, § 1, effective April 11. **L. 94:** (2) amended, p. 2818, § 1, effective June 3.

**Editor's note:** This section is similar to former § 8-49-102 as it existed prior to 1990.

### ANNOTATION

**Law reviews.** For article, "Medical Utilization Review Under Worker's Compensation", see 17 Colo. Law. 1995 (1988).

The medical utilization review process created in this section is a separate and distinct proceeding from the compensation claim process, and records from such process are not admissible in compensation claims hearings. *Reg'l Transp. Dist. v. Jackson*, 805 P.2d 1190 (Colo. App. 1991).

This section provides a method to review and remedy medical services which may not be reasonably necessary or reasonably appropriate in light of accepted professional standards. *Colo. Comp. Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994).

Subsection (2)(b) does not require the review of services to include an independent medical examination, medical opinion concerning services rendered, or a certificate of review addressing the necessity and appropriateness of provider's services. The medical utilization review (MUR) process contemplates that the substantive analysis of necessity and appropriateness of treatments will be provided by the three-member MUR panel. *Rook v. Indus. Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005).

Request for change of physician could proceed despite finding of maximum medical improvement (MMI), where request was based on allegations of professional misconduct and was made prior to the same physician's finding of MMI. *Ames v. Indus. Claim Appeals Office*, 89 P.3d 477 (Colo. App. 2003).

Although the medical utilization review committee may recommend a change in medical provider or a retroactive denial of fees for the present provider, the committee is not authorized to terminate a claimant's previously authorized medical benefits. *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-49-102 as it

existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

The medical evidence, together with the findings of the utilization committee members that the claimant and her treating chiropractor had become business associates in the practice of chiropractic, provided ample support for the director's order, under former § 8-49-102, requiring a change in the claimant's authorized health care provider. *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-49-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

A party to the utilization review process appealing an order of the director of the division of labor is limited to an appellate standard of review by an administrative law judge in determining whether the director's order was supported by substantial evidence. *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-49-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

However, if the director's order has terminated a particular type of benefit or if a party seeks to terminate medical benefits based on the review proceedings, the aggrieved party must request an evidentiary hearing under former § 8-53-103 (now § 8-43-207). *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-49-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

When a party seeks a de novo hearing following the director's retroactive denial of payment, the insurer has the burden of proof to establish that the care provider's treatment was unreasonable under pertinent professional

standards. *Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000).

**Mere change in health care provider does not give rise to de novo hearing.** In order to be entitled to a de novo hearing under the rationale set forth in *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992), a claimant must show a termination of benefits rather than just a change of benefits. *Colo. Comp. Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994).

**If the issue in controversy involves the necessity and appropriateness of medical care, rather than industrial disability, the medical utilization committee reports and the director's order based thereon are admissible in hearings under former § 8-53-103 (now § 8-43-207), subject to the hearing officer's evidentiary rulings.** *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-49-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

**The administrative rules establishing the types of committees for utilization review were neither arbitrary, unreasonable, nor inconsistent with the legislative purposes under former § 8-49-102 where such committee consisted of four general types: Joints/musculoskeletal, internal medicine, dental, and psychiatry.** *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-49-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

**It was neither arbitrary nor unreasonable for the division of labor to require committee members to submit individual reports and recommendations where the committee votes needed for the respective committee recommendations were statutorily established.** *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992) (decided under former § 8-49-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

**Collateral estoppel is applicable when an administrative adjudication and utilization review proceed contemporaneously and the same treatment is under consideration in each, so that a validation of the director's utilization review order is precluded.** *Williams v. Indus. Claim Appeals Office*, 862 P.2d 1007 (Colo. App. 1993).

**A claimant is not precluded from seeking redress after the issuance of a utilization review ruling and an administrative law judge has the authority to adjudicate a claimant's entitlement to past and ongoing medical benefits.** *Mason Jar Restaurant v. Indus. Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993).

**A medical utilization review proceeding does not result in a binding adjudicatory decision and cannot provide the basis for application of res judicata or collateral estoppel in subsequent proceedings between the parties.** *Mason Jar Restaurant v. Indus. Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993).

**A payment to a preferred provider cannot be retroactively denied as a matter of law because a medical utilization review order has no effect on a provider's status as an authorized treating physician prior to the effective date of the order.** *Mason Jar Restaurant v. Indus. Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993).

**The statute does not authorize a permanent ban on treatment by a reviewed physician, as such ban would nullify a claimant's right to request a change in authorized provider at any time.** *Mason Jar Restaurant v. Indus. Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993).

**Information that a party to a medical utilization review proceeding submits beyond the statutory deadline for submission may not be excluded from review if the party is unable to meet the deadline through no fault of his or her own.** *Donn v. Indus. Claim Appeals Office*, 865 P.2d 873 (Colo. App. 1993).

**Due process considerations apply to a medical utilization review proceeding since it may result in the termination of a previously authorized provider or treatment and recipients of statutorily created benefits have a property interest in the continued receipt of such benefits.** *Donn v. Indus. Claim Appeals Office*, 865 P.2d 873 (Colo. App. 1993).

**While an accredited provider is entitled to a hearing under certain circumstances, such entitlement does not create a property interest that independently entitles the provider to a hearing where his or her services have been terminated.** *Carlson v. Indus. Claim Appeals Office*, 950 P.2d 663 (Colo. App. 1997).

**Absent circumstances involving retroactive denial of fees or revocation of the provider's accreditation, there is no due process right to a hearing before a change of provider may be ordered.** *Carlson v. Indus. Claim Appeals Office*, 950 P.2d 663 (Colo. App. 1997); *Hall v. Indus. Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003); *Rook v. Indus. Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005); *Franz v. Indus. Claim Appeals Office*, 250 P.3d 755 (Colo. App. 2010).

**Application of statute governing medical utilization review proceeding, § 8-43-501, does not constitute a retroactive application of law contrary to the Colorado Constitution, art. II, § 11, since claimant's right to treatment was always subject to statutory qualifications.** *Donn v. Indus. Claim Appeals Office*, 865 P.2d 873 (Colo. App. 1993).



There is no conflict of interest if a member of a medical utilization review committee has a relationship with the insurer or a provider network, because the workers' compensation rule of procedure specifies that a conflict exists only if a committee member has a relationship with the authorized treating physician that involves a direct or substantial financial interest. *Franz v. Indus. Claim Appeals Office*, 250 P.3d 755 (Colo. App. 2010).

Injured worker has no standing to challenge statute governing medical utilization review proceeding as permitting an unconstitutional confiscation of property and impairment of contract. *Donn v. Indus. Claim Appeals Office*, 865 P.2d 873 (Colo. App. 1993).

Where the director's order terminates the claimant's care by a previously authorized health care provider, the claimant is entitled to have the matter adjudicated de novo by an administrative law judge under § 8-43-207. *McWhorter v. CNA Ins. Co.*, 868 P.2d 1128 (Colo. App. 1993).

While a provider may become authorized to treat a claimant's industrial injury as a result of a referral from an authorized treating physician where the referral is made in the normal progression of authorized treatment, the authorization to refer the claimant to the other provider ends when the treating physician loses his authorized status. *Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008).

The requirement that an appeal of a medical utilization review appeal be made within 40 days of the director's order is jurisdictional; it cannot be waived or eliminated by consent or avoided by estoppel. *Cramer v. Indus. Claim Appeals Office*, 885 P.2d 318 (Colo. App. 1994).

A medical utilization review order is not an award within the scope of § 8-43-303 and the director is not authorized to reopen such an order. *Cramer v. Indus. Claim Appeals Office*, 885 P.2d 318 (Colo. App. 1994).

Selection of an authorized treating physician as ordered by a medical utilization review committee was ripe for a hearing notwithstanding that the injured employee's appeal of the order was still pending, because the statute requires the parties to act quickly to select a new authorized treating physician regardless of whether an appeal has been filed. *Franz v. Indus. Claim Appeals Office*, 250 P.3d 1284 (Colo. App. 2010).

Subsection (3)(d) requires the director to give great weight to reports and recommendations of the MUR panel. Unless an assessment is entirely arbitrary or based on factors other than medical considerations, neither the director, the administrative law judge, nor a reviewing court may substitute its judgment for the assessment of provider's care made by a panel of physicians. *Rook v. Indus. Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005).

**8-43-502. Independent medical examinations.** (1) The director shall maintain a list of physicians which shall be known as the medical review panel. The director shall utilize public and private resources as are available and appropriate in determining standards and qualifications for the medical review panel members. It shall be the duty of the medical review panel to perform independent medical examinations at the request of the director or an administrative law judge.

(2) Any party to a workers' compensation proceeding has the right to obtain an independent medical examination with the physician selected by the director from the medical review panel. The requesting party, when submitting a request for the independent medical evaluation, shall specify the professional specialty of the physician to be selected by the director to perform the independent medical examination. The director shall select, through a revolving selection process established by the department, the physician from the medical review panel to perform the examination. The cost of such independent medical examination shall be borne by the requesting party. In no instance shall the independent examining physician become the authorized treating physician.

(3) Whenever the director or an administrative law judge deems it necessary to assist in resolving any issue of medical fact or opinion, the director or administrative law judge shall cause the employee to be examined by a physician or physicians from the medical review panel. The director or the administrative law judge shall have the authority and discretion to charge the cost of such examination to the employer or, if insured, the employer's insurance carrier. Transportation expenses and all expenses necessary, reasonable, and incidental to such examination shall be included in the cost of such examination.

(4) Nothing in this section shall preclude any party from obtaining an independent medical examination from a physician who is not a member of the medical review panel.

(5) Upon written request of the employer, or if insured, the insurer, the employee shall submit to a reasonable number of independent medical examinations as provided for in this

section. The employee shall be entitled to have a physician, provided and paid for by such employee, present at any such independent medical examination. The employee shall be entitled to receive from the independent examining physician a copy of any report which said physician makes to the employer, insurer, or the division. Said copy shall be furnished to the employee at the same time it is furnished to the employer, insurer, or division.

(6) Members of the medical review panel and any person acting as a consultant, witness, or complainant shall be immune from liability in any civil action brought against said person for acts occurring while the person was acting as a panel member, consultant, witness, or complainant, respectively, if such person was acting in good faith within the scope of the respective capacity, made a reasonable effort to obtain the facts of the matter as to which action was taken, and acted in the reasonable belief that the action taken by such person was warranted by the facts.

(7) Any physician determining an impairment rating on an injured worker pursuant to this title shall be immune from civil liability in any action brought by any person based on said impairment rating, absent the showing of malice or bad faith on the part of the rating physician.

**Source: L. 90:** Entire section added, p. 579, § 1, effective July 1.

**8-43-503. Utilization review of health care providers.** (1) The general assembly hereby finds and determines that health care providers that provide medical care or health care services that are not reasonably necessary or not reasonably appropriate according to accepted professional standards should not be allowed to provide such services to workers' compensation claimants. The general assembly, therefore, hereby declares that the purpose of the utilization review process authorized in this section is to provide a mechanism to review medical care or health care services rendered pursuant to this article that may not be reasonably necessary or reasonably appropriate according to accepted professional standards and to provide a mechanism to prevent such health care providers from providing medical care or health care services.

(2) The provisions relating to the procedures for utilization review found in section 8-43-501 (2), (3), (4), (5) (a), (5) (c), and (5) (d) shall apply to utilization review under this section. A unanimous vote by the committee created in section 8-43-501 (3) shall be required for a recommendation to the director that a health care provider not be allowed to provide medical care or health care services to claimants.

(3) Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. Nothing in this subsection (3) shall be construed to abrogate any managed care or cost containment measures authorized in articles 40 to 47 of this title.

**Source: L. 94:** Entire section added, p. 2003, § 7, effective July 1.

## PART 6

### PROVIDER REVIEW AND DISCLOSURE

**8-43-601. Short title.** This part 6 shall be known and may be cited as the "Provider Review and Disclosure Act".

**Source: L. 2010:** Entire part added, (SB 10-178), ch. 290, p. 1347, § 1, effective July 1.

**8-43-602. Legislative declaration.** The general assembly finds, determines, and declares that insurer performance programs are used in marketing, sales, and other efforts, and, as such, may impact an employer's selection of an authorized health care provider. To protect patients, employers, and providers, and to avoid improper profiling, all performance programs must be fair, objective, consistently applied, and accord providers due process.



Consistent with these goals, performance programs should align incentives not only with efficient operations, but also with cost-effective, high-quality care. Accordingly, the general assembly finds that requiring minimum standards and full disclosure of performance program data and methodologies will help improve the quality and efficiency of health care delivered to Colorado workers.

**Source: L. 2010:** Entire part added, (SB 10-178), ch. 290, p. 1347, § 1, effective July 1.

**8-43-603. Definitions.** As used in this part 6, unless the context otherwise requires:

(1) “Insurer” means an entity that provides workers’ compensation insurance coverage required by article 44 of this title, including any third-party insurer or self-insured employer.

(2) “Methodology” means the method by which an assessment or measurement is determined, including algorithms or studies, evaluation of data, application of guidelines, or performance measures.

(3) “Patient” means a person who qualifies for health care benefits under articles 40 to 47 of this title.

(4) “Performance program” means any program, system, or process through which an insurer rates or recognizes the cost, efficiency, quality, or other assessment or measurement of a provider’s care, whether through awards, payments, assignment, or characterization or representation that is disclosed to patients, other providers, employers, or the public.

(5) “Provider” means a physician licensed under the “Colorado Medical Practice Act”, article 36 of title 12, C.R.S., or a clinic that provides health care pursuant to articles 40 to 47 of this title.

**Source: L. 2010:** Entire part added, (SB 10-178), ch. 290, p. 1348, § 1, effective July 1.

**8-43-604. Performance programs.** (1) All performance programs shall include, at a minimum:

(a) A quality of care component that is satisfied by using standard treatment guidelines promulgated by the director pursuant to section 8-42-101 or evidence-based administrative, operational, or clinical performance measures that improve care;

(b) A clear representation of the weight given to the quality of care component in comparison with other factors, which weight shall be equal to or greater than any other factor;

(c) If a performance program includes an employer satisfaction element, a patient satisfaction element, which shall be weighted equal to or greater than the employer satisfaction element;

(d) Statistical analyses that are objective, accurate, valid, reliable, and verifiable;

(e) A period of assessment of data, pertinent to the performance program, which shall be updated at appropriate intervals;

(f) If claims data are used, accurate claims data appropriately attributed to the provider. When reasonably available, the insurer shall use aggregated data from other insurers to supplement its own claims data.

(g) The provider’s responsibility for health care decisions and the financial consequences of those decisions, which shall be fairly and accurately attributed to the provider.

(2) Performance program results shall be reported to each provider reviewed in the program and shall include comparison of the provider’s results to the results of the provider’s peers.

(3) Any disclosure to patients, other providers, employers, or the public of the results of a performance program shall be accompanied by a conspicuous disclaimer written in bold-faced type stating that the information is intended only as a guide, should not be the sole factor in selecting a provider, has a risk of error, and should be discussed with the provider.

**Source: L. 2010:** Entire part added, (SB 10-178), ch. 290, p. 1348, § 1, effective July 1.

**8-43-605. Due process.** (1) At least forty-five days before disclosing the results of a performance program, an insurer shall give a provider written notice of the availability of the provider's individual result, specific instructions on how the provider can access the result, and a description of the implications to the provider. The written notice shall describe the procedures by which the provider may request:

- (a) The information required to be disclosed under subsection (2) of this section; and
- (b) An appeal of the result pursuant to subsection (3) of this section.

(2) (a) Within ten business days after receiving a request by or on behalf of a provider, an insurer shall disclose, in a manner that is reasonably understandable and that allows the provider to verify the data against his or her records, the methodology and all data upon which a provider's performance program result was calculated, with sufficient detail to allow the provider to determine the effect of the methodology on the data reviewed.

(b) An insurer shall not use the "Uniform Trade Secrets Act", article 74 of title 7, C.R.S., to avoid compliance with this section.

(3) Insurers shall establish procedures for providers to appeal the results of a performance program. Such procedures, in addition to the disclosures and the written notice furnished, shall provide:

(a) A reasonable method by which the provider may submit notice of the desire to appeal;

(b) The name, title, qualifications, and relationship to the insurer of any person responsible for deciding the appeal, who shall be authorized to uphold, modify, or reject results or require additional action to ensure that results are fair, reasonable, accurate, and comply with the requirements of this part 6;

(c) An opportunity for a provider to submit or have considered corrected data or other information relevant to the results or the appropriateness of the methodology used. If requested, a provider may appear at a face-to-face meeting with those responsible for the appeal decision at a location reasonably convenient to the provider or by teleconference. The provider shall submit in writing any corrected data or information in advance of the meeting.

(d) The provider's right to be assisted by a representative, including an attorney;

(e) A detailed written decision regarding the appeal that states the reasons for upholding, modifying, or rejecting the appeal;

(f) Resolution of the appeal within forty-five days after the date upon which the data and methodology are disclosed unless otherwise agreed to by the parties to the appeal; and

(g) A stay on the implementation, use, and disclosure of and action upon the individual results of the performance program until the appeal and any subsequent hearing requested pursuant to section 8-43-207 has become final.

**Source: L. 2010:** Entire part added, (SB 10-178), ch. 290, p. 1349, § 1, effective July 1.

**8-43-606. Enforcement.** (1) An insurer shall not limit, by contract or other means, the right of a provider to enforce this part 6.

(2) This part 6 may be enforced through a hearing pursuant to section 8-43-207 or in a civil action, and any remedies at law and in equity are available.

(3) A violation of this part 6 constitutes an unfair or deceptive act or practice under part 11 of article 3 of title 10, C.R.S.

**Source: L. 2010:** Entire part added, (SB 10-178), ch. 290, p. 1350, § 1, effective July 1.



**8-43-607. Filing with director.** At least thirty days before implementing any new or amended performance program, an insurer shall file a detailed description of the performance program with the director.

**Source: L. 2010:** Entire part added, (SB 10-178), ch. 290, p. 1350, § 1, effective July 1.

## ARTICLE 44

### Insurance

**Editor's note:** This article was numbered as article 5 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

**Cross references:** For the extent to which workers' compensation insurance is subject to part 4 of article 4 of title 10, see § 10-4-401 (3)(b).

#### PART 1

##### GENERAL PROVISIONS

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8-44-114.

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#### PART 2

##### SELF-INSURED

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#### PART 1

##### GENERAL PROVISIONS

**8-44-101. Insurance requirements.** (1) Any employer subject to the provisions of articles 40 to 47 of this title shall secure compensation for all employees in one or more of

the following ways, which shall be deemed to be compliance with the insurance requirements of said articles:

(a) By insuring and keeping insured the payment of such compensation in the Pinnacol Assurance fund;

(b) By insuring and keeping insured the payment of such compensation with any stock or mutual corporation authorized to transact the business of workers' compensation insurance in this state. If insurance is effected in such stock or mutual corporation, the employer or insurer shall forthwith file with the division, in form prescribed by it, a notice specifying the name of the insured and the insurer, the business and place of business of the insured, the effective and termination dates of the policy, and, when requested, a copy of the contract or policy of insurance.

(c) By procuring a self-insurance permit from the executive director as provided in section 8-44-201, except for public entity pools as described in section 8-44-204 (3), which shall procure self-insurance certificates of authority from the commissioner of insurance as provided in section 8-44-204;

(d) By procuring a self-insurance certificate of authority from the commissioner of insurance as provided in section 8-44-205.

(2) It shall be unlawful, except as provided in sections 8-41-401 and 8-41-402, for any employer, regardless of the method of insurance, to require an employee to pay all or any part of the cost of such insurance.

(3) (a) (I) Except as otherwise provided in subparagraph (II) of this paragraph (a), all public entities in the state shall insure and keep insured the payment of compensation by electing one of the methods provided in subsection (1) of this section. A public entity having an insured payroll of less than one million dollars annually shall not be eligible for self-insurance; except that public entities forming a pool pursuant to section 8-44-204 (3) shall be eligible if the total of all the payrolls of the public entities in the pool exceeds the required minimum.

(II) Any public entity in the state that is participating in the federal prison industry enhancement certification program pursuant to the federal "Justice System Improvement Act of 1979", 18 U.S.C. sec. 1761 (c), shall insure and keep insured the payment of compensation by electing one of the methods provided in subsection (1) of this section; except that the method for insuring the participants of such program need not be the same method selected by the public entity pursuant to subparagraph (I) of this paragraph (a).

(b) For purposes of this subsection (3), the department of human services, by virtue of the self-insurance program established pursuant to section 8-44-203, shall be considered a public entity of the state.

**Source:** L. 90: Entire article R&RE, p. 520, § 1, effective July 1. L. 94: (3)(b) amended, p. 2635, § 72, effective July 1. L. 2002: (1)(a) amended, p. 1884, § 33, effective July 1. L. 2010: (3)(a) amended, (HB 10-1109), ch. 171, p. 607, § 3, effective August 11.

**Editor's note:** This section is similar to former § 8-44-101 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Brodeur: A Clarification of Defense Counsel Duties in Workers' Compensation Cases", see 37 Colo. Law. 43 (December 2008).

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which required that notice regarding an employer's workmen's compensation insurance be filed with the division of labor instead of the industrial commission.

**Colorado law that requires each employer to operate a separately-administered work-**

**er's compensation plan is not preempted by the federal Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. (ERISA), regardless of whether the ERISA benefits are equal or inferior to the state requirements.** Fuller v. Norton, 881 F. Supp. 468 (D. Colo. 1995).

**Colorado's worker's compensation laws are not preempted by ERISA as applied to multiple employer welfare arrangements.** Fuller v. Norton, 86 F.3d 1016 (10th Cir. 1996).

**The notice of issuance of a workmen's compensation policy is required by this sec-**



tion to be filed with the industrial commission. *Chevron Oil Co. v. Indus. Comm'n*, 169 Colo. 336, 456 P.2d 735 (1969).

**But notice of cancellation of a workmen's compensation policy is not required** by statute to be given to the commission. *Chevron Oil Co. v. Indus. Comm'n*, 169 Colo. 336, 456 P.2d 735 (1969).

**This section does not negative the right of an employer to insure with a foreign reciprocal insurance exchange** licensed under § 10-13-101 et seq. to write workmen's compensation liability insurance. *Consolidated Underwriters v. Indus. Comm'n*, 117 Colo. 239, 185 P.2d 1013 (1947).

**A lessee's employee cannot be made to suffer by reason of lessor's failure to comply with this section** requiring them to obtain insurance or to procure a self-insurance permit. *McKune v. Indus. Comm'n*, 94 Colo. 523, 31 P.2d 322 (1934).

The duty of good faith derives from the relationship, arising from the underlying insurance or compensation obligation between an insured claimant and the provider of benefits, and precedes official intervention and permeates all of the dealings between the parties. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

The duty of an insurer under the act to provide benefits and compensation is factually and analytically distinct from its duty to deal in good faith with claimants, even though such duties necessarily involve a common underlying physical injury. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**The relationship of the insured to the insurer** in a first-party claim context is significantly different from the relationship which characterizes the third-party claim context. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

A case involving a claim by an employee against a compensation insurance carrier for the tort of bad faith is like a first-party, direct coverage case because workers compensation benefits serve a purpose similar to that served by direct coverage insurance contracts. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

In the first-party context an insurer acts in bad faith in delaying the processing of or denying a valid claim when the insurer's conduct is unreasonable and the insurer knows that the conduct is unreasonable or recklessly disregards the fact that the conduct is unreasonable. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**Insured and insurer in a workers' compensation context are not in either a fiduciary or quasi-fiduciary relationship.** As in a first-party direct coverage case, a workers' compensation claimant has not ceded any right to represent his interests to the insurer. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139 (Colo. 2007).

**Violation of public policy.** Where employee was told to pay over to employer the amount he had received as a result of the settlement of his worker's compensation claim as a condition to continued employment, and because the employee declined to do so, retaliation against the employee violated public policy and provides the basis of a common law claim against the employer. *Lathrop v. Entenmann's Inc.*, 770 P.2d 1367 (Colo. App.), cert. granted, 778 P.2d 1370 (Colo.), cert. dismissed, 778 P.2d 1370 (Colo. 1989).

**In determining whether to impose sanctions for failure to secure insurance, the only issue is whether the employer had insurance in effect to pay the injured employee's benefits.** *U.S. Fidelity & Guar., Inc. v. Kourlis*, 868 P.2d 1158 (Colo. App. 1994); *McManus v. Indus. Claim Appeals Office*, 81 P.3d 1074 (Colo. App. 2003).

Where the employer had purchased insurance, it was irrelevant that the insurance was not used to pay benefits for the first three years following the injury. *U.S. Fidelity & Guar., Inc. v. Kourlis*, 868 P.2d 1158 (Colo. App. 1994).

**Because employer secured compensation for claimant, employer's failure to give the notice** described in subsection (1)(b) is not grounds for the imposition of penalties under § 8-43-408 (1). *McManus v. Indus. Claim Appeals Office*, 81 P.3d 1074 (Colo. App. 2003).

**Applied** in *Meyer v. Indus. Comm'n*, 644 P.2d 46 (Colo. App. 1981).

**8-44-102. Contract for insurance subject to workers' compensation act.** Every contract for the insurance of compensation and benefits as provided in articles 40 to 47 of this title or against liability therefor shall be made subject to all the provisions of said articles, and all provisions in such contract for insurance inconsistent with the provisions of said articles shall be void. Any contract of insurance issued under said articles by any insurance carrier, including stock and mutual corporations and Pinnacol Assurance, may include and cover any liability of the employer on account of personal injuries sustained by or death resulting therefrom to any employee as such. No insurance carrier shall write any policy of insurance covering the liability under said articles of any employer doing business within the state of Colorado except on a form that has been previously filed with and approved by the commissioner of insurance, nor shall there be attached to said policy or contract of insurance any endorsement, rider, letter, or other document affecting such contract unless the same has been filed with and the form thereof approved by the

commissioner of insurance. The commissioner of insurance shall from time to time approve and prescribe a standard or universal form, as nearly as possible, for every contract or policy of insurance, endorsement, rider, letter, or other document affecting such contract for use in insuring the compensation provided for in said articles.

**Source:** **L. 90:** Entire article R&RE, p. 521, § 1, effective July 1. **L. 93:** Entire section amended, p. 455, § 2, effective April 19. **L. 2002:** Entire section amended, p. 1884, § 34, effective July 1. **L. 2003:** Entire section amended, p. 2200, § 1, effective July 1.

**Editor's note:** (1) This section is similar to former § 8-44-102 as it existed prior to 1990.  
(2) The provisions of Pinnacol Assurance are contained in article 45 of this title.

#### ANNOTATION

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the commissioner of insurance with the power previously exercised by the industrial commission to prescribe the form of the workmen's compensation insurance contract.

**The common law rule that working partners are ineligible for workers' compensation as employees of the partnership or joint venture has been modified** in this section permitting working partners to elect workers' compensation coverage. *Hancock Const. Co. v. Cummins*, 791 P.2d 1208 (Colo. App. 1990).

**Provision that industrial commission shall prescribe form of contract is not unconstitutional.** That part of this section providing that the industrial commission shall prescribe the form of contract of insurance for use in insuring compensation is administrative only, and not unconstitutional as delegating legislative power. *Travelers Ins. Co. v. Indus. Comm'n*, 71 Colo. 495, 208 P. 465 (1922).

**To "prescribe" means to dictate, to positively command.** *Travelers Ins. Co. v. Indus. Comm'n*, 71 Colo. 495, 208 P. 465 (1922).

**Policy held not to cover death of employer who worked with his men.** *Indus. Comm'n v. Bracken*, 83 Colo. 72, 262 P. 521 (1927).

**This section does not require that an operating owner endorse himself as an employee in his insurance contract,** and no sanctions attach if the owner does not include himself as an insured. *Oliver Const. Co., Inc. v. Indus. Comm'n*, 680 P.2d 1308 (Colo. App. 1983).

**Where two parties were engaged in a joint venture as a subcontractor of the general contractor,** a working co-partner was properly exempted from liability and the general contractor held liable under subsection (1), where that working co-partner's insurance policy did not include coverage for the other, decedent, working co-partner as authorized under this section. *Hancock Const. Co. v. Cummins*, 791 P.2d 1208 (Colo. App. 1990).

**A leased driver is not an employee for the purposes of workers' compensation** because § 8-40-301 (5)(b) is an exception to the more general workers' compensation statutes. *Scott v. Matlack, Inc.*, 1 P.3d 185 (Colo. App. 1999), rev'd on other grounds, 39 P.3d 1160 (Colo. 2002).

**8-44-103. Insurers to file system of rating - approval.** Every insurance carrier authorized to transact business in this state that insures employers against liability for compensation under the provisions of articles 40 to 47 of this title shall file with the commissioner of insurance its classification of risks, any premiums relating thereto, and any subsequent proposed classification of risks and premiums, together with all rates and any systems of rating.

**Source:** **L. 90:** Entire article R&RE, p. 521, § 1, effective July 1. **L. 2000:** Entire section amended, p. 470, § 10, effective August 2. **L. 2002:** Entire section amended, p. 1884, § 35, effective July 1. **L. 2003:** Entire section amended, p. 2201, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-44-103 as it existed prior to 1990.

**Cross references:** For the legislative declaration contained in the 2000 act amending this section, see section 1 of chapter 135, Session Laws of Colorado 2000.

**8-44-104. Cutting rates - rebates - penalty.** Every insurance carrier that writes compensation insurance shall write insurance at the rates filed with the commissioner of



insurance. The cutting of rates, rebating, or any other method whereby, directly or indirectly, any employer is given the benefit of or obtains a rate lower than that approved by the commissioner of insurance is prohibited. The commissioner of insurance may suspend the license of any insurance carrier, agent, or broker who violates any provision of this section. Also, any insurance carrier, any employer, or any officer, agent, or employee thereof who violates any provision of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars for each such violation.

**Source:** L. 90: Entire article R&RE, p. 521, § 1, effective July 1. L. 2000: Entire section amended, p. 471, § 11, effective August 2. L. 2002: Entire section amended, p. 1884, § 36, effective July 1. L. 2003: Entire section amended, p. 2201, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-44-104 as it existed prior to 1990.

**Cross references:** For the legislative declaration contained in the 2000 act amending this section, see section 1 of chapter 135, Session Laws of Colorado 2000.

**8-44-105. Provisions of policies - primary liability - notice of injury.** Every contract insuring against liability for compensation or insurance policy evidencing the same shall contain a clause to the effect that the insurance carrier shall be directly and primarily liable to the employee and, in the event of death, to said employee's dependents to pay compensation, if any, for which the employer is liable, thereby discharging to the extent of such payment the obligations of the employer to the employee; that, as between the employee and the insurance carrier, notice or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer, for the purpose of articles 40 to 47 of this title, shall be jurisdiction of the insurance carrier; and that the insurance carrier, in all things, shall be bound by and subject to the orders, findings, decisions, or awards rendered against the employer under the provisions of said articles. Such policy shall also provide that the employee shall have a first lien upon any amount which becomes owing to the employer from the insurance carrier, and the insurance carrier shall pay the same directly to the employee or the employee's dependents, thereby discharging to the extent of such payment the obligation of the employer to the employee. The policy shall not contain any provisions relieving the insurance carrier from payment when the employer becomes legally incapable or insolvent or is discharged in bankruptcy or otherwise during the period that the policy is in operation or the compensation remains owing.

**Source:** L. 90: Entire article R&RE, p. 522, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-44-105 as it existed prior to 1990.

#### ANNOTATION

**The policy of the workmen's compensation act is to hold the employer primarily liable to the employee for disability proximately resulting from accidents arising out of and in the course of the employment.** *Century Indem. Co. v. Klipfel*, 99 Colo. 213, 61 P.2d 842 (1936); *Tri-State Ins. Co. v. Indus. Comm'n*, 151 Colo. 494, 379 P.2d 388 (1963).

**But this section provides that the insurance carrier is directly and primarily liable to the employee for compensation, if any, for which the employer is liable, thereby discharging to the extent of such payment the obligations of the**

**employer to the employee.** *Century Indem. Co. v. Klipfel*, 99 Colo. 213, 61 P.2d 842 (1936); *Indus. Comm'n, v. Lopez*, 150 Colo. 87, 371 P.2d 269 (1962); *Tri-State Ins. Co. v. Indus. Comm'n*, 151 Colo. 494, 379 P.2d 388 (1963).

**And the insurance policy, and not the liability of the insured, measures the liability of the insurer.** Where an employer lets out part of his work to contractors and insurers his liability to employees, the insurer's liability extends only to employees of the employer — its policy so providing — and not to those of the contractors. *United States Fid. & Guar. Co. v. Turkey Creek*

Stone, Clay & Gypsum Co., 75 Colo. 611, 227 P. 569 (1924).

Compensation carrier's intentional misconduct in the processing of a claim is neither a "direct" nor a "natural" consequence of an employment injury. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

A case involving a claim by an employee against a compensation insurance carrier for the tort of bad faith is like a first-party, direct coverage case because workers compensation benefits serve a purpose similar to that served by direct coverage insurance contracts. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

**Coverage by an insurer is coextensive with the liability of the employer.** *Indus. Comm'n v. Lopez*, 150 Colo. 87, 371 P.2d 269 (1962).

**And if an employer extends his operation by engaging in a joint venture**, so does the insurance policy extend its coverage. *Indus. Comm'n v. Lopez*, 150 Colo. 87, 371 P.2d 269 (1962).

**The omission by an employer to list or pay a premium upon an employee does not affect the right of the employee to receive compensation from the carrier.** *Indus. Comm'n v. Lopez*, 150 Colo. 87, 371 P.2d 269 (1962).

**The duties of an insurer are contractual and may be discharged by making payments pursuant to a final adjudication of liability.** *Indus. Comm'n v. Spoo*, 151 Colo. 581, 380 P.2d 49 (1963).

**But an insurer's reliance on an award in process of review is not the measure of its liability**, and its good faith cannot serve as a substitute for discharging its legal obligations. *Indus. Comm'n v. Spoo*, 151 Colo. 581, 380 P.2d 49 (1963).

**Employer may insure with two insurance companies against injury to an employee in two successive accidents.** *Tri-State Ins. Co. v. Indus. Comm'n*, 151 Colo. 494, 379 P.2d 388 (1963).

**And two insurers are equally liable.** Where an employer pays each of two insurance companies to indemnify him against liability for accidental injury to an employee, presumably both insurers are financially responsible, and each contracts to indemnify the employer for a portion of a disability caused by two accidents for which the employer is unquestionably liable. *Century Indem. Co. v. Klipfel*, 99 Colo. 213, 61 P.2d 842 (1936); *Tri-State Ins. Co. v. Indus. Comm'n*, 151 Colo. 494, 379 P.2d 388 (1963).

**8-44-106. Insurer violation - suspension or revocation of license.** If any insurance carrier intentionally, knowingly, or willfully violates any of the provisions of articles 40 to 47 of this title, the commissioner of insurance, on the request of the director, shall suspend or revoke the license or authority of such carrier to do a compensation business in this state.

**Source:** L. 90: Entire article R&RE, p. 522, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-44-106 as it existed prior to 1990.

**8-44-107. Right of insurer to examine books of employer.** Any insurance carrier operating under the workers' compensation act may apply to the commissioner of insurance for permission to examine any of the books, payrolls, or other documents of any employer insured by such carrier or of any contractor, subcontractor, lessee, sublessee, or person covered by the employer's compensation insurance to determine the amount of wage expenditure of such employer or of any contractor, subcontractor, lessee, sublessee, or person during any period that such insureds were insured by the insurance carrier. The commissioner of insurance may grant such carrier authority in writing to make the investigation or may appoint any agents of the division of insurance to conduct the investigation.

**Source:** L. 90: Entire article R&RE, p. 522, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-44-108 as it existed prior to 1990.

**8-44-108. Repayments for misclassifications.** (1) Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, is authorized to charge and collect any amount of money that should have been included in premiums paid by an insured but were not included in such premiums as a result of job misclassification. Upon written request by the employer, the issue of whether a job misclassification occurred shall be determined in writing by the insurance company. The



employer's request shall be made within thirty working days after the anniversary date of the policy or the date of receipt by the employer of notice of a change in job classification. The insurance company's determination shall be made within thirty days after receipt of the employer's written request. An employer may appeal any determination of an insurance company made pursuant to this subsection (1) to the workers' compensation classification appeals board, pursuant to section 8-55-102. If it is determined that a job misclassification occurred and that such misclassification was caused by the failure of the insured to provide accurate or complete data in order to determine the proper classification as requested by the insurance carrier, the repayment may be collected during the term of the contract for such insurance plus an additional reasonable time not to exceed twelve months.

(2) Any employer who has purchased insurance against liability for compensation under the provisions of articles 40 to 47 of this title is authorized to recover any amount of money which should not have been included in premiums paid by the employer but which were included in such premiums as a result of job misclassification. The repayment may be collected during the term of the contract for such insurance plus an additional reasonable time not to exceed twelve months.

**Source:** L. 90: Entire article R&RE, p. 522, § 1, effective July 1. L. 96: (1) amended, p. 1143, § 2, effective October 1. L. 2002: (1) amended, p. 1885, § 37, effective July 1.

**Editor's note:** This section is similar to former § 8-44-113 as it existed prior to 1990.

**8-44-109. Notice - change in rate by classification - policyholder's right to appeal classifications - availability of medical case management services.** (1) Any insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall supply information regarding a change in the rate by classification to any insured employer, if such employer has requested that such information be supplied. Such information shall be supplied within thirty days following release of such information to such insurer by the authorized rating organization and following approval of such rate change by the division of insurance. As soon as reasonably possible after the division of insurance's approval of a change in rate by classification, the authorized rating organization shall disseminate notice of such approval and change in rate.

(2) Every insurance carrier authorized to transact business in Colorado, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall clearly and conspicuously inform policyholders of their rights to appeal employee classification designations, the procedures to be used for such an appeal, and the types of medical case management that the carrier has available to employees to promote medical cost containment.

**Source:** L. 90: Entire article R&RE, p. 523, § 1, effective July 1. L. 2002: Entire section amended, p. 1885, § 38, effective July 1.

**Editor's note:** This section is similar to former § 8-44-115 as it existed prior to 1990.

**8-44-110. Notice of cancellation.** Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall notify any employer insured by the carrier or Pinnacol Assurance, and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer's insurance coverage. Such notice shall be sent at least thirty days prior to the effective date of the cancellation of the insurance. However, if the cancellation is based on one or more of the following reasons, then such notice may be sent less than thirty days prior to the effective date of the cancellation of the insurance: Fraud, material misrepresentation, nonpayment of premium, or any other reason approved by the commissioner of insurance.

**Source:** **L. 90:** Entire article R&RE, p. 523, § 1, effective July 1. **L. 2002:** Entire section amended, p. 1886, § 39, effective July 1. **L. 2003:** Entire section amended, p. 838, § 3, effective August 6.

**Editor's note:** This section is similar to former § 8-44-114 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Workers' Compensation Law", see 32 Colo. Law. 113 (October 2003).

**Substantial compliance with the mailing requirements of this section is sufficient**, when the employer does not dispute actual notice of cancellation was received by the insurer and the

court does not treat the notice as jurisdictional. An employer received notice of cancellation via regular mail prior to a worker being injured. The injured worker's benefits were therefore paid by the employer. EZ Bldg. Components Mfg., LLC v. Indus. Claim Appeals Office, 74 P.3d 516 (Colo. App. 2003).

**8-44-111. Workers' compensation insurance - deductibles.** (1) Any employer may agree, as a condition of any contract for the insurance of compensation and benefits as provided in articles 40 to 47 of this title or against liability therefor, to pay an amount not to exceed five thousand dollars per claim toward the total amount of any claim payable under articles 40 to 47 of this title. The amount of premium to be paid by an employer who agrees to pay such deductible shall be reduced based upon such deductible in an amount determined by the insurance carrier.

(1.5) Whenever any insurer, including Pinnacol Assurance created in section 8-45-101, issues a workers' compensation policy in this state, and annually thereafter, the insurer must issue a policy including the deductible provision if requested by the insured employer; except that the commissioner shall promulgate rules establishing criteria to allow the insurer to deny a deductible policy to an employer based on financial inability to reimburse the insurer for the deductible plan selected.

(2) The existence of an insurance contract with a deductible or the fact of payment as a result of a deductible shall not affect the requirement of an employer to report an injury or death to the division as required in section 8-43-103 (1).

(3) The deductible amounts paid by any employer under the provisions of this section shall be excluded from consideration by insurance carriers authorized to transact business in Colorado, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, in establishing the modification factors based upon experience used by such insurance carriers to determine premiums. For purposes of experience modifications, medical only claims shall be calculated in the same manner as claims with indemnity payments.

(4) Every insurance carrier authorized to transact business in Colorado, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall clearly and conspicuously inform policyholders of the availability of the deductible option specified in subsection (1) of this section.

**Source:** **L. 90:** Entire article R&RE, p. 523, § 1, effective July 1. **L. 91:** (3) added, p. 1331, § 44, effective July 1. **L. 92:** Entire section amended, p. 1816, § 1, effective July 1. **L. 93:** (1.5) added, p. 2085, § 4, effective July 1. **L. 2002:** (1.5), (3), and (4) amended, p. 1886, § 40, effective July 1. **L. 2010:** (3) amended, (SB 10-112), ch. 52, p. 196, § 1, effective January 1, 2011.

**Editor's note:** This section is similar to former § 8-44-116 as it existed prior to 1990.

**8-44-112. Surcharge on workers' compensation insurance premiums - workers' compensation cash fund.** (1) (a) Notwithstanding the provisions of sections 10-3-209 (1) (c) and 10-6-128 (3), C.R.S., for the purpose of offsetting the direct and indirect costs



of the administration of the workers' compensation system, every person, partnership, association, and corporation, whether organized under the laws of this state or of any other state or country, every mutual company or association, every captive insurance company, and every other insurance carrier, including Pinnacol Assurance, insuring employers in this state against liability for personal injury to their employees or death caused thereby under the provisions of the "Workers' Compensation Act of Colorado" shall, as provided in this section, pay a surcharge upon the premiums received, whether in cash or not, in this state, or on account of business done in this state, for such insurance in this state, at a rate established by the director by rule, which surcharge shall be reviewed and adjusted annually based upon appropriations made for the direct and indirect costs of the administration of the workers' compensation system, as provided in subsection (7) of this section. Such insurance carriers shall be credited with all cancelled or returned premiums actually refunded during the year of such insurance.

(b) (I) For the purpose of funding the direct and indirect costs of the activities of the division related to the "Workers' Compensation Cost Containment Act", article 14.5 of this title, there shall be added to the surcharge imposed pursuant to paragraph (a) of this subsection (1) an increment not to exceed three-hundredths of one percent upon the premiums received, said surcharge to be reviewed and adjusted annually and paid over to the division in the same manner as specified in this section for the surcharge.

(II) Notwithstanding any other provisions of this section, no employer acting as a self-insurer under the provisions of the "Workers' Compensation Act of Colorado" shall be subject to the increment added to the surcharge pursuant to subparagraph (I) of this paragraph (b).

(III) All moneys collected pursuant to subparagraph (I) of this paragraph (b) shall be transmitted to the state treasurer, who shall credit the same to the cost containment fund, created in section 8-14.5-108.

(2) Every such insurance carrier shall, on July 1, 1987, and semiannually thereafter, make a return, verified by affidavits of its president and secretary, or other chief officers or agents, to the division of workers' compensation, stating the amount of all such premiums received and credits granted during the period covered by such return. Every insurance carrier required to make such return shall file the same with the division within thirty days after the close of the period covered thereby and shall, at the same time, pay to the division of workers' compensation a surcharge ascertained as provided in subsection (1) of this section, less return premiums on cancelled policies.

(3) Every employer acting as a self-insurer under the provisions of the "Workers' Compensation Act of Colorado" shall, under oath, report to the division of workers' compensation the business payroll in such form as may be prescribed by the director and at the times in this section provided for premium reports by insurance companies in subsection (2) of this section. The division shall assess against such payroll a surcharge for the purposes of this section ascertained as provided in subsection (2) of this section on the basic premiums chargeable against the same or most similar industry or business taken from the manual insurance rates, including any discount or experience modification allowed, chargeable by the Pinnacol Assurance fund, and, upon receipt of notice from the division of workers' compensation of the surcharge so assessed, every such self-insurer shall, within thirty days after the receipt of such notice, pay to the division of workers' compensation the surcharge so assessed.

(4) If any such insurance carrier or self-insurer fails or refuses to make the return required by this article, the director shall assess the surcharge against such insurance carrier or self-insurer at the rate provided for in this section on such amount of premium as the director may deem just, and the proceedings thereof shall be the same as if the return had been made.

(5) If any such insurance carrier or self-insurer withdraws from business in this state before the surcharge falls due as provided in this section, or fails or neglects to pay such surcharge, the director shall at once proceed to collect the same; and the director is authorized to employ such legal processes as may be necessary for that purpose. Suit shall be brought by the director in any of the courts of this state having jurisdiction.

(6) The director, in the enforcement of this section, shall have all of the powers granted to said director in the "Workers' Compensation Act of Colorado", and any insurance carrier or self-insurer violating any of the provisions of this section, or failing to pay the surcharge imposed in this section, is guilty of violation of said act and subject to the penalties therein prescribed.

(7) (a) All moneys collected pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the workers' compensation cash fund, which fund is hereby created. The moneys in the workers' compensation cash fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs of the administration of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title. Any interest earned on the investment or deposit of moneys in the workers' compensation cash fund shall remain in the fund and shall not revert to the general fund of the state at the end of any fiscal year.

(b) Notwithstanding any provision of paragraph (a) of this subsection (7) to the contrary, on March 5, 2003, the state treasurer shall deduct six million dollars from the workers' compensation cash fund and transfer such sum to the general fund.

(c) Notwithstanding any provision of paragraph (a) of this subsection (7) to the contrary, on March 30, 2009, the state treasurer shall deduct fifteen million seven hundred thousand dollars from the workers' compensation cash fund and transfer such sum to the general fund.

**Source:** **L. 90:** Entire article R&RE, p. 524, § 1, effective July 1. **L. 92:** (7) amended, p. 1828, § 2, effective May 19. **L. 93:** (1)(b) RC&RE, p. 1459, § 1, effective June 6; (1)(b) RC&RE, p. 1723, § 2, effective June 6. **L. 99:** (7) amended, p. 617, §4, effective August 4. **L. 2002:** (1)(a) and (3) amended, p. 1886, § 41, effective July 1. **L. 2003:** (7) amended, p. 454, § 2, effective March 5. **L. 2009:** (7)(c) added, (SB 09-208), ch. 149, p. 618, § 1, effective April 20.

**Editor's note:** (1) This section is similar to former § 8-44-111 as it existed prior to 1990.

(2) Subsection (1)(b)(IV) provided for the repeal of subsection (1)(b), effective July 1, 1992. (See L. 90, p. 524.) Subsection (1)(b) has subsequently been reenacted.

(3) Subsection (7)(c) requires the state treasurer to transfer \$15,700,000 from the workers' compensation cash fund to the general fund on March 30, 2009; however, Senate Bill 09-208, which enacted the provision did not take effect until April 20, 2009.

#### **8-44-113. Data from insurance carriers and self-insured employers related to workers' compensation - studies related to workers' compensation system. (Repealed)**

**Source:** **L. 91:** Entire section added, p. 1331, § 45, effective July 1. **L. 93:** (1), (2), (3), and (4) amended, p. 1276, § 1, effective June 6. **L. 97:** (4) RC&RE p. 529, § 1, effective April 24; (1)(b) repealed, p. 1475, § 10, effective June 3. **L. 2002:** (1)(a) amended, p. 1887, § 42, effective July 1; (1)(a) amended, p. 1467, § 21, effective October 1. **L. 2003:** (1)(a), (1)(c), and IP(4)(b) amended, p. 1556, § 1, effective May 1. **L. 2005:** Entire section repealed, p. 1248, § 1, effective July 1.

**8-44-114. Determination of premium.** The amount of the premium to be paid by an employer for a contract of insurance of compensation and benefits as provided in articles 40 to 47 of this title or against liability therefor shall be on the basis of the annual expenditure of money by said employer for the services of persons engaged in such employer's employment; except that no portion of such expenditure representing a per diem payment shall be considered unless such payment is considered wages for federal income tax purposes.

**Source:** **L. 94:** Entire section added, p. 1286, § 4, effective May 22.



**8-44-115. Calculation of premium - motor vehicle accidents.** (1) The amount by which an employer's experience rating is modified, if at all, as the result of a motor vehicle accident in which an employee is injured or killed shall be reduced in accordance with this section if:

(a) The employee is entitled to benefits under articles 40 to 47 of this title; and  
(b) The accident was not caused, wholly or in part, by the employee or the employer; and

(c) The use of a motor vehicle is not an integral part of the employer's business, as determined under rules promulgated by the commissioner of insurance under section 10-4-408 (5) (e), C.R.S.

(2) (a) Any modification of an employer's experience rating resulting from an accident described in subsection (1) of this section shall reflect the deduction of a loss limitation, the amount of which shall be determined by the commissioner of insurance under rules adopted pursuant to section 10-4-408 (5) (e), C.R.S.

(b) All loss experience remaining after deduction of the loss limitation referred to in paragraph (a) of this subsection (2) shall be distributed among all workers' compensation classifications in use in the state as determined by the commissioner of insurance. For purposes of such distribution, classifications of businesses of which use of a motor vehicle is an integral part may be treated differently from classifications of businesses of which use of a motor vehicle is not an integral part.

(3) This section applies to all insurers, including Pinnacol Assurance created in section 8-45-101, offering workers' compensation insurance under articles 40 to 47 of this title. The provisions of this section shall be disclosed to all policyholders annually.

**Source: L. 94:** Entire section added, p. 1366, § 1, effective October 1. **L. 2002:** (3) amended, p. 1887, § 43, effective July 1.

**8-44-116. Reversionary interests in indemnity benefits prohibited.** No provision in a contract for insurance regulated by this article or any contract ancillary to such a contract, including specifically a contract setting up an annuity for indemnity benefits, shall establish a reversionary interest in the insurer for the indemnity benefits. Any such provision is void and unenforceable as against public policy.

**Source: L. 2010:** Entire section added, (SB 10-011), ch. 302, p. 1433, § 4, effective May 27.

## PART 2

### SELF-INSURED

**8-44-201. Employer as own insurance carrier - revocation of permission.** (1) The executive director has the discretion to grant to any employer who has accepted the provisions of articles 40 to 47 of this title permission to be its own insurance carrier for the payment of the compensation and benefits provided by said articles. Such permission may be granted by the executive director after the filing by an employer of such statement and the giving of such information as may be required by the executive director. The executive director has the sole power to prescribe the rules, regulations, orders, terms, and conditions upon which said permit shall be granted or continued. Permission for self-insurance may be revoked at any time by the executive director, and the employer, upon notice of revocation, shall immediately insure otherwise all liability.

(2) Notwithstanding the provisions of subsection (1) of this section, the executive director shall not prescribe or apply security requirements in granting or continuing permission for the self-insurance program of the department of human services established pursuant to section 8-44-203 but shall provide instead for alternatives to such security requirements including trust funds, surety bonds, excess insurance, or other security acceptable to the executive director. The alternative security requirements provided by this subsection (2) shall apply only to claims arising on or after July 1, 1985, and before July

1, 1990. The trust fund in existence on May 24, 1990, pursuant to the trust agreement between the department of human services, a third party administrator, and the state treasurer, dated June 27, 1985, shall remain in existence through June 30, 1990.

(3) Notwithstanding the provisions of subsection (1) of this section, the executive director shall not prescribe or apply security requirements in continuing permission for an employer which is acting as its own insurance carrier on July 1, 1986, which are in excess of those security requirements in effect on July 1, 1986, unless there is a substantial change in the economic condition or potential liability of such employer.

(4) Notwithstanding the provisions of subsection (1) of this section, the executive director shall not prescribe or apply security requirements in granting or continuing permission for a self-insurance program established by the state pursuant to section 24-30-1510.7, C.R.S.

**Source:** **L. 90:** Entire article R&RE, p. 525, § 1, effective July 1; (2) amended, p. 1199, § 12, effective July 1. **L. 94:** (2) amended, p. 2635, § 73, effective July 1. **L. 97:** (4) added, p. 51, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-44-109 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Update on Colorado Appellate Decisions in Colorado Workers' Compensation Law", see 30 Colo. Law. 69 (April 2001).

**8-44-202. Workers' compensation self-insurance fund - created.** (1) The executive director shall establish and collect such fees as the executive director determines are necessary to administer this section, which fees shall not supplant funding for any other function of the department of labor and employment. The fees established pursuant to this subsection (1) shall not exceed two thousand dollars for an initial application or for an annual review of any employer acting as a self-insurer under this section.

(2) The executive director shall transmit any moneys received pursuant to subsection (1) of this section to the state treasurer, who shall place such moneys in the workers' compensation self-insurance fund, which fund is hereby created. The general assembly shall make appropriations from such fund for the purposes of administering this section.

**Source:** **L. 90:** Entire article R&RE, p. 526, § 1, effective July 1; (1) amended, p. 583, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-44-109 as it existed prior to 1990.

**8-44-203. Department of human services - self-insurance program.** The general assembly hereby finds and declares that a program shall be established by the department of human services and the department of labor and employment to provide for a self-insurance program for the department of human services, which shall apply only to claims arising on or after July 1, 1985, and before July 1, 1990.

**Source:** **L. 90:** Entire article R&RE, p. 526, § 1, effective July 1; entire section amended, p. 1200, § 13, effective July 1. **L. 94:** Entire section amended, p. 2636, § 74, effective July 1.

**Editor's note:** This section is similar to former § 8-44-109 as it existed prior to 1990.

**8-44-204. Public entities - self-insurance authorized for workers' compensation - pooled insurance.** (1) "Public entity", as used in this section, means and includes any county, municipality, school district, and any other type of district or authority organized pursuant to law.



(2) A public entity may, after receiving permission pursuant to section 8-44-101 (1) (c), act as its own insurance carrier for compensation and benefits. Any public entity other than a school district may establish and maintain an insurance reserve fund for self-insurance purposes and may include in the annual tax levy of the public entity such amounts as are determined by its governing body to be necessary for the uses and purposes of the insurance reserve fund, subject to the limitations imposed by section 29-1-301, C.R.S. School districts may establish and maintain an insurance reserve fund in accordance with the provisions of section 22-45-103 (1) (e), C.R.S., using moneys allocated thereto pursuant to the provisions of section 22-54-105 (2), C.R.S. In the event that a public entity has no annual tax levy, it may appropriate from any unexpended balance in the general fund such amounts as the governing body shall deem necessary for the purposes and uses of the insurance reserve fund.

(3) Public entities may cooperate with one another to form a self-insurance pool to provide the insurance coverage required by this article for the cooperating public entities. Any such insurance pool shall be formed pursuant to the provisions of part 2 of article 1 of title 29, C.R.S. The provisions of articles 10.5 and 47 of title 11, C.R.S., shall apply to moneys of such self-insurance pool.

(4) Any self-insurance pool authorized by subsection (3) of this section shall not be construed to be an insurance company nor otherwise subject to the provisions of the laws of this state regulating insurance or insurance companies; except that the pool shall comply with the applicable provisions of sections 10-1-203 and 10-1-204 (1) to (5) and (10), C.R.S.

(5) Prior to the formation of a self-insurance pool, there shall be submitted to the commissioner of insurance a complete written proposal of the pool's operation, including, but not limited to, the administration, claims adjusting, membership, plan for reinsurance, and capitalization of the pool. The commissioner shall review the proposal within thirty days after receipt to assure that proper insurance techniques and procedures are included in the proposal. After such review, the commissioner shall have the right to approve or disapprove the proposal. If the commissioner approves the proposal, the commissioner shall issue a certificate of authority. The costs of such review shall be paid by the public entities desiring to form such a pool.

(6) Each self-insurance pool for public entities created in this state shall file, with the commissioner of insurance on or before March 30 of each year, a written report in a form prescribed by the commissioner, signed and verified by its chief executive officer as to its condition.

(7) The commissioner of insurance, or any person authorized by the commissioner of insurance, shall conduct an insurance examination at least once a year to determine that proper underwriting techniques and sound funding, loss reserves, and claims procedures are being followed. This examination shall be paid for by the self-insurance pool out of its funds at the same rate as provided for foreign insurance companies under section 10-1-204 (9), C.R.S.

(8) (a) The certificate of authority issued to a public entity under this section may be revoked or suspended by the commissioner of insurance for any of the following reasons:

- (I) Insolvency or impairment;
- (II) Refusal or failure to submit an annual report as required by subsection (6) of this section;
- (III) Failure to comply with the provisions of its own ordinances, resolutions, contracts, or other conditions relating to the self-insurance pool;
- (IV) Failure to submit to examination or any legal obligation relative thereto;
- (V) Refusal to pay the cost of examination as required by subsection (7) of this section;
- (VI) Use of methods which, although not otherwise specifically proscribed by law, nevertheless render the operation of the self-insurance pool hazardous, or its condition unsound, to the public;
- (VII) Failure to otherwise comply with the law of this state, if such failure renders the operation of the self-insurance pool hazardous to the public.

(b) If the commissioner of insurance finds upon examination, hearing, or other evidence that any participating public entity has committed any of the acts specified in paragraph (a) of this subsection (8) or any act otherwise prohibited in this section, the commissioner may

suspend or revoke such certificate of authority if the commissioner deems it in the best interest of the public. Notice of any revocation shall be published in one or more daily newspapers in Denver which have a general state circulation. Before suspending or revoking any certificate of authority of a public entity, the commissioner shall grant the public entity fifteen days in which to show cause why such action should not be taken.

(9) (a) Any self-insurance pool organized pursuant to this section may invest in securities meeting the investment requirements established in part 6 of article 75 of title 24, C.R.S., and may also invest in membership claim deductibles and in any other security or other investment authorized for such pools by the commissioner of insurance.

(b) Any public entity which is a member of a self-insurance pool which is organized pursuant to this section or any instrumentality formed by two or more of such members may invest in subordinated debentures issued by such self-insurance pool.

(10) In addition to workers' compensation coverage pursuant to subsection (3) of this section, a self-insurance pool authorized by subsection (3) of this section may provide property coverage pursuant to section 29-13-102, C.R.S., and liability coverage pursuant to section 24-10-115.5, C.R.S.

**Source:** L. 90: Entire article R&RE, p. 526, § 1, effective July 1. L. 92: (4) amended, p. 1500, § 35, effective July 1; (7) amended, p. 1613, § 165, effective July 1. L. 94: (2) amended, p. 810, § 17, effective April 27; (7) amended, p. 1626, § 17, effective May 31. L. 97: (6) amended, p. 1475, § 11, effective June 3.

**Editor's note:** This section is similar to former § 8-44-110 as it existed prior to 1990.

#### **8-44-205. Employers - self-insurance pools authorized for workers' compensation.**

(1) "Employers", as used in this section, means a bona fide trade or professional association or two or more employers which are engaged in the same or similar type of business or are members of the same bona fide trade or professional association.

(2) Employers may cooperate with one another to form a self-insurance pool to provide the insurance coverage required by this article for cooperating employers.

(3) Any self-insurance pool authorized by subsection (2) of this section shall not be construed to be an insurance company nor otherwise subject to the provisions of the laws of this state regulating insurance or insurance companies; except that the pool shall comply with the applicable provisions of sections 10-1-203 and 10-1-204 (1) to (5) and (10), C.R.S., and shall be subject to proceedings authorized by part 5 of article 3 of title 10, C.R.S.

(4) Prior to the formation of a self-insurance pool, there shall be submitted to the commissioner of insurance a complete written proposal of the pool's operation, including, but not limited to, the administration, claims adjusting, membership, plan for reinsurance, capitalization of the pool, and risk management programs. The commissioner shall review the proposal within forty-five days after receipt to assure that proper insurance techniques and procedures are included in the proposal. After such review, the commissioner shall have the right to approve or disapprove the proposal. If the commissioner of insurance has not disapproved the proposal within ninety days of receipt of the proposal, such proposal shall be deemed approved. If the commissioner approves the proposal, the commissioner shall issue a certificate of authority. The costs of such review shall be paid by the employers desiring to form such a pool.

(5) Each self-insurance pool for employers created in this state shall file with the commissioner of insurance, on or before March 30 of each year, a written report in a form prescribed by the commissioner, signed and verified by its chief executive officer as to its condition.

(6) The commissioner of insurance, or the commissioner's designee, shall conduct an insurance examination at least once a year to determine that proper underwriting techniques and sound funding, loss reserves, and claims procedures are being followed. This examination shall be paid for by the self-insurance pool out of its funds at the same rate as provided for foreign insurance companies under section 10-1-204 (9), C.R.S.



(7) (a) The certificate of authority issued to an employer self-insurance pool under this section may be revoked or suspended by the commissioner of insurance for any of the following reasons:

- (I) Insolvency or impairment;
- (II) Refusal or failure to submit an annual report as required by subsection (5) of this section;
- (III) Failure to comply with the provisions of its own rules, resolutions, contracts, or other conditions relating to the self-insurance pool;
- (IV) Failure to submit to examination or any legal obligation relative thereto;
- (V) Refusal to pay the cost of examination as required by subsection (6) of this section;
- (VI) Use of methods which, although not otherwise specifically proscribed by law, nevertheless render the operation of the self-insurance pool hazardous, or its condition unsound, to the public;
- (VII) Failure to otherwise comply with the law of this state, if such failure renders the operation of the self-insurance pool hazardous to the public.

(b) If the commissioner of insurance finds upon examination, hearing, or other evidence that any participating employer self-insurance pool has committed any of the acts specified in paragraph (a) of this subsection (7) or any act otherwise prohibited in this section, the commissioner may suspend or revoke such certificate of authority if the commissioner deems it in the best interest of the public. Notice of any revocation shall be published in one or more daily newspapers in Denver which have a general state circulation. Before suspending or revoking any certificate of authority of an employer self-insurance pool, the commissioner shall grant the employer self-insurance pool fifteen days in which to show cause why such action should not be taken.

(8) The commissioner of insurance may supervise or rehabilitate an employer self-insurance pool pursuant to the provisions of parts 4 and 5 of article 3 of title 10, C.R.S., for any of the following reasons:

- (a) Insolvency or impairment;
- (b) Failure to comply with the provisions of its own rules, resolutions, contracts, or other conditions relating to the self-insurance pool;
- (c) Failure to submit to examination or any legal obligation relative thereto;
- (d) Use of methods which, although not otherwise specifically proscribed by law, nevertheless render the operation of the self-insurance pool hazardous, or its condition unsound, to the public;
- (e) Failure to otherwise comply with the law of this state, if such failure renders the operation of the self-insurance pool hazardous to the public.

(9) The commissioner of insurance may promulgate reasonable rules and regulations necessary to effectuate the purposes of this section.

(10) Any self-insurance pool or any trust which provides insurance coverage for purposes of articles 40 to 47 of this title which is in existence and is operating prior to July 10, 1987, is not subject to the requirements of this section and may continue to operate such pool or trust as authorized by law.

(11) Each self-insurance pool created under this section shall establish a trust fund, on an annual basis, to provide payment of the total workers' compensation loss cost incurred by all pool members within each given year. Aggregate excess insurance shall be provided by each self-insurance pool to the statutory limit of coverage, attaching at the maximum amount of each annual trust fund balance, or, in lieu thereof, the commissioner of insurance shall set other security standards which assure payment of workers' compensation in the event that a self-insurance pool disbands or defaults.

**Source:** L. 90: Entire article R&RE, p. 529, § 1, effective July 1. L. 92: (3) amended, p. 1500, § 36, effective July 1; (6) amended, p. 1613, § 166, effective July 1. L. 94: (6) amended, p. 1627, § 18, effective May 31. L. 97: (5) amended, p. 1475, § 12, effective June 3.

**Editor's note:** This section is similar to former § 8-44-112 as it existed prior to 1990.

**8-44-206. Guaranty fund - immediate payment fund - special funds board - creation.** (1) The general assembly hereby finds and declares that benefits awarded under articles 40 to 47 of this title to claimants employed by self-insurers may be unreasonably delayed or not paid at all if receipt of the proceeds of the bond required of the self-insurer is delayed or if the self-insurer declares bankruptcy or has insufficient reserves to cover the claim. The general assembly further finds and declares that the creation of an immediate payment fund and a guaranty fund will assure prompt and complete payment of benefits awarded to such claimants.

(2) **Creation of special funds board - duties.** (a) For the purposes of carrying out this section, there is hereby created a special funds board which shall exercise its powers and perform its duties and functions as specified in this subsection (2) under the department of labor and employment as if the same were transferred to the department by a **type 2** transfer as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S. Said board shall be composed of five members: Four members who are managers or employees of self-insured employers in good standing, two of whom shall demonstrate knowledge of risk management and finance, and the executive director.

(b) With the exception of the executive director, the board members shall be appointed by the governor and approved by the senate. The terms of the members of the board first appointed shall be four years, three years, two years, and one year, respectively. Thereafter, the term for each appointed board member shall be four years. Members of the board may be reappointed and the executive director shall serve continuously.

(c) The members of the board shall receive no compensation but shall be reimbursed for actual and necessary traveling and subsistence expenses incurred in the performance of their duties as members of the board.

(d) (I) The board shall determine the assessments to be made pursuant to subsections (3) and (4) of this section and shall determine the qualifications and requirements for any claims administrators hired to adjust the claims of a self-insurer who fails to meet his obligations with respect to benefits awarded pursuant to articles 40 to 47 of this title.

(II) The board shall also participate, in an advisory capacity only, in matters concerning the granting or termination of self-insurance permits and the setting of security requirements.

(3) **Immediate payment fund - assessments - creation of fund.** (a) The board shall impose an assessment upon each employer self-insured under section 8-44-201. Assessments under this subsection (3) shall be based upon a ratio equal to the self-insured employer's paid workers' compensation medical and indemnity losses for the most recent self-insurance permit year divided by the aggregate sum of paid medical and indemnity losses by all self-insured employers for that year. Such losses shall be determined on July 1, 1990, for the most recently completed permit year, and on the first day of July for each year thereafter until the minimum fund balance has been reached. Contributions to the fund shall not be assets of the self-insured employer.

(b) (I) All moneys received by the executive director pursuant to this subsection (3) shall be deposited in the state treasury in the immediate payment fund, which fund is hereby created, and all moneys credited to such fund shall be used solely for the administration and payment of benefits to employees pursuant to this section. The general assembly shall make annual appropriations out of such fund for the administration of the fund. The moneys in such fund for the payment of benefits are hereby continuously appropriated to the department for payment of such benefits. Any moneys not utilized in the fund shall not revert to the general fund.

(II) The minimum fund balance shall be three hundred thousand dollars, to be assessed during the first three years at the rate of one hundred thousand dollars annually. Interest shall accrue to the fund to a maximum fund balance of one million dollars. Thereafter, the fund balance shall be maintained at one million dollars by refunding the excess funds to each self-insured employer, on a pro rata basis, based on that employer's contribution.

(4) **Guaranty fund - assessments - creation of fund.** (a) When the board determines that existing security held by an employer self-insured under section 8-44-201 is insufficient to meet its existing liability for workers' compensation benefits, the board shall impose an assessment on each self-insured employer. The assessment shall be based on a ratio which



equals each self-insured employer's paid workers' compensation medical and indemnity losses for the most recent self-insurance permit year divided by the aggregate sum of paid medical and indemnity losses by all self-insured employers for that year. If necessary, the executive director may direct the board to make an annual assessment thereafter until such time as the present value of the guaranty fund, created in paragraph (b) of this subsection (4), equals the total liability for workers' compensation benefits which are in excess of the security held by the defaulting self-insured employers.

(b) (I) All moneys received by the executive director pursuant to this subsection (4) shall be deposited in the state treasury in the guaranty fund, which fund is hereby created. Such moneys credited to the fund shall be used solely for the administration and payment of benefits to employees pursuant to this section. The general assembly shall make annual appropriations out of such fund for the administration of the fund. The moneys in such fund for the payment of benefits are hereby continuously appropriated to the department for payment of such benefits. Any moneys not utilized in the fund shall not revert to the general fund.

(II) All interest shall accrue to the fund. No amounts shall be refunded until all liability in excess of security held by self-insured employers has been discharged and until the dates imposing limitations on actions, as specified in sections 8-43-103 and 8-43-303 have passed. When those conditions have been met, the remaining moneys in the fund shall be refunded to each self-insured employer, on a pro rata basis, based on that employer's contribution.

(c) Public entities self-insuring under section 8-44-201 shall be exempt from and shall not participate in this subsection (4).

(5) The department shall select any claims administrators required under this section based on the qualifications and requirements established by the board. For the purpose of contracting for such services, the department shall not be subject to articles 101 to 114 of title 24, C.R.S.

**Source: L. 90:** Entire section added, p. 581, § 1, effective July 1. **L. 92:** (3)(b)(I) and (4)(b)(I) amended, p. 1808, § 1, effective March 19.

## ARTICLE 45

### Pinnacol Assurance

**Editor's note:** This article was numbered as article 6 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

8-45-101.	Pinnacol Assurance - creation - powers and duties.	8-45-107.	impose surcharges.
8-45-102.	Pinnacol Assurance fund created - control of fund.	8-45-108.	Basis of rates - reserve - surplus.
8-45-103.	Board to fix rates - chief executive officer to administer rates - sue and be sued - personal liability limited.	8-45-109.	Intentional misrepresentation by employer. (Repealed)
8-45-104.	Blanks furnished by state. (Repealed)	8-45-110.	Rate schedules posted. (Repealed)
8-45-105.	Places of employment classified - amount of premiums.	8-45-111.	Board to keep accounts - readjustment by board of rates. (Repealed)
8-45-106.	Insurance at cost - board may	8-45-112.	Portions of premiums paid carried to surplus.
		8-45-113.	Amendment of rates - distribution to policyholders.
			New policies issued - when.

8-45-114.	Adjustment of premiums. (Repealed)	8-45-121.	Visitation of fund by commissioner of insurance - annual audit - examination.
8-45-115.	Determination of premium - payment in advance - deductibles. (Repealed)	8-45-122.	Annual report.
8-45-116.	Reinsurance. (Repealed)	8-45-123.	Change of names - direction to revisor.
8-45-117.	Regulation by commissioner of insurance.	8-45-124.	Review of cost-effectiveness of use of national council on compensation insurance by the authority. (Repealed)
8-45-118.	Treasurer custodian of fund - disbursements.	8-45-125.	Legislative interim committee on operation of Pinnacol Assurance - creation - members - study - report - repeal. (Repealed)
8-45-119.	State treasurer to give separate bond as custodian.		
8-45-120.	State treasurer to invest funds.		

**8-45-101. Pinnacol Assurance - creation - powers and duties.** (1) There is hereby created Pinnacol Assurance, which shall be a political subdivision of the state and shall operate as a domestic mutual insurance company except as otherwise provided by law. Pinnacol Assurance shall not be an agency of state government, nor shall it be subject to administrative direction by any state agency except as provided in this article, and except for the purposes of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S. Pinnacol Assurance shall not be dissolved except by the general assembly. Section 10-12-411, C.R.S., shall not apply to Pinnacol Assurance.

(2) (a) The powers of Pinnacol Assurance shall be vested in the board of directors of Pinnacol Assurance, which shall have nine members. The members of the board shall be appointed by the governor with the consent of the senate. Of the nine members, four shall be employers whose liability under articles 40 to 47 of this title is insured by Pinnacol Assurance with one of such employers to be a farmer or rancher. Three of the nine members shall be employees of employers whose liability under articles 40 to 47 of this title is insured by Pinnacol Assurance. One of the nine members shall be experienced in the management and operation of insurance companies as defined in section 10-1-102 (6), C.R.S. Such member shall not concurrently serve as an owner, a shareholder, an officer, an employee, an agent of, or in any other capacity with any business which competes with Pinnacol Assurance. One of the nine members shall be experienced in finance or investments, but shall not be an employer whose liability under articles 40 to 47 of this title is insured by Pinnacol Assurance. The term of office for each such member shall be five years. The appointees may serve on a temporary basis if the senate is not in session when they are appointed until the senate is in session and is able to confirm such appointments. Vacancies on the board shall be filled by appointment of the governor for the remainder of any unexpired terms. The board shall elect a chairman annually from its membership.

(b) The members of the board who were serving as of January 1, 2002, shall continue to serve until the completion of each member's term. New members of the board shall be appointed pursuant to paragraph (a) of this subsection (2).

(c) The board shall have the powers, rights, and duties as set forth in this article and otherwise provided by law.

(3) Members of the board shall be compensated one hundred forty dollars per diem plus their actual and necessary expenses. Per diem compensation, not to exceed thirty days in any calendar year, shall be paid only when the board is transacting official business.

(4) On and after July 1, 2002, the powers, duties, and functions formerly exercised by the Colorado compensation insurance authority may be exercised by Pinnacol Assurance.

(5) The board shall:

(a) (I) Appoint the chief executive officer of Pinnacol Assurance who shall serve under contract and appoint, hire, or delegate the authority to hire such other staff as may be necessary to carry out the duties of Pinnacol Assurance.

(II) If an executive officer of Pinnacol Assurance is appointed pursuant to subparagraph (I) of this paragraph (a) and such executive officer appoints, hires, or delegates duties to any other staff necessary to carry out the duties of Pinnacol Assurance, and the executive officer or other staff receives total compensation, including bonuses or deferred compensation, in



an amount equal to or greater than one hundred fifty thousand dollars annually, such compensation information shall be a public record.

(b) Develop and approve an annual budget;

(c) Establish general policies and procedures for the operation and administration of Pinnacol Assurance;

(d) (Deleted by amendment, L. 2002, p. 1865, § 1, effective July 1, 2002.)

(e) Promulgate policies and procedures that establish the basis by which employer premiums payable to Pinnacol Assurance are determined. The board may establish different rates for employers who meet the requirements established by the board for any classification after complying with the requirements of part 4 of article 4 of title 10, C.R.S., so long as those rates are not excessive, inadequate, or unfairly discriminatory.

(f) Offer to provide workers' compensation insurance and employer's liability insurance covering any liability of Colorado employers on account of personal injuries sustained by, or the death of, any employee. Nothing in this article shall be interpreted to permit Pinnacol Assurance to provide any other type of insurance or to provide insurance to employers that are not Colorado employers. Pinnacol Assurance shall not refuse to insure any Colorado employer or cancel any insurance policy due to the risk of loss or amount of premium, except as otherwise provided in this title.

(g) Review and streamline administrative procedures;

(h) Oversee the operations and make necessary personnel changes;

(i) Review the investigative procedures and implement changes to expedite investigations;

(j) Review and recommend legislation pertaining to workers' compensation in articles 40 to 47 of this title and to clarify legal concepts related thereto;

(k) Review the method of calculation of the experience modification factor with the object of providing maximum incentives for job safety;

(l) Establish general policies and procedures by rule and regulation concerning medical care cost containment practices under articles 40 to 47 of this title; and

(m) Post the date, time, and location of each board meeting on the Pinnacol Assurance web site at least seven calendar days prior to the scheduled meeting.

(6) Article 4 of title 24, C.R.S., shall not apply to the promulgation of any policies or procedures authorized by subsection (5) of this section.

(7) Pinnacol Assurance may sell services, including but not limited to medical bill processing, that are developed pursuant to its powers under this article.

(8) Employees of Pinnacol Assurance shall be exempt from the state personnel system but shall, by acceptance of employment, be subject to the provisions of article 51 of title 24, C.R.S. Pinnacol Assurance shall provide for the deduction of employer and employee contributions from salary and for payment to the association of such deductions and for any other payments that would be due from a state employer.

(9) Notwithstanding any provision of law to the contrary, the claim files of injured employees, the policy files of employers, and all business records relating to the determination of rates that are not required to be disclosed by any other insurance company shall not be subject to the provisions of part 2 of article 72 of title 24, C.R.S.

(10) With respect to meetings of Pinnacol Assurance, matters relating to the claim files of injured employees and policy files of employers shall not be subject to the provisions of part 4 of article 6 of title 24, C.R.S.

(11) Pinnacol Assurance may enter into cooperative arrangements with any public or private entity for the purpose of carrying out its powers, duties, and functions. Nothing in this section shall require or be interpreted to require an employer to provide health insurance coverage for its employees.

(12) Notwithstanding the provisions of subsection (1) of this section, upon the attainment of a reasonable surplus as set forth in section 8-45-111, the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., shall not apply to Pinnacol Assurance.

(13) Any member of the board who owns at least ten percent of an entity that enters into a contract with Pinnacol Assurance shall disclose the board member's ownership interest in the entity. This disclosure shall be a public record.

**Source:** **L. 90:** Entire article R&RE, p. 531, § 1, effective July 1. **L. 91:** (8.5), (11), and (12) added, p. 1362, § 1, effective July 1. **L. 95:** (13) added, p. 987, § 1, effective May 25; (7)(b) amended, p. 636, § 16, effective July 1. **L. 96:** (1) amended, p. 1512, § 37, effective June 1. **L. 97:** (5)(e) and (11) amended and (5)(e.5) added, p. 935, § 1, effective May 21. **L. 2000:** (1) amended, p. 284, § 1, effective July 1. **L. 2002:** Entire section amended, p. 1865, § 1, effective July 1. **L. 2003:** (2)(a) amended, p. 614, § 5, effective July 1. **L. 2009:** (2)(c) amended, (SB 09-281), ch. 335, p. 1775, § 1, effective June 1. **L. 2010:** (5)(m) added, (HB 10-1009), ch. 273, p. 1255, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-54-102.5 as it existed prior to 1990.

**Cross references:** For the provisions that designate Pinnacol Assurance as a "special purpose authority" for the purposes of section 20 of article X of the Colorado constitution, see § 24-77-102 (15).

## ANNOTATION

**Terms in this section such as "body corporate" and "political subdivision of the state"** denote entities such as counties and municipalities and not entities that are arms of the state. They suggest that CCIA should not be treated as an arm of the state. *Simon v. State Compensation Ins. Auth.*, 946 P.2d 1298 (Colo. 1997).

**CCIA is sufficiently autonomous from the state to be considered a "person" under 42**

**U.S.C. § 1983:** it is clear that the legislature intended to create the equivalent of a private insurance company in creating CCIA. *Simon v. State Compensation Ins. Auth.*, 946 P.2d 1298 (Colo. 1997).

**Annotator's note.** CCIA is now Pinnacol Assurance (see § 8-45-123).

**8-45-102. Pinnacol Assurance fund created - control of fund.** (1) There is hereby created in the state treasury a fund, to be known as the Pinnacol Assurance fund, for the benefit of injured and the dependents of killed employees, which shall be administered in accordance with the provisions of this article by the board. Such administration shall be without liability on the part of the state, beyond the amount of said fund, constituted as provided in this article. The state shall have no liability for the solvency or financial condition of the fund.

(2) The chief executive officer is vested with full power and jurisdiction over the administration of Pinnacol Assurance and may appoint such subordinate officers as may be necessary for the efficient operation of Pinnacol Assurance and may do and perform all things, whether specifically designated in this article or in addition thereto, that are necessary or convenient in the exercise of any power or jurisdiction over Pinnacol Assurance in the administration thereof under the provisions of this article as fully and completely as the head of a private insurance company might or could do, subject, however, to all the provisions of this article and other applicable law.

(3) Control of all moneys in the Pinnacol Assurance fund shall be transferred to the board, which shall administer the fund and use such moneys for the purposes of this article.

(4) The Pinnacol Assurance fund shall be a continuing fund and shall consist of all premiums received and paid into said fund for compensation insurance, all property and securities acquired by and through the use of moneys belonging to said fund, and all interest earned upon moneys belonging to said fund and deposited or invested. Said fund shall be applicable to the payment of the salaries of the employees of the fund and to its other operating expenses and to the payment of losses sustained or liabilities incurred under the contracts or policies of insurance issued by Pinnacol Assurance in accordance with the provisions of articles 40 to 47 of this title. All moneys in the fund previously known as the Colorado compensation insurance authority fund shall be transferred into the Pinnacol Assurance fund on July 1, 2002.

(5) The moneys in the Pinnacol Assurance fund shall be continuously available for the purposes of this article and shall not be transferred to or revert to the general fund of the state at the end of any fiscal year. All revenues, moneys, and assets of Pinnacol Assurance



belong solely to Pinnacol Assurance. The state of Colorado has no claim to nor any interest in such revenues, moneys, and assets and shall not borrow, appropriate, or direct payments from such revenues, moneys, and assets for any purpose.

**Source:** L. 90: Entire article R&RE, p. 533, § 1, effective July 1. L. 2002: Entire section amended, p. 1869, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-54-102 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-45-102 is similar to § 8-54-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**The liability of the state compensation insurance fund is limited by statute.** Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

**And this liability of the state compensation insurance fund is for the payment of claims for injuries to employees who are covered by**

the state workmen's compensation law. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

**Furthermore, this liability of the state compensation insurance fund presupposes an injury to an employee arising out of his employment.** Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

**And this liability is exclusively to be determined** in administrative proceedings on a claim filed pursuant to law. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

**8-45-103. Board to fix rates - chief executive officer to administer rates - sue and be sued - personal liability limited.** (1) The board shall have full power and it is its duty to fix and determine the rates to be charged by Pinnacol Assurance for compensation insurance.

(2) The chief executive officer shall manage and conduct all business and affairs in relation to the rates to be charged by Pinnacol Assurance for compensation insurance which shall be conducted in the name of Pinnacol Assurance, and in that name, without any other name, title, or authority, the chief executive officer may:

(a) (I) Sue and be sued in all the courts of this state, or of any other state, or of the United States, and in actions arising out of any act, deed, matter, or thing made, omitted, entered into, done, or suffered in connection with Pinnacol Assurance and the administration, management, or conduct of the business or affairs relating thereto; and the chief executive officer shall be authorized to employ counsel to represent Pinnacol Assurance in any action.

(II) Nothing in this paragraph (a) shall be construed to waive any provisions of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., nor shall it be construed to waive immunity of the state of Colorado from suit in federal court, guaranteed by the eleventh amendment to the constitution of the United States.

(b) The chief executive officer shall not, nor shall any officer or employee of Pinnacol Assurance, or entities or parties with whom it contracts for services, be personally liable in a private capacity for or on account of any act done or omitted or contract or other obligation entered into or undertaken in an official capacity in good faith and without intent to defraud in connection with the administration, management, or conduct of Pinnacol Assurance, its business, or other affairs relating thereto.

(c) (Deleted by amendment, L. 2002, p. 1870, § 3, effective July 1, 2002.)

**Source:** L. 90: Entire article R&RE, p. 534, § 1, effective July 1. L. 2002: Entire section amended, p. 1870, § 3, effective July 1.

**Editor's note:** This section is similar to former § 8-54-105 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-45-103 is similar to § 8-45-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**Under this section the manager of the state compensation insurance fund is authorized to enter into contracts of insurance with employers.** *Indus. Comm'n v. Spoo*, 151 Colo. 581, 380 P.2d 49 (1963).

State fund may enter into contracts with employers which contracts may cover a number of details, including that of cancellation, not set forth by statute so long as they conform with the public policy of this state. *Dye Const. Co. v. Indus. Comm'n*, 678 P.2d 1066 (Colo. App. 1983).

Contract provisions for cancellation are valid unless in conflict with the terms of an applicable statute. *Dye Const. Co. v. Indus. Comm'n*, 678 P.2d 1066 (Colo. App. 1983).

An unequivocal agreement contained in a policy, by which either party may cancel the contract, is binding between the parties, because the parties to an insurance contract validly may contract as they please with respect to cancellation. *Dye Const. Co. v. Indus. Comm'n*, 678 P.2d 1066 (Colo. App. 1983).

**No statutory requirement that the fund accept each and every application for insurance.** Implicit in the fund's authority to make and enter into contracts of insurance with employers is the power or authority to reject an application if the fund has a legitimate basis for doing so. *Bastian v. Martinez*, 698 P.2d 1373 (Colo. App. 1984).

**The failure of the state compensation insurance fund to specify the time of effective cancellation of coverage** results in the policy coverage being in effect until midnight of the date of cancellation. *State Comp. Ins. Fund v. Bldg. Sys.*, 713 P.2d 940 (Colo. App. 1985).

#### 8-45-104. Blanks furnished by state. (Repealed)

**Source:** L. 90: Entire article R&RE, p. 535, § 1, effective July 1. L. 2002: Entire section repealed, p. 1871, § 4, effective July 1.

**Editor's note:** Prior to its repeal in 2002, this section was similar to former § 8-54-126 as it existed prior to 1990.

**8-45-105. Places of employment classified - amount of premiums.** (1) The board may classify the places of employment of employers insured by Pinnacol Assurance into classes in accordance with the nature of the business in which they are engaged and the probable hazard or risk of injury to their employees. It shall determine the amount of the premiums that such employers shall pay to Pinnacol Assurance, and may prescribe in what manner such premiums shall be paid, and may change the amount thereof both in respect to any or all of such employers as circumstances may require, and the condition of their respective plants, establishments, or places of work in respect to the safety of their employees may justify. All such premiums shall be levied on a basis that shall be fair, equitable, and just as among such employers.

(2) (Deleted by amendment, L. 2002, p. 1871, § 5, effective July 1, 2002.)

**Source:** L. 90: Entire article R&RE, p. 535, § 1, effective July 1. L. 2002: Entire section amended, p. 1871, § 5, effective July 1.

**Editor's note:** This section is similar to former § 8-54-107 as it existed prior to 1990.

**8-45-106. Insurance at cost - board may impose surcharges.** (1) It is the duty of the board, in the exercise of the powers and discretion conferred upon it by articles 40 to 47 of this title, ultimately to fix and maintain, for each class of occupation, the lowest possible rates of premium consistent with the maintenance of a solvent Pinnacol Assurance fund, and the creation and maintenance of a reasonable surplus after the payment of legitimate claims for injury and death, that may be authorized to be paid from the Pinnacol Assurance fund for the benefit of injured and dependents of killed employees.



(2) The board may impose a premium surcharge, not to exceed an additional fifty percent, for up to twelve continuous months, as a condition precedent to insure or reinsure an employer whose policy was canceled or terminated by any insurer for reasons of fraud or intentional misrepresentation of a material fact; except that, if an employer disputes the imposition of such surcharge, the employer may make a complaint to the commissioner of insurance. If the commissioner of insurance determines that the board, in imposing a premium surcharge, has engaged in any conduct in violation of part 11 of article 3 of title 10, C.R.S., the commissioner may take any action the commissioner deems appropriate and authorized by law.

**Source:** L. 90: Entire article R&RE, p. 536, § 1, effective July 1. L. 97: Entire section amended, p. 936, § 2, effective May 21. L. 2002: (1) amended, p. 1872, § 6, effective July 1.

**Editor's note:** This section is similar to former § 8-54-109 as it existed prior to 1990.

**8-45-107. Basis of rates - reserve - surplus.** (1) The rates shall be the percentage of the payroll of any employer that, on the average, shall produce a sufficient sum to:

(a) Carry all claims to maturity such that the rates shall be based upon the reserve and not upon the assessment plan;

(b) Produce a reasonable surplus as provided in articles 40 to 47 of this title, cover the catastrophe hazard, and ensure the payment to employees and their dependents of the compensation provided in said articles.

(2) In determining the amount of reserve to be laid aside to meet deferred payments according to awards, such reserve may be ascertained by finding the present worth of such deferred medical and indemnity payments calculated at a rate of interest not higher than six percent per annum, and such calculations of disability indemnity benefits shall be made according to a table of mortality not lower than the American experience table of mortality and, in the discretion of the board, by such other and further methods as will result in the establishment of adequate reserves.

(3) The amounts raised for the Pinnacol Assurance fund shall ultimately become neither more nor less than necessary to make the fund self-supporting, which includes the attainment and maintenance of an adequate surplus as determined in accordance with section 8-45-111, and the premiums or rates levied for such purpose shall be subject to readjustment from time to time by the board as may become necessary.

**Source:** L. 90: Entire article R&RE, p. 536, § 1, effective July 1. L. 91: (3) amended, p. 1362, § 2, effective July 1. L. 2002: Entire section amended, p. 1872, § 7, effective July 1.

**Editor's note:** This section is similar to former § 8-54-110 as it existed prior to 1990.

#### **8-45-108. Intentional misrepresentation by employer. (Repealed)**

**Source:** L. 90: Entire article R&RE, p. 536, § 1, effective July 1. L. 94: Entire section repealed, p. 1719, § 15, effective July 1.

**Editor's note:** Prior to its repeal in 1994, this section was similar to former § 8-54-125 as it existed prior to 1990.

#### **8-45-109. Rate schedules posted. (Repealed)**

**Source:** L. 90: Entire article R&RE, p. 536, § 1, effective July 1. L. 2002: Entire section repealed, 1873, § 8, effective July 1.

**Editor's note:** Prior to its repeal in 2002, this section was similar to former § 8-54-127 as it existed prior to 1990.

**8-45-110. Board to keep accounts - readjustment by board of rates. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 537, § 1, effective July 1. **L. 2002:** Entire section repealed, p. 1873, § 9, effective July 1.

**Editor's note:** Prior to its repeal in 2002, this section was similar to former § 8-54-111 as it existed prior to 1990.

**8-45-111. Portions of premiums paid carried to surplus.** The board shall set aside such proportion as it may deem necessary of the earned premiums paid into the Pinnacol Assurance fund, as a contribution to the surplus of the fund.

**Source:** **L. 90:** Entire article R&RE, p. 537, § 1, effective July 1. **L. 97:** Entire section amended, p. 936, § 3, effective May 21. **L. 2002:** Entire section amended, p. 1873, § 10, effective July 1. **L. 2003:** Entire section amended, p. 2201, § 4, effective July 1. **L. 2010:** Entire section amended, (HB 10-1220), ch. 197, p. 854, § 15, effective July 1.

**Editor's note:** This section is similar to former § 8-54-112 as it existed prior to 1990.

**8-45-112. Amendment of rates - distribution to policyholders.** The board may amend at any time the rates for any class. No contract of insurance between Pinnacol Assurance and any employer shall be in effect until a policy or binder has been actually issued by the board and the premium therefor paid as and when required by this article. Not less often than once a year the chief executive officer shall tabulate the earned premiums paid by policyholders of Pinnacol Assurance. Should the experience of the Pinnacol Assurance fund show a credit balance and after payment of all amounts that have fallen due because of operating expenses, injury, or death, and after setting aside proper reserves, the board shall distribute such credit balance to the policyholders who have a balance to their credit in proportion to the premium paid and losses incurred by each such policyholder during the preceding insurance period. In the event any such policyholder fails to renew a policy with Pinnacol Assurance for the period following the period in which said dividends were earned, said policyholder shall be entitled to said credit dividend if such policy is terminated in good standing. In the event an employer actually discontinues business, said employer's policy shall be cancelled, and the dividend, if any, when ascertained, shall be returned to the employer.

**Source:** **L. 90:** Entire article R&RE, p. 537, § 1, effective July 1. **L. 2002:** Entire section amended, p. 1873, § 11, effective July 1.

**Editor's note:** This section is similar to former § 8-54-113 as it existed prior to 1990.

**8-45-113. New policies issued - when.** Pinnacol Assurance shall not be required to issue a new policy of insurance to an employer until all moneys due Pinnacol Assurance have been paid, all premiums have been paid on all cancelled policies, and the employer has complied with all provisions of such cancelled policies.

**Source:** **L. 90:** Entire article R&RE, p. 537, § 1, effective July 1. **L. 93:** Entire section amended, p. 61, § 1, effective March 22. **L. 95:** Entire section amended, p. 63, § 1, effective March 23. **L. 97:** (1)(c) added, p. 936, § 4, effective May 21. **L. 2002:** Entire section R&RE, p. 1874, § 12, effective July 1.

**Editor's note:** This section is similar to former § 8-54-114 as it existed prior to 1990.



## ANNOTATION

**Annotator's note.** Since § 8-45-113 is similar to § 8-45-113 as it existed prior its 2002 repeal and reenactment and to § 8-54-114 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing those provisions have been included in the annotations to this section.

**The state fund is authorized to cancel a policy,** without notice and as of its effective date, if the employer's payment therefor is in arrears for more than 20 days. *Chevron Oil Co. v. Indus. Comm'n*, 169 Colo. 336, 456 P.2d 735 (1969).

**Method of cancellation not exclusive.** Although a method of cancellation is provided by

statute, unless it is manifestly all-inclusive, the statute, in specifying the instances under which a party to an insurance contract may cancel, does not make such cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law. *Dye Const. Co. v. Indus. Comm'n*, 678 P.2d 1066 (Colo. App. 1983).

**The term "any policy" in subsection (1) includes binders as well as formal policies.** Coverage did not lapse because premium was paid within the 30-day grace period. *Southeastern Colo. Homeless Center v. West*, 843 P.2d 117 (Colo. App. 1992).

**8-45-114. Adjustment of premiums. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 538, § 1, effective July 1. **L. 2002:** Entire section repealed, p. 1874, § 13, effective July 1.

**Editor's note:** Prior to its repeal in 2002, this section was similar to former § 8-54-115 as it existed prior to 1990.

**8-45-115. Determination of premium - payment in advance - deductibles. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 538, § 1, effective July 1. **L. 94:** (1) amended, p. 1286, § 3, effective May 22. **L. 2002:** Entire section repealed, p. 1874, § 14, effective July 1.

**Editor's note:** Prior to its repeal in 2002, this section was similar to former § 8-54-116 as it existed prior to 1990.

**8-45-116. Reinsurance. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 539, § 1, effective July 1. **L. 95:** Entire section amended, p. 987, § 2, effective May 25. **L. 2002:** Entire section repealed, p. 1875, § 15, effective July 1.

**Editor's note:** Prior to its repeal in 2002, this section was similar to former § 8-54-120 as it existed prior to 1990.

**8-45-117. Regulation by commissioner of insurance.** (1) Pinnacol Assurance shall be subject to regulation by the commissioner of insurance as provided in:

(a) Part 11 of article 3 of title 10, C.R.S., pertaining to unfair competition and deceptive practices;

(b) Part 4 of article 4 of title 10, C.R.S., pertaining to rate regulation; however, if the pure premium rates used by Pinnacol Assurance are the national council on compensation insurance rates previously approved by the commissioner of insurance, Pinnacol Assurance may use different pure premium rates for employers who meet the requirements established by the board of directors after complying with the requirements of part 4 of article 4 of title 10, C.R.S., concerning type II insurers;

(c) Sections 24-31-104.5, C.R.S.; 10-1-108 (7), 10-1-109, and 10-1-102, except subsections (3) and (6), C.R.S.; 10-1-205 (1) to (6) and (8), C.R.S.; 10-3-109, C.R.S., except

for the publication requirements; 10-3-118, C.R.S.; 10-3-128, C.R.S.; 10-3-202, C.R.S.; 10-3-207, C.R.S.; 10-3-208, C.R.S.; 10-3-231, C.R.S.; 10-3-239, C.R.S.; 10-3-701, C.R.S.; and part 8 of article 3 of title 10, C.R.S., except as these sections are inconsistent with the provisions of this article.

(2) (Deleted by amendment, L. 97, p. 936, § 5, effective May 21, 1997.)

(3) Nothing in this section shall be construed to subject Pinnacol Assurance to any premium tax assessed pursuant to title 10, C.R.S.

(4) The cost of examinations performed in accordance with section 8-45-121 (4) shall be billed by the commissioner to Pinnacol Assurance at prevailing hourly rates based upon time records kept by the commissioner. Any such payment received by the commissioner is hereby appropriated to the division of insurance in addition to any other funds appropriated for its normal operation.

(5) At such time as a reasonable surplus of the Pinnacol Assurance fund is reached pursuant to section 8-45-111, Pinnacol Assurance shall be subject to regulation by the commissioner of insurance as provided in section 10-1-205 (7) and part 4 of article 3 of title 10, C.R.S., to the extent consistent with the provisions of this article.

(6) Notwithstanding the provisions of sections 8-45-102 (1) and 8-45-118, upon the attainment of a reasonable surplus as set forth in section 8-45-111 and verified by audit and examination performed in accordance with section 8-45-121, all of the moneys in the Pinnacol Assurance fund shall be transferred out of the state treasury and into the custody of the board of Pinnacol Assurance. The board shall thereafter control the investment of the fund pursuant to the requirements set forth in part 2 of article 3 of title 10, C.R.S.

(7) Notwithstanding the provisions of sections 8-45-102 (1) and 8-45-118, upon the transfer of the moneys in the Pinnacol Assurance fund in accordance with subsection (6) of this section, the board of Pinnacol Assurance shall make all disbursements, and such disbursements shall not be made upon state warrants.

(8) Notwithstanding the provisions of sections 8-45-102 (1) and 8-45-119, upon the transfer of the moneys in the Pinnacol Assurance fund in accordance with subsection (6) of this section, the state treasurer shall not be required to give any bond as custodian of the Pinnacol Assurance fund.

(9) After the transfer of the moneys in the Pinnacol Assurance fund in accordance with subsection (6) of this section, if the commissioner of insurance places Pinnacol Assurance under direct supervision pursuant to the provisions of section 10-3-405, C.R.S., the moneys in the Pinnacol Assurance fund may be transferred back to the custody of the state treasury pursuant to sections 8-45-102 (1), 8-45-118, and 8-45-119, and the state treasurer shall control the investment of the fund pursuant to section 8-45-120. The transfer of funds shall be under such conditions and within such time period as the state treasurer and the commissioner of insurance deem appropriate.

(10) Pinnacol Assurance shall not acquire or control any other insurer.

**Source:** L. 90: Entire article R&RE, p. 539, § 1, effective July 1. L. 97: (1), (2), and (4) amended and (5) added, p. 936, § 5, effective May 21. L. 2002: (1)(c) amended, p. 1012, § 4, effective June 1; IP(1), (1)(b), (3), (4), and (5) amended and (6), (7), (8), (9), and (10) added, p. 1875, § 16, effective July 1. L. 2003: (1)(c) amended, p. 615, § 6, effective July 1. L. 2004: (1)(c) amended, p. 1058, § 1, effective July 1. L. 2010: (1)(c) amended, (HB 10-1385), ch. 204, p. 883, § 2, effective May 5; (5) amended, (HB 10-1220), ch. 197, p. 854, § 16, effective July 1. L. 2012: (1)(c) amended, (SB 12-110), ch. 158, p. 560, § 4, effective July 1.

**Editor's note:** This section is similar to former § 8-54-124.5 as it existed prior to 1990.

**8-45-118. Treasurer custodian of fund - disbursements.** (1) The state treasurer shall be the custodian of the Pinnacol Assurance fund, and all disbursements therefrom shall be paid either by the state treasurer upon warrants drawn in accordance with law upon vouchers issued by the board upon order of the chief executive officer, or by or under the direction of the chief executive officer in such other manner as the state treasurer may approve. In every case occurring in which a warrant has been drawn in accordance with law



against the state treasurer upon vouchers issued by the board for payment of any sum of money from the Pinnacol Assurance fund, or when another form of payment has been made from such fund by or under the direction of the chief executive officer, and the time within which said warrant or other form of payment shall be presented for payment in order to be valid has not been stamped, printed, or written across the face thereof, or otherwise specified, and a period of six months has elapsed since the issuance of such warrant or other form of payment, during which no person entitled thereto, or the proceeds thereof, has presented the same to the state treasurer for payment, or appeared to claim the funds so authorized to be paid from the hands of the state treasurer or the chief executive officer, such warrant or other form of payment may in the discretion of the chief executive officer be posted for cancellation, and thereafter cancelled and set aside.

(2) In every such case in which it is proposed to cancel any such warrant, the chief executive officer shall cause a notice to be drawn in duplicate, with a description of said warrant containing the amount, number, date of issuance, and name of payee, and shall cause one copy of said notice to be posted in a conspicuous place that is open to the public in the office of said board and one copy to be delivered to the state treasurer. If, at the end of one month after the posting of such notice and the delivery of a copy to the state treasurer, such warrant is not presented for payment and no person entitled to the proceeds thereof appears to claim the funds so authorized to be paid in said warrant, said warrant may be cancelled as provided in this section.

(3) (a) The state treasurer shall, upon the request of the chief executive officer, transfer any such funds held to the credit of or for the payment of such warrant back to the credit of the Pinnacol Assurance fund. Except as otherwise provided in paragraph (b) of this subsection (3), if at any time thereafter application shall be made for the reissuance of such warrant, the same may be reissued, if the claim that it represents appears to be valid and still outstanding. Such reissued warrant shall be made payable from the moneys on deposit in the Pinnacol Assurance fund and shall be made payable to the person entitled to the proceeds thereof.

(b) For warrants issued on or after August 6, 2003, the funds transferred pursuant to paragraph (a) of this subsection (3) shall be subject to the provisions of the "Unclaimed Property Act", article 13 of title 38, C.R.S., and for purposes of this paragraph (b), Pinnacol Assurance shall be considered an insurance company as defined in section 38-13-102 (6.5), C.R.S.

(4) Except as provided in section 8-45-117, the powers and discretion granted in this section to the chief executive officer and the state treasurer shall obtain in all cases relating to the warrants or other forms of payment drawn on the Pinnacol Assurance fund, anything to the contrary in any statute notwithstanding.

**Source:** L. 90: Entire article R&RE, p. 539, § 1, effective July 1. L. 95: (1) and (4) amended, p. 987, § 3, effective May 25. L. 2002: Entire section amended, p. 1876, § 17, effective July 1. L. 2003: (3) amended, p. 721, § 1, effective August 6.

**Editor's note:** This section is similar to former § 8-54-121 as it existed prior to 1990.

**8-45-119. State treasurer to give separate bond as custodian.** (1) The state treasurer shall give a separate and additional bond in such amount as may be fixed by the board with sureties to be approved by the governor, conditioned for the faithful performance of the state treasurer's duties as custodian of the Pinnacol Assurance fund, and as custodian of all the bonds, warrants, investments, and moneys of, or belonging to, said Pinnacol Assurance fund, subject to all provisions of law governing bonds of the state treasurer. The premium on said bond shall be paid out of the earnings of the Pinnacol Assurance fund.

(2) The state treasurer shall give a separate and additional bond in such amount as may be fixed by the executive director of the department of labor and employment with sureties to be approved by the governor, conditioned for the faithful performance of the state treasurer's duties as custodian of the funds under the jurisdiction of the director of the division of workers' compensation, and as custodian of all the bonds, warrants, investments, and moneys of, or belonging to, the funds under the jurisdiction of the director of the

division of workers' compensation, subject to all provisions of law governing bonds of the state treasurer. The premium on said bond shall be paid out of the earnings of the funds under the jurisdiction of the director of the division of workers' compensation on a pro rata basis.

**Source:** L. 90: Entire article R&RE, p. 540, § 1, effective July 1. L. 2002: (1) amended, p. 1877, § 18, effective July 1.

**Editor's note:** This section is similar to former § 8-54-123 as it existed prior to 1990.

**8-45-120. State treasurer to invest funds.** (1) Except as provided in subsection (2) of this section, the state treasurer, after consulting with the board of directors or the board's designated committee as to the overall direction of the portfolio, shall invest any portion of the Pinnacol Assurance fund, including its surplus or reserves, which is not needed for immediate use. Such moneys may be invested in the types of investments authorized in sections 24-36-109, 24-36-112, and 24-36-113, C.R.S. Such moneys may also be invested in common and preferred stock in the same manner as a domestic insurance company pursuant to section 10-3-226, C.R.S. The state treasurer shall determine the appropriate percentage of the fund, not to exceed one hundred percent of the surplus, to be invested in common and preferred stock and the appropriate level of risk for such investments. The state treasurer may make such investments in the form of mutual funds and may contract with private professional fund managers and employ portfolio managers.

(2) Subject to approval by the board, the chief executive officer may authorize and direct the state treasurer to invest a portion of the funds in the Pinnacol Assurance fund for the purchase of real property, to house, contain, and maintain the offices and operational facilities of Pinnacol Assurance as may be deemed necessary to accommodate its immediate and reasonably anticipated future needs. The chief executive officer is authorized to purchase such real property, buildings, and improvements thereon. Title to such real property, buildings, and improvements thereon shall vest in Pinnacol Assurance, and such assets shall be a part of the Pinnacol Assurance fund. The chief executive officer may lease or rent space not needed for the immediate requirements of Pinnacol Assurance in such real property to other public agencies or private businesses. Moneys received from such rental or lease of space and moneys appropriated by the general assembly for rental or lease of space in such real property shall be deposited with the state treasurer for credit to the Pinnacol Assurance fund. The chief executive officer shall not sell or otherwise dispose of any property, buildings, or improvements thereon so acquired, without consent of the board, and the moneys received from such sale or disposition shall be credited to the account of the Pinnacol Assurance fund.

(3) Repealed.

**Source:** L. 90: Entire article R&RE, p. 540, § 1, effective July 1. L. 92: (3) amended, p. 1112, § 1, effective July 1. L. 97: (1) amended, p. 938, § 6, effective May 21; (3) repealed, p. 376, § 7, effective August 6. L. 2002: (1) and (2) amended, p. 1878, § 19, effective July 1.

**Editor's note:** This section is similar to former § 8-54-122 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** (1) Since § 8-45-120 is similar to § 8-54-122 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that

provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986



Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this article to the board of directors of the state compensation insurance authority.

**Treasurer to obey commission and invest as directed by it.** Full control of the fund is given to the commission; the custodian is authorized to do nothing with it except upon their order, and his investment of it is restricted. Nothing is required of the treasurer by this section but to obey the commission and invest as

directed at the market price. *Stong v. Indus. Comm'n*, 71 Colo. 133, 204 P. 892 (1922).

**Mandamus of state treasurer does not waive commission's right to sue for damages.** In an action in mandamus against the state treasurer by the industrial commission to compel the former to invest state insurance funds as directed, the commission by electing to sue in mandamus did not waive its right to sue for damages occasioned by failure of the treasurer to act as directed. *Indus. Comm'n v. Stong*, 77 Colo. 590, 239 P. 12 (1925).

**8-45-121. Visitation of fund by commissioner of insurance - annual audit - examination.** (1) Pinnacol Assurance shall be open to visitation by the commissioner of insurance at all reasonable times, and the commissioner of insurance shall require from the chief executive officer reports as to the condition of Pinnacol Assurance, as required by law to be made by other insurance carriers doing business in this state insofar as applicable to Pinnacol Assurance.

(2) An annual financial audit and, in 2009, a performance audit of Pinnacol Assurance shall be made as soon as practicable by the state auditor, such audits to include, but not be limited to, executive compensation, premium rate structure, known loss reserves, incurred but not reported losses, and injured workers' claims experience. In conducting such audits, the state auditor may employ a firm of auditors and actuaries, or both, with the necessary specialized knowledge and experience. The cost of such annual audit shall be paid from the operating funds of Pinnacol Assurance. The state auditor shall report his or her findings from such audits, along with any comments and recommendations, to the governor, the general assembly, the executive director of the department of labor and employment, and the commissioner of insurance. The state auditor shall have continuing authority to conduct performance audits of Pinnacol Assurance as the state auditor deems appropriate. The cost of performance audits shall be paid from the operating funds of Pinnacol Assurance.

(3) (Deleted by amendment, L. 2002, p. 1879, § 20, effective July 1, 2002.)

(4) At least once every three years, the commissioner of insurance shall conduct an examination of said fund, such examination to be conducted in the same manner as an examination of a private insurance carrier. With respect to such examination, the provisions of section 10-1-204, C.R.S., shall be applicable. The commissioner of insurance shall transmit a copy of the commissioner's examination to the governor, the state auditor, the general assembly, the executive director of the department of labor and employment, and the chief executive officer.

**Source:** **L. 90:** Entire article R&RE, p. 541, § 1, effective July 1. **L. 97:** (2) amended, p. 1475, § 13, effective June 3. **L. 2002:** Entire section amended, p. 1879, § 20, effective July 1. **L. 2009:** (2) amended, (SB 09-281), ch. 335, p. 1775, § 2, effective June 1.

**Editor's note:** This section is similar to former § 8-54-124 as it existed prior to 1990.

**8-45-122. Annual report.** (1) The chief executive officer of Pinnacol Assurance shall submit an annual report to the governor; the business affairs and labor committee of the house of representatives; the business, labor, and technology committee of the senate; and the health and human services committees of the house of representatives and the senate, or their successor committees, reporting on the business operations, resources, and liabilities of the Pinnacol Assurance fund.

(2) The report required in subsection (1) of this section shall include the following information for the previous calendar year:

- (a) The number of policies held by Pinnacol Assurance;
- (b) The total assets of Pinnacol Assurance;
- (c) The amount of reserves;
- (d) The amount of surplus;

- (e) The number of claims filed;
- (f) The number of claims admitted or contested within the twenty-day period pursuant to section 8-43-203, specifying the number of contested claims that are medical only and those that are indemnity claims;
- (g) The number of medical procedures denied;
- (h) The amount of total compensation each executive officer or staff member receives, including bonuses or deferred compensation;
- (i) The amount spent on commissions;
- (j) The amount paid to trade associations for marketing fees;
- (k) All information relating to bonus programs; and
- (l) Any other information the chief executive officer deems relevant to the report.

**Source:** **L. 90:** Entire article R&RE, p. 542, § 1, effective July 1. **L. 97:** Entire section repealed, p. 1475, § 14, effective June 3. **L. 2010:** Entire section RC&RE, (SB 10-013), ch. 303, p. 1434, § 2, effective July 1.

**Editor's note:** This section is similar to former § 8-54-104.5 as it existed prior to 1990.

**8-45-123. Change of names - direction to revisor.** The revisor of statutes is authorized to change all references to the Colorado compensation insurance authority in the "Workers' Compensation Act of Colorado" and everywhere else a reference is contained in the Colorado Revised Statutes to Pinnacol Assurance and to change all references to the Colorado compensation insurance authority fund in the "Workers' Compensation Act of Colorado" and everywhere else a reference is contained in the Colorado Revised Statutes to the Pinnacol Assurance fund.

**Source:** **L. 90:** Entire article R&RE, p. 542, § 1, effective July 1. **L. 2002:** Entire section amended, p. 1879, § 21, effective July 1.

**8-45-124. Review of cost-effectiveness of use of national council on compensation insurance by the authority. (Repealed)**

**Source:** **L. 91:** Entire section added, p. 1363, § 3, effective July 1.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 1992. (See L. 91, p. 1363.)

**8-45-125. Legislative interim committee on operation of Pinnacol Assurance - creation - members - study - report - repeal. (Repealed)**

**Source:** **L. 2009:** Entire section added, (SB 09-281), ch. 335, p. 1776, § 3, effective June 1.

**Editor's note:** Subsection (8) provided for the repeal of this section, effective July 1, 2011. (See L. 2009, p. 1776.)

## ARTICLE 46

### Specific Insurance Funds

**Editor's note:** This article was numbered as article 7 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.



PART 1		8-46-204.	Use of funds limited. (Repealed)
SUBSEQUENT INJURY FUND		8-46-205.	Collection of taxes due.
8-46-101.	Subsequent injury fund.	8-46-206.	Enforcement powers - violations.
8-46-102.	Funding for subsequent injury fund and major medical insurance fund.	8-46-207.	Receipt and disbursement of moneys. (Repealed)
8-46-103.	State treasurer to invest funds.	8-46-208.	Applications - awards.
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8-46-105.	Calculation of premium - permanent total disability - employer may request examination.	8-46-210.	State treasurer to invest funds.
		8-46-211.	Abatement of tax - when. (Repealed)
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PART 2		PART 3	
8-46-106.	Abatement of taxes - independent review of fund.	COLORADO MEDICAL DISASTER INSURANCE FUND	
8-46-107.	Report to general assembly and governor. (Repealed)	8-46-301.	Short title.
8-46-108.	Legislative council study of subsequent injury fund. (Repealed)	8-46-302.	Medical disaster insurance fund - tax imposed - returns.
8-46-109.	Legislative declaration - claims management.	8-46-303.	Use of funds limited.
PART 2		8-46-304.	Enforcement powers - violations.
COLORADO MAJOR MEDICAL INSURANCE FUND ACT		8-46-305.	Receipt and disbursement of moneys.
8-46-201.	Short title.	8-46-306.	Applications - medical panel - awards - limitations.
8-46-202.	Major medical insurance fund - tax imposed - returns.	8-46-307.	Credit for reduced disability - when.
8-46-203.	Failure to make returns. (Repealed)	8-46-308.	State treasurer to invest funds.
		8-46-309.	Authority to utilize other revenue.

## PART 1

## SUBSEQUENT INJURY FUND

**8-46-101. Subsequent injury fund.** (1) (a) In a case where an employee has previously sustained permanent partial industrial disability and in a subsequent injury sustains additional permanent partial industrial disability and it is shown that the combined industrial disabilities render the employee permanently and totally incapable of steady gainful employment and incapable of rehabilitation to steady gainful employment, then the employer in whose employ the employee sustained such subsequent injury shall be liable only for that portion of the employee's industrial disability attributable to said subsequent injury, and the balance of compensation due such employee on account of permanent total disability shall be paid from the subsequent injury fund as is provided in this section.

(b) (I) In addition to such compensation and after the completion of the payments therefor, the employee shall continue to receive compensation at said employee's established compensation rate for permanent total disability until death out of a special fund to be known as the subsequent injury fund, hereby created for such purpose. The subsequent injury fund shall be funded pursuant to the provisions of section 8-46-102.

(II) The unrestricted year-end balance of the subsequent injury fund, created pursuant to subparagraph (I) of this paragraph (b), for the 1991-92 fiscal year shall constitute a reserve, as defined in section 24-77-102 (12), C.R.S., and, for purposes of section 24-77-103, C.R.S.:

(A) Any moneys credited to the subsequent injury fund in any subsequent fiscal year shall be included in state fiscal year spending, as defined in section 24-77-102 (17), C.R.S.; and

(B) Any transfers or expenditures from the subsequent injury fund in any subsequent fiscal year shall not be included in state fiscal year spending, as defined in section 24-77-102 (17), C.R.S., for such fiscal year.

(1.5) Notwithstanding any provision of this section to the contrary, on May 1, 2003, the state treasurer shall deduct twenty million dollars from the subsequent injury fund and transfer such sum to the general fund.

(1.7) Notwithstanding any provision of this section to the contrary, on March 30, 2009, the state treasurer shall deduct twenty-six million five hundred thousand dollars from the subsequent injury fund and transfer such sum to the general fund.

(2) If an employee entitled to additional benefits, as provided in this section, obtains employment while receiving compensation from the subsequent injury fund, such employee shall be compensated out of said fund at the rate of one-half of said employee's average weekly wage loss, subject to the maximum and minimum provisions of the workers' compensation act, during such period of employment.

(3) In case payment is or has been made under the provisions of this section and dependency later is shown or if payment is made by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the division is authorized to refund such payment to the employer or, if insured, the employer's insurance carrier.

(4) (a) The sums provided for the subsequent injury fund created by this section shall be used to pay the costs related to the administration of the fund and to make such compensation payments as may be required by the provisions of articles 40 to 47 of this title.

(b) Moneys in the subsequent injury fund are continuously appropriated to the division for the payment of benefits as provided in this section and legal fees.

(5) The director shall administer and conduct all matters involving the subsequent injury fund in the name of the division, and, in that name and without any other name, title, or authority, the director may:

(a) (I) Sue and be sued in all the courts of this state, of any other state, or of the United States and in actions arising out of any act, deed, matter, or thing made, omitted, entered into, done, or suffered in connection with the subsequent injury fund and the administration or conduct of matters relating thereto, including the authority to employ counsel to represent the fund in any action.

(II) Nothing in this paragraph (a) shall be construed to waive any provisions of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., nor shall it be construed to waive immunity of the state of Colorado from suit in federal court, guaranteed by the eleventh amendment to the constitution of the United States.

(b) Make and enter into contracts or obligations relating to the subsequent injury fund as authorized or permitted under the provisions of articles 40 to 47 of this title, but neither the director nor any officer or employee of the division shall be personally liable in any private capacity for or on account of any act done or omitted or contract or other obligation entered into or undertaken in an official capacity in good faith and without intent to defraud in connection with the administration or conduct of the subsequent injury fund, its business, or other affairs relating thereto.

**Source:** L. 90: Entire article R&RE, p. 542, § 1, effective July 1. L. 93: (1)(b) amended, p. 1505, § 2, effective June 6. L. 2003: (1.5) added, p. 455, § 3, effective March 5. L. 2007: (4)(b) amended, p. 608, § 1, effective April 20. L. 2009: (1.7) added, (SB 09-208), ch. 149, p. 618, § 2, effective April 20.

**Editor's note:** This section is similar to former § 8-51-106 as it existed prior to 1990.

#### ANNOTATION

**Law reviews.** For article, "Primer on Permanent Disability in the Colorado Workmen's Compensation Law", see 57 Den. L.J. 573 (1980).

**Annotator's note.** Since § 8-46-101 is similar to § 8-51-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of



this title, relevant cases construing that provision have been included in the annotations to this section.

**Constitutional guarantees of equal protection are not violated** by overall statutory scheme for assessing and apportioning liability among different classes of employees because legitimate governmental interest to encourage the employment of partially disabled persons is furthered. *Electron Corp. v. Indus. Claim Appeals Office*, 833 P.2d 821 (Colo. App. 1992).

**Purpose of this statute is to enhance opportunities for employment for partially disabled persons.** *Horizon Land Corp. v. Indus. Comm'n*, 34 Colo. App. 178, 524 P.2d 638 (1974); *Sears, Roebuck & Co. v. Baca*, 682 P.2d 11 (Colo. 1984); *McGrath v. Indus. Comm'n*, 708 P.2d 1382 (Colo. App. 1985).

**The legislative policy underlying subsection (1)(a) is to provide an incentive for employers to hire partially disabled persons.** This policy is effectuated by relieving employers who hire such persons from full responsibility if the employee suffers a subsequent industrial injury and becomes permanently and totally disabled. In such instances, the total compensation to be paid the employee is divided between the last employer and the subsequent injury fund. *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

This section imposes liability on a later employer for that portion of the employee's permanent total disability attributable to the last injury while making the subsequent injury fund responsible for that portion caused by the previous industrial injuries. *Bowland v. Indus. Claim Appeals Office*, 984 P.2d 660 (Colo. App. 1998); *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999).

**By relieving employers of greater potential liability.** The general assembly intended, by enactment of this statute, to encourage employers to hire partially disabled persons by relieving them of any greater potential liability resulting therefrom. *Horizon Land Corp. v. Indus. Comm'n*, 34 Colo. App. 178, 524 P.2d 638 (1974); *McGrath v. Indus. Comm'n*, 708 P.2d 1382 (Colo. App. 1985).

**And under this statute an employer is liable for actual injuries and disability which occur to an employee in his employment.** *Horizon Land Corp. v. Indus. Comm'n*, 34 Colo. App. 178, 524 P.2d 638 (1974).

**But permanent total disability from additional loss borne by subsequent injury fund.** In the case of an employee who has previously lost the use of a bodily member, the permanent total disability resulting from the loss of an additional member or additional members shall, after the employer has compensated the employee for such loss, be borne by the subsequent injury fund. *Horizon Land Corp. v. Indus.*

*Comm'n*, 34 Colo. App. 178, 524 P.2d 638 (1974).

**The effect of this section is to provide a scheme for apportioning the permanent total disability** to which a claimant may be entitled under § 8-51-107(1). *McGrath v. Indus. Comm'n*, 708 P.2d 1382 (Colo. App. 1985); *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987).

Apportionment of liability for permanent total disability pursuant to this section should be a de novo determination of the relative contributions of the partial disabilities to the total disability based on the relevant circumstances existing at the time of that determination. *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987).

**Industrial disabilities are those which arise out of an industrial incident.** *Heggar v. Watts-Hardy Dairy*, 685 P.2d 235 (Colo. App. 1984).

**And injuries incurred during active military service are not considered industrial injuries within the meaning of this section.** *Waddell v. Indus. Claim Appeals Office*, 964 P.2d 552 (Colo. App. 1998).

**Subsection (1) precludes compensation from the subsequent injury fund** when nonindustrial factors contribute to the claimant's total disability. *City & County of Denver v. Indus. Comm'n*, 690 P.2d 199 (Colo. 1984).

**If, in the course of his employment, a partially disabled person receives an injury which totally disables him,** he is entitled to compensation without apportionment. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**This state has adopted to a very limited extent a "subsequent injury fund" covering scheduled injuries involving hands, arms, feet, legs, and eyes.** *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**And in the absence of an apportionment statute, the general rule is that the employer becomes liable for the entire disability** resulting from a compensable accident. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 151 Colo. 18, 379 P.2d 153 (1962).

**When preexisting condition of an employee was stable but becomes aggravated by an industrial injury,** the fund is liable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990).

**Where no apportionment evidence was presented,** and no other evidence was available regarding the relative contributions of the injury to the total disability, the subsequent employer should be held liable for that portion of permanent total disability benefits which exceeds the percentage of the prior permanent partial disability award. *State Compensation Ins. Auth. v. Collins*, 771 P.2d 9 (Colo. App. 1988).

**Where a worker's permanent total disability has been caused by the combination of two or more injuries and the subsequent occupational disease of silicosis, liability is apportioned.** Liability for that portion of the permanent total disability attributable to industrial injuries not involving silicosis is governed by this section. *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991).

**This section is applicable only where the entire vision of the remaining eye has been lost** and no provision is made authorizing an award thereunder for partial permanent disability. *Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 88 Colo. 573, 298 P.2d 955 (1931).

**Congenital loss of vision existing at birth comes within the meaning of "lost vision"** under this section. *Jewell Collieries Corp. v. Kenda*, 110 Colo. 394, 134 P.2d 206 (1943).

**And the uncorrected eye deficiency may be relied upon in the determination of the loss of vision in the remaining eye.** *Jewell Collieries Corp. v. Kenda*, 110 Colo. 394, 134 P.2d 206 (1943).

**Section 8-51-112 takes precedence over subsection (1)(a).** The specific provisions of § 8-51-112, applicable to occupational disease, take precedence over the general provisions of subsection (1)(a) of this section, applicable to "injury", notwithstanding that the statutory definition of injury, § 8-41-108 (2), includes occupational disease. *Denver v. Hansen*, 650 P.2d 1319 (Colo. App. 1982).

**Where no claim is filed, no dependents exist** and subsection (1)(b) is triggered for purposes of payment into the subsequent injury fund. *Frontier Airlines v. Indus. Comm'n*, 654 P.2d 1333 (Colo. App. 1982).

**Payment to subsequent injury fund required where survivors fail to file.** The employer is required to make the \$15,000 payment to the subsequent injury fund where the survivors of the claimant fail to file for compensation within the three-year statute of limitations. *Frontier Airlines v. Indus. Comm'n*, 654 P.2d 1333 (Colo. App. 1982).

The intent of the statute is to have payments made to the subsequent injury fund in instances where no compensation is paid. *Frontier Airlines v. Indus. Comm'n*, 654 P.2d 1333 (Colo. App. 1982).

**Else insurance carrier receives windfall benefit.** This legislative purpose is reasonable because, with every compensable injury which occurs without dependents, the insurance carrier receives a windfall benefit. *Frontier Airlines v. Indus. Comm'n*, 654 P.2d 1333 (Colo. App. 1982).

**Payment of interest.** The interest awarded by the commission in excess of the \$7,500 award was payable out of the subsequent injury fund, rather than by employer and insurance company. *Union Carbide Corp. v. Indus. Comm'n*, 40

*Colo. App.* 182, 573 P.2d 938 (1977), *aff'd*, 196 Colo. 56, 581 P.2d 734 (1978).

**Subsequent injury fund was a legal entity** and had standing to appeal an order of the referee. *Indus. Comm'n v. St. Thomas More Hosp.*, 697 P.2d 33 (Colo. 1985) (case arose prior to 1984 enactment of subsection (5)).

**Subsequent injury fund is not a legal entity with the capacity to sue and to be sued.** This section does not provide for separate legal status of the subsequent injury fund, nor does the statute supply the necessary characteristics of a legal entity. *Sears, Roebuck & Co. v. Baca*, 682 P.2d 11 (Colo. 1984); *Subsequent Injury Fund v. Black Mt. Spruce*, 682 P.2d 1188 (Colo. 1984).

**In situations covered by this statute, the subsequent employer is not liable** for the degree of permanent partial disability sustained by the subsequent injury; rather, the employer is liable for the portion of the permanent total disability that is attributable to the subsequent injury. *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71 (Colo. App. 1987).

**Where claimant's industrial injuries were the sole cause of her permanent total disability, and not her degenerative disc condition, the fund is responsible for a portion of the payments to which the claimant is entitled.** *Injury Fund v. Denver Pub. Schools*, 798 P.2d 900 (Colo. 1990).

**Offset for employer financed pension benefits** is deducted from total award prior to the apportionment of liability between the employer and the subsequent liability fund. *Jefferson County Pub. Schools v. Sago*, 786 P.2d (Colo. App. 1989), *aff'd*, 793 P.2d 580 (Colo. 1990).

**The subsequent injury fund is not available for contribution unless a claimant's permanent total disability results solely from a combination of previous and subsequent permanent partial industrial disabilities.** *General Iron Works v. Indus. Comm'n*, 719 P.2d 353 (Colo. App. 1985).

However, one or more of the permanent partial disabilities which contribute to the total disability required for compensation under this section may take into account non-industrial factors or conditions, but the condition which triggers the liability of the subsequent injury fund may not be a non-industrial disabling condition. *Subsequent Injury Fund v. Compensation Ins. Auth.*, 768 P.2d 751 (Colo. App. 1988).

**Claimant's approved stipulation and settlement that specifically reserved the right to claim against the subsequent injury fund was not a determination of permanent, total disability** barring a claim against the subsequent injury fund. *Subsequent Injury Fund v. Ladow*, 923 P.2d 368 (Colo. App. 1996).

**This section requires subsequent injury fund contribution in all cases in which an employee is rendered totally and permanently disabled by the combined effect of two**



or more permanent partial disabilities and was enacted to provide an incentive for employers to hire partially disabled workers by relieving those employers of full liability for total permanent disability which might result from a subsequent injury. Subsequent Injury Fund v. Grant, 827 P.2d 574 (Colo. App. 1991).

**This section applies only if two or more industrial disabilities combine to render a claimant permanently and totally incapable of steady gainful employment and incapable of rehabilitation to steady gainful employment.** Holly Nursing Care Ctr. v. Indus. Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999).

**This section imposes liability** on a later employer for the portion of the permanent total disability attributable to the last injury, while making the subsequent injury fund responsible for that portion caused by the previous industrial injuries. Holly Nursing Care Ctr. v. Indus. Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999).

**An employer is liable for only that portion of the employee's industrial disability which is attributable to a subsequent injury** and the subsequent injury fund is liable, in accordance with this section, for the remaining portion of the employee's permanent total disability resulting from industrial injuries not involving occupational disease. Subsequent Injury Fund v. Grant, 827 P.2d 574 (Colo. App. 1991).

**Where there are two separate compensable injuries**, one temporary total disability and a subsequent injury rendering claimant permanently and totally disabled, the subsequent injury fund is obligated to pay the balance not attributable to the subsequent injury. Citadel Mall v. Indus. Claim Appeals Office, 892 P.2d 419 (Colo. App. 1994).

**In dual or hybrid employment relationship** in which claimant was engaged in rehabilitative employment partially funded by employer, liability is apportioned and the fund is available for contribution when the claimant's permanent total disability results from a combination of previous and subsequent industrial disabilities. Cit-

adel Mall v. Indus. Claim Appeals Office, 892 P.2d 419 (Colo. App. 1994).

**An employee's second injury in another state was not a "subsequent injury" for the purposes of the subsequent injury fund after the second injury worsened a condition caused by the first accident that occurred in Colorado.** Pacheco v. Roaring Fork Aggregates, 897 P.2d 872 (Colo. App. 1995).

**The Colorado subsequent injury fund is not liable for payment of any portion of permanent disability benefits arising from a subsequent injury incurred in the employ of an out-of-state employer not subject to the act.** Pacheco v. Roaring Fork Aggregates, 897 P.2d 872 (Colo. App. 1995).

**Person responsible for enforcing this section is director of division of labor.** General powers given to director of division of labor place him in a fiduciary role to funds such as the subsequent injury fund which are not legal entities, and therefore the director is the proper party to represent the fund and to protect its interests in workmen's compensation proceedings. Sears, Roebuck & Co. v. Baca, 682 P.2d 11 (Colo. 1984); Hatfield v. Dir. of Div. of Labor, 682 P.2d 1190 (Colo. 1984).

**Due process requires that rules be enacted governing procedures under the subsequent injury fund** in order to inform employers and claimants of the procedures for invoking participation of the subsequent injury fund in workmen's compensation proceedings. Sears, Roebuck & Co. v. Baca, 682 P.2d 11 (Colo. 1984).

**For purposes of imposing a percentage of liability on employer for permanent total disability, "subsequent injury" under this section should be determined from the date of the resulting disability.** Pikes Peak Cmty. Coll. v. Leonard, 865 P.2d 913 (Colo. App. 1993).

**Penalties imposed by the act** are not available as compensation to wronged individuals, but rather are credited to the subsequent injury fund. Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985).

## **8-46-102. Funding for subsequent injury fund and major medical insurance fund.**

(1) (a) For every compensable injury resulting in death wherein there are no persons either wholly or partially dependent upon the deceased, the employer or the employer's insurance carrier, if any, shall pay to the division the sum of fifteen thousand dollars, not to exceed one hundred percent of the death benefit, to be transmitted to the state treasurer, as custodian, and credited by the state treasurer to the subsequent injury fund. In the event that there are only partially dependent persons dependent upon the deceased, the employer or the employer's insurance carrier, if any, shall first pay such benefits to such partial dependents and shall transmit the balance of the sum of fifteen thousand dollars to the state treasurer, as custodian, who shall credit the same to the subsequent injury fund.

(b) In the event that the deceased is a minor with no persons either wholly or partially dependent upon the deceased, the employer or the employer's insurance carrier, if any, shall pay to the parents of the deceased the sum of fifteen thousand dollars, not to exceed one hundred percent of the death benefit. In the event that there are no surviving parents, the employer or the employer's insurance carrier, if any, shall pay such benefits to the division, to be transmitted to the state treasurer, as custodian, and credited by the state treasurer to

the subsequent injury fund. In the event that there are persons only partially dependent upon the deceased, the employer or the employer's insurance carrier, if any, shall first pay such benefits to such partially dependent persons and shall pay the balance to the surviving parents of the deceased, or in the event that there are no surviving parents, the remaining balance shall be paid to the division, to be transmitted to the state treasurer, as custodian, who shall credit the same to the subsequent injury fund.

(2) (a) (I) Notwithstanding sections 10-3-209 (1) (c) and 10-6-128 (3), C.R.S., for the purpose of funding the financial liabilities of the subsequent injury fund pursuant to this section and of the major medical insurance fund pursuant to section 8-46-202, every person, partnership, association, and corporation, whether organized under the laws of this state or of any other state or country, every mutual company or association, every captive insurance company, and every other insurance carrier, including Pinnacol Assurance, insuring employers in this state against liability for personal injury to their employees or death caused thereby under the provisions of articles 40 to 47 of this title shall, as provided in this subsection (2), be levied a tax upon the premiums received in this state, whether or not in cash, or on account of business done in this state for such insurance in this state at a rate determined by the director to generate sufficient revenue for claim payments and direct and indirect costs of administration that are anticipated to be submitted in the following state fiscal year for which such funds are liable. In determining the rate, the director shall, in addition to revenue for claim payments and direct and indirect costs of administration that are anticipated to be due in the following state fiscal year, maintain a cash balance in both the major medical insurance fund and the subsequent injury fund of an amount of otherwise unrestricted revenues equal to approximately one year's worth of claim payments and direct and indirect administrative costs. Such insurance carriers shall be credited with all cancelled or returned premiums actually refunded during the year of such insurance.

(II) Repealed.

(b) Every such insurance carrier shall, on July 1, 1988, and semiannually thereafter, make a return, verified by affidavits of its president and its secretary or by affidavits of its other chief officers or agents, to the division, stating the amount of all such premiums received and credits granted during the period covered by such return. Every insurance carrier required to make such return shall file the same with the division within thirty days after the close of the period covered thereby and shall, at the same time, pay to the division a tax ascertained as provided in paragraph (a) of this subsection (2), less return premiums on cancelled policies.

(c) Every employer acting as a self-insurer under the provisions of articles 40 to 47 of this title shall, under oath, report to the division the employer's payroll in such form as may be prescribed by the director and at the times specified for premium reports by insurance companies in paragraph (b) of this subsection (2). The division shall assess against such payroll a tax for the purposes of paragraph (b) of this subsection (2) on the basic premiums chargeable against the same or most similar industry or business taken from the manual insurance rates, including any discount or experience modification allowed, chargeable by Pinnacol Assurance, and, upon receipt of notice from the division of the tax so assessed, every such self-insurer shall, within thirty days after the receipt of such notice, pay to the division the tax so assessed.

(d) If any such insurance carrier or self-insurer fails or refuses to make the return or report required by paragraph (b) or (c) of this subsection (2), the director shall assess the tax against such insurance carrier or self-insurer at the rate provided for in this subsection (2) on such amount of premium as the director may deem just, and the proceedings thereof shall be the same as if the return had been made.

(e) If any such insurance carrier or self-insurer withdraws from business in this state before the tax provided for in this subsection (2) falls due as provided in this section, or fails or neglects to pay such tax, the director shall proceed at once to collect the same; and the director is authorized to employ such legal processes as may be necessary for that purpose. Suit shall be brought by the director in any of the courts of this state having jurisdiction.

(f) The director, in the enforcement of this subsection (2), shall have all of the powers granted in articles 40 to 47 of this title, and any insurance carrier or self-insurer who violates



any of the provisions of this subsection (2) or fails to pay the tax thereby imposed is guilty of a violation of said articles and shall be subject to the penalties therein prescribed.

(g) All moneys collected pursuant to this subsection (2) shall be transmitted to the state treasurer, as custodian, who shall credit the same to the subsequent injury fund and to the major medical insurance fund as determined by the director in accordance with subsection (3) of this section. Any interest earned on the investment or deposit of moneys in said funds shall remain in the funds and shall not revert to the general fund of the state at the end of any fiscal year.

(3) (a) As determined by the director, a portion of the revenue received each year pursuant to subsection (2) of this section shall be deposited into the subsequent injury fund, established in section 8-46-101 (1) (b), and a portion shall be deposited into the major medical insurance fund, established in section 8-46-202 (1). In addition, the director may move revenue between the funds when the director determines that doing so is necessary. The director shall continue to establish a surcharge rate pursuant to subsection (2) of this section until the balance in both such funds is sufficient to meet the future claim payments plus the amount necessary to pay the direct and indirect costs of administration of the funds, at which time the surcharge rate established in paragraph (a) of subsection (2) of this section shall be reduced to zero.

(b) For the purpose of determining the proper allocation of the surcharge and making the estimates contemplated in paragraph (a) of this subsection (3), the director shall contract for the services of qualified private actuaries.

**Source:** **L. 90:** Entire article R&RE, p. 544, § 1, effective July 1. **L. 92:** (1), (2)(a), and (2)(g) amended, p. 1829, § 3, effective May 19. **L. 93:** (2)(a)(I) and (2)(g) amended and (3) added, p. 2141, § 2, effective July 1. **L. 97:** (3)(b) amended, p. 1476, § 15, effective June 3. **L. 99:** (2)(g) amended, p. 618, § 5, effective August 4. **L. 2000:** (1) amended, p. 821, § 2, effective May 24. **L. 2002:** (2)(a) and (2)(c) amended, p. 1888, § 44, effective July 1. **L. 2006:** (2)(a)(II) repealed, p. 140, § 1, effective August 7. **L. 2009:** (2)(a)(I) and (3)(a) amended, (SB 09-037), ch. 324, p. 1729, § 1, effective August 5.

**Editor's note:** (1) This section is similar to former § 8-51-106 as it existed prior to 1990.

(2) The provisions pertaining to Pinnacol Assurance are contained in article 45 of this title.

## ANNOTATION

**Annotator's note.** Since § 8-46-102 is similar to § 8-51-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**In case of death of employee intoxicated at time of injury,** § 8-52-104 (1)(c) (now § 8-42-112 (1)(c)) does not operate to reduce the \$15,000 employer is required to contribute to the subsequent injury fund pursuant to this section, because this amount is a tax imposed upon the employer for the purpose of funding the subsequent injury fund and not a benefit to the claimant or his dependents. *Portofino Apts. v. Indus. Claim Appeals Office*, 789 P.2d 1117 (Colo. App. 1990) (decided under law in effect prior to 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8).

**Benefits for injuries occurring prior to July 1, 1993,** and that result in permanent partial disability may come proportionately from the subsequent injury fund and the last employer when the employee suffers from multiple disabilities. *United Airlines v. Indus. Claim Appeals Office*, 993 P.2d 1152 (Colo. 2000).

**By closing the subsequent injury fund to cases of permanent total disability involving new injuries,** the general assembly intended to place full liability for permanent total disability benefits on the last employer. The general assembly further intended to mitigate the costs to an employer held liable for such benefits by requiring its insurers to consider only the medical impairment rating of the last injury when setting the employer's insurance premiums. Insurers may recoup expenses not covered by an employer's premiums by increasing its insurance rates to similarly situated employers in a risk pool. *United Airlines v. Indus. Claim Appeals Office*, 993 P.2d 1152 (Colo. 2000).

**8-46-103. State treasurer to invest funds.** (1) The state treasurer shall invest any portion of the subsequent injury fund, including its surplus and reserves, which the division determines is not needed for immediate use. All interest earned upon such invested portion shall be credited to the fund and used for the same purposes and in the same manner as other moneys in the fund. Such moneys may be invested in the types of investments authorized in sections 24-36-109, 24-36-112, and 24-36-113, C.R.S.

(2) Repealed.

**Source:** L. 90: Entire article R&RE, p. 545, § 1, effective July 1. L. 97: (2) repealed, p. 377, § 8, effective August 6.

**Editor's note:** This section is similar to former § 8-51-111 as it existed prior to 1990.

**8-46-104. Closure of fund.** No cases shall be accepted into the subsequent injury fund for injuries occurring on or after July 1, 1993, or for occupational diseases occurring on or after April 1, 1994. When all payments have been made for all cases accepted into the fund, any remaining balance shall revert to the general fund.

**Source:** L. 92: Entire section added, p. 1830, § 5, effective May 19. L. 93: Entire section amended, p. 2142, § 3, effective July 1.

#### ANNOTATION

The subsequent injury fund is liable for death benefits claimed in accordance with the version of § 8-41-304(2) in effect when the occupational diseases suffered by decedents occurred. Subsequent Injury Fund v. King, 961 P.2d 575 (Colo. App. 1998).

An occupational disease or disability "occurs" on the onset of disability, rather than upon the date of diagnosis. Union Carbide Corp. v. Indus. Claim Appeals Office, 128 P.3d 319 (Colo. App. 2005).

**8-46-105. Calculation of premium - permanent total disability - employer may request examination.** (1) Effective July 1, 1993, in any case in which an employee previously has sustained permanent partial disability and, in a subsequent injury, sustains additional permanent partial disability and it is shown that the combined industrial disabilities render the employee permanently and totally disabled, then the premiums of the employer in whose employ the employee sustained such subsequent injury shall be determined only on the basis of the impairment rating for such subsequent injury and not on the basis of the employee's permanent total disability. If such employer disputes the impairment rating for the subsequent injury, the employer shall request an independent medical examination pursuant to the procedures set forth in section 8-42-107.2. The finding of the independent medical examiner regarding the impairment rating may be overcome only by clear and convincing evidence. The total cost of the employee's permanent total disability shall not be considered in determining the employer's premiums, but shall be considered by the commissioner of insurance in setting rates.

(2) In any case in which an employee becomes disabled by an occupational disease and the employer is liable for benefits pursuant to section 8-41-304 (2), then the premiums of the employer in whose employ the employee became disabled shall be determined only on the basis of the impairment rating for the portion of the occupational disease attributable to such employer and not on the basis of the combination of such portion and any prior impairment resulting from such occupational disease. For the purposes of premium calculations, if such employer disputes the impairment rating for the occupational disease, the employer shall request an independent medical examination pursuant to the procedures set forth in section 8-42-107.2. The finding of the independent medical examiner regarding the impairment rating may be overcome only by clear and convincing evidence. The total cost of the employee's occupational disease shall not be considered in determining the employer's premiums, but shall be considered by the commissioner of insurance in setting rates.



**Source:** **L. 92:** Entire section added, p. 1831, § 5, effective May 19. **L. 93:** Entire section amended, p. 2142, § 4, effective July 1. **L. 98:** Entire section amended, p. 1431, § 4, effective August 5.

#### ANNOTATION

By closing the subsequent injury fund to cases of permanent total disability involving new injuries, the general assembly intended to place full liability for permanent total disability benefits on the last employer. The general assembly further intended to mitigate the costs to an employer held liable for such benefits by requiring its insurers to consider only the med-

ical impairment rating of the last injury when setting the employer's insurance premiums. Insurers may recoup expenses not covered by an employer's premiums by increasing its insurance rates to similarly situated employers in a risk pool. *United Airlines v. Indus. Claim Appeals Office*, 993 P.2d 1152 (Colo. 2000).

**8-46-106. Abatement of taxes - independent review of fund.** The funding provisions of section 8-46-102, including the provisions relating to the assessment and levying of taxes, shall cease to be effective when an independent actuary, retained by the division for such purpose, determines that the fund has sufficient resources to pay benefits for injuries occurring prior to July 1, 1993, and occupational diseases occurring prior to April 1, 1994.

**Source:** **L. 92:** Entire section added, p. 1831, § 5, effective May 19. **L. 2000:** Entire section amended, p. 75, § 1, effective August 2.

#### **8-46-107. Report to general assembly and governor. (Repealed)**

**Source:** **L. 92:** Entire section added, p. 1831, § 5, effective May 19. **L. 97:** Entire section repealed, p. 1476, § 16, effective June 3.

#### **8-46-108. Legislative council study of subsequent injury fund. (Repealed)**

**Source:** **L. 92:** Entire section added, p. 1831, § 5, effective May 19. **L. 2006:** Entire section repealed, p. 140, § 2, effective August 7.

**8-46-109. Legislative declaration - claims management.** (1) The general assembly finds and declares that the purpose of this section is to provide for prompt, efficient, and fair settlement of all pending claims and the closure of both the subsequent injury fund and the major medical insurance fund as soon as is practicable.

(2) As necessary to augment the division's regular staff, the director shall contract for the services of qualified specialists in the area of settlements, who shall, on the director's behalf, negotiate for and enter into settlements of claims of the subsequent injury fund and the major medical insurance fund for present value whenever possible.

(3) Repealed.

**Source:** **L. 93:** Entire section added, p. 2143, § 5, effective July 1. **L. 97:** (3) amended, p. 1476, § 17, effective June 3. **L. 2006:** (3) repealed, p. 141, § 3, effective August 7.

#### PART 2

#### COLORADO MAJOR MEDICAL INSURANCE FUND ACT

**8-46-201. Short title.** This part 2 shall be known and may be cited as the "Colorado Major Medical Insurance Fund Act".

**Source:** **L. 90:** Entire article, R&RE, p. 545, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-66-101 as it existed prior to 1990.

**8-46-202. Major medical insurance fund - tax imposed - returns.** (1) (a) There is hereby established a major medical insurance fund to defray medical, surgical, dental, hospital, nursing, and drug expenses and expenses for medical, hospital, and surgical supplies, crutches, apparatus, and vocational rehabilitation, which shall include tuition, fees, transportation, and weekly maintenance equivalent to that which the employee would receive under section 8-42-105 for the period of time that the employee is attending a vocational rehabilitation course, which expenses are in excess of those provided under the "Workers' Compensation Act of Colorado" for employees who have established their entitlement to disability benefits under said act, whether necessary to promote recovery, alleviate pain, or reduce disability.

(b) The unrestricted year-end balance of the major medical insurance fund, created pursuant to paragraph (a) of this subsection (1), for the 1991-92 fiscal year shall constitute a reserve, as defined in section 24-77-102 (12), C.R.S., and, for purposes of section 24-77-103, C.R.S.:

(I) Any moneys credited to the major medical insurance fund in any subsequent fiscal year shall be included in state fiscal year spending, as defined in section 24-77-102 (17), C.R.S., for such fiscal year; and

(II) Any transfers or expenditures from the major medical insurance fund in any subsequent fiscal year shall not be included in state fiscal year spending, as defined in section 24-77-102 (17), C.R.S., for such fiscal year.

(c) Moneys in the major medical insurance fund are continuously appropriated to the division for the payment of benefits as provided in this section and legal fees.

(1.5) (a) Notwithstanding any provision of this section to the contrary, on May 1, 2003, the state treasurer shall deduct one hundred fifty million dollars from the major medical insurance fund and transfer such sum to the general fund.

(b) On July 1, 2003, the state controller shall transfer ten million dollars from the general fund to the major medical insurance fund.

(1.6) Notwithstanding any provision of this section to the contrary, on March 30, 2009, the state treasurer shall deduct sixty-nine million five hundred thousand dollars from the major medical insurance fund and transfer such sum to the general fund.

(1.7) Notwithstanding any provision of this section to the contrary, on March 31, 2010, the state treasurer shall deduct twenty-six million five hundred thousand dollars from the major medical insurance fund and transfer such sum to the general fund.

(1.8) Notwithstanding any provision of this section to the contrary, on June 30, 2011, the state treasurer shall deduct ten million dollars from the major medical insurance fund and transfer such sum to the general fund.

(2) The director shall administer the major medical insurance fund and is hereby given jurisdiction to enforce the provisions of this article. The director shall administer and conduct all matters involving the major medical insurance fund in the name of the division, and, in that name and without any other name, title, or authority, the director may:

(a) (I) Sue and be sued in all the courts of this state, of any other state, or of the United States and in actions arising out of any act, deed, matter, or thing made, omitted, entered into, done, or suffered in connection with the major medical insurance fund and the administration or conduct of matters relating thereto, including the authority to employ counsel to represent the fund in any action.

(II) Nothing in this paragraph (a) shall be construed to waive any provisions of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., nor shall it be construed to waive immunity of the state of Colorado from suit in federal court, guaranteed by the eleventh amendment to the constitution of the United States.

(b) Make and enter into contracts or obligations relating to the major medical insurance fund as authorized or permitted under the provisions of articles 40 to 47 of this title, but neither the director nor any officer or employee of the division shall be personally liable in any private capacity for or on account of any act done or omitted or contract or other obligation entered into or undertaken in an official capacity in good faith and without intent to defraud in connection with the administration or conduct of the major medical insurance fund, its business, or other affairs relating thereto;



(c) Contract with physicians, surgeons, and hospitals for medical and surgical treatment, services and supplies, crutches and apparatus, and the care and nursing of injured persons entitled to benefits from said fund and, in addition, may contract for medical, surgical, hospital, and nursing services and supplies in excess of the amount and period otherwise limited in this article if said director determines that the contracting of such extra medical, surgical, hospital, and nursing services and supplies will reduce the period of disability for which said fund would be liable for the payment and compensation.

(3) to (5) Repealed.

**Source:** **L. 90:** Entire article R&RE, p. 545, § 1, effective July 1; (1) amended, p. 1844, § 32, effective July 1. **L. 93:** (1) amended, p. 1505, § 3, effective June 6; (3) to (5) repealed, p. 2143, § 6, effective July 1. **L. 2003:** (1.5) added, p. 455, § 4, effective March 5. **L. 2007:** (1)(c) added, p. 608, § 2, effective April 20. **L. 2009:** (1.6) added, (SB 09-208), ch. 149, p. 618, § 3, effective April 20; (1.7) added, (SB 09-279), ch. 367, p. 1925, § 1, effective June 1. **L. 2011:** (1.8) added, (SB 11-164), ch. 33, p. 92, § 1, effective March 18.

**Editor's note:** This section is similar to former § 8-66-102 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-46-202 is similar to § 8-66-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

**This act provides for the creation, administration, and funding of the Colorado major medical insurance fund, which provides ben-**

efits for qualified employees in addition to those available under the Workers' Compensation Act. Jefferson Sch. D. R-1 v. Div. of Labor, 791 P.2d 1217 (Colo. App. 1990).

**Fund established by this section is not legal entity which can sue or be sued.** McGrath v. Indus. Comm'n, 683 P.2d 810 (Colo. App. 1984).

**Applied in** In re Sterling v. Indus. Comm'n, 662 P.2d 1096 (Colo. App. 1982).

#### **8-46-203. Failure to make returns. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 547, § 1, effective July 1. **L. 93:** Entire section repealed, p. 2144, § 7, effective July 1.

**Editor's note:** Prior to its repeal in 1993, this section was similar to former § 8-66-103 as it existed prior to 1990.

#### **8-46-204. Use of funds limited. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 547, § 1, effective July 1. **L. 93:** Entire section repealed, p. 2144, § 8, effective July 1.

**Editor's note:** Prior to its repeal in 1993, this section was similar to former § 8-66-107 as it existed prior to 1990.

**8-46-205. Collection of taxes due.** If any such insurance carrier or self-insurer withdraws from business in this state before the tax falls due as provided in this part 2, or fails or neglects to pay such tax, the director shall at once proceed to collect the same; and the director is authorized to employ such legal processes as may be necessary for that purpose. Suit shall be brought by the director in any of the courts of this state having jurisdiction.

**Source:** **L. 90:** Entire article R&RE, p. 547, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-66-104 as it existed prior to 1990.

**8-46-206. Enforcement powers - violations.** The director, in the enforcement of this article, shall have all of the powers granted in the “Workers’ Compensation Act of Colorado”, and any insurance carrier or self-insurer violating any of the provisions of this article, or failing to pay the tax imposed in this article, is guilty of violation of said act and subject to the penalties therein prescribed.

**Source:** L. 90: Entire article R&RE, p. 548, § 1, effective July 1.

**Editor’s note:** This section is similar to former § 8-66-105 as it existed prior to 1990.

#### ANNOTATION

**Annotator’s note.** Since § 8-46-206 is similar to § 8-66-105 as it existed prior to the 1990 repeal and reenactment of the “Workers’ Compensation Act of Colorado”, articles 40 to 47 of this title, a relevant case construing that provi-

sion has been included in the annotations to this section.

**Applied in** *In re Sterling v. Indus. Comm’n*, 662 P.2d 1096 (Colo. App. 1982).

#### **8-46-207. Receipt and disbursement of moneys. (Repealed)**

**Source:** L. 90: Entire article R&RE, p. 548, § 1, effective July 1. L. 93: Entire section repealed, p. 2145, § 9, effective July 1.

**Editor’s note:** Prior to its repeal in 1993, this section was similar to former § 8-66-106 as it existed prior to 1990.

**8-46-208. Applications - awards.** (1) Payments from the major medical insurance fund shall be awarded by the director only after an application therefor has been filed by a claimant employee, the claimant’s employer, or such employer’s insurance carrier, or one on their behalf, for admission to the fund, in any case where the limits of liability provided under section 8-42-101 have been exhausted.

(2) Following the filing of an application, the director shall approve or disapprove the expenditure of further sums of money from the major medical insurance fund and in so doing may rely upon medical reports contained in the case file if the director deems them adequate, or the director may rely upon recommendations of the medical director, appointed pursuant to section 8-1-103, or the director may appoint a medical panel of not more than three medical experts to see and examine the applicant, each of whom shall render a report to the director, advising whether or not such expenditure of further sums of money will promote recovery, alleviate pain, or reduce disability, suggesting the form and manner of such treatment or services and suggesting the reasonable cost thereof. The director, in every case in which an award is made from this fund, shall review said case at such time as the total medical expenditures, including those expended under section 8-42-101, shall reach fifteen thousand dollars and at each ten thousand dollars increment thereafter to determine and enter an order regarding continuation or cessation of further payments from said fund.

(3) The director shall award, and the state treasurer shall pay from the major medical insurance fund, the reasonable fees and expenses of the appointed members of the medical panel when such procedure is used by the director.

**Source:** L. 90: Entire article R&RE, p. 548, § 1, effective July 1.

**Editor’s note:** This section is similar to former § 8-66-108 as it existed prior to 1990.

#### ANNOTATION

**Annotator’s note.** Since § 8-46-208 is similar to § 8-66-108 as it existed prior to the 1990

repeal and reenactment of the “Workers’ Compensation Act of Colorado”, articles 40 to 47 of



this title, relevant cases construing that provision have been included in the annotations to this section.

**Application under this section after limit of § 8-49-101 met.** The general assembly established the limit of liability under § 8-49-101, and when this limit has been initially reached, application for major medical benefits under this section is appropriate. A later recovery or lack of recovery will only affect the employer's loss experience and premium charges; it cannot affect the question of whether the statutory limit of liability has been exhausted. *Weaver-Beatty*

*Motor Co. v. Billen*, 36 Colo. App. 442, 541 P.2d 120 (1975).

**Granting application for admission to major medical insurance fund is not necessarily an award of worker's compensation benefits.** *Brothers v. Indus. Comm'n*, 733 P.2d 1217 (Colo. App. 1987).

**Removing claimant from the major medical insurance fund once admitted was, in effect, a denial of her right to apply for medical benefits.** *Major Med. Ins. Fund v. Indus. Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003).

**8-46-209. Credit for reduced disability - when.** In any determination of permanent disability, the employer or the employer's insurance carrier shall receive any credit or benefit for the reduction of disability of any claimant employee under the "Workers' Compensation Act of Colorado" directly attributable to a compensable accident or disease when such reduction of disability is accomplished by expenditures from the major medical insurance fund.

**Source:** L. 90: Entire article R&RE, p. 548, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-66-109 as it existed prior to 1990.

**8-46-210. State treasurer to invest funds.** (1) The state treasurer shall invest any portion of the major medical insurance fund, including its surplus and reserves, which the director of the division of workers' compensation determines is not needed for immediate use. All interest earned upon such invested portion shall be credited to the fund and used for the same purposes and in the same manner as other moneys in the fund. Such moneys may be invested in the types of investments authorized in sections 24-36-109, 24-36-112, and 24-36-113, C.R.S.

(2) Repealed.

**Source:** L. 90: Entire article R&RE, p. 548, § 1, effective July 1. L. 92: (1) amended, p. 1830, § 4, effective May 19. L. 97: (2) repealed, p. 377, § 9, effective August 6. L. 99: (1) amended, p. 618, § 6, effective August 4.

**Editor's note:** This section is similar to former § 8-66-110 as it existed prior to 1990.

#### **8-46-211. Abatement of tax - when. (Repealed)**

**Source:** L. 90: Entire article R&RE, p. 549, § 1, effective July 1; entire section repealed, p. 584, § 6, effective July 1.

**Editor's note:** Prior to its repeal in 1990, this section was similar to former § 8-66-111.

**8-46-212. Closure of fund.** Effective July 1, 1981, no further cases shall be accepted into the major medical insurance fund for injuries or occupational diseases occurring after that date, nor shall any cases be transferred from the medical disaster insurance fund to the major medical insurance fund.

**Source:** L. 90: Entire article R&RE, p. 549, § 1, effective July 1. L. 93: Entire section amended, p. 2145, § 10, effective July 1.

**Editor's note:** This section is similar to former § 8-66-112 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** Since § 8-46-212 is similar to § 8-66-112 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provi-

sion has been included in the annotations to this section.

**Applied** in Claim of Green, 789 P.2d 481 (Colo. App. 1990) (decided under § 8-66-112 as it existed prior to the 1990 repeal of article 66).

## PART 3

COLORADO MEDICAL DISASTER  
INSURANCE FUND

**8-46-301. Short title.** This part 3 shall be known and may be cited as the "Colorado Medical Disaster Insurance Fund Act".

**Source: L. 90:** Entire article R&RE, p. 549, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-65-101 as it existed prior to 1990.

**8-46-302. Medical disaster insurance fund - tax imposed - returns.** (1) There is hereby established a medical disaster insurance fund to defray medical, surgical, hospital, nursing, and drug expenses in excess of those provided under the "Workers' Compensation Act of Colorado" for employees who have established their entitlement to disability benefits under said act, whether necessary to promote recovery, alleviate pain, or reduce disability.

(2) The director shall administer the medical disaster insurance fund and is hereby given jurisdiction to enforce the provisions of this part 3. The director shall approve or disapprove admissions to the Colorado medical disaster insurance fund.

**Source: L. 90:** Entire article R&RE, p. 549, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-65-102 as it existed prior to 1990.

**8-46-303. Use of funds limited.** (1) All funds received by the division under the provisions of this article shall be used solely to pay the costs related to the administration of the medical disaster insurance fund and to defray the cost of medical, surgical, and hospital expenses necessary to effect the recovery, alleviate pain, or reduce the disability of employees who have established their entitlement to disability benefits under the "Workers' Compensation Act of Colorado" in accordance with and subject to the provisions of such act.

(2) Moneys in the medical disaster insurance fund are continuously appropriated to the division for the payment of benefits as provided in this section and legal fees.

**Source: L. 90:** Entire article R&RE, p. 549, § 1, effective July 1. **L. 2007:** (2) amended, p. 608, § 3, effective April 20.

**Editor's note:** This section is similar to former § 8-65-105 as it existed prior to 1990.

**8-46-304. Enforcement powers - violations.** (1) The director, in the enforcement of this article, shall have all of the powers granted in the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, and any insurance carrier or self-insurer violating any of the provisions of this article is guilty of a violation of said act and shall be subject to the penalties therein prescribed.

(2) The director shall administer and conduct all matters involving the medical disaster insurance fund in the name of the division, and, in that name and without any other name, title, or authority, the director may:



(a) (I) Sue and be sued in all courts of this state, of any other state, or of the United States and in actions arising out of any act, deed, matter, or thing made, omitted, entered into, done, or suffered in connection with the medical disaster insurance fund and the administration or conduct of matters relating thereto, including the authority to employ counsel to represent the fund in any action.

(II) Nothing in this paragraph (a) shall be construed to waive any provisions of the "Colorado Governmental Immunity Act", article 10 of title 24, C.R.S., nor shall it be construed to waive immunity of the state of Colorado from suit in federal court, guaranteed by the eleventh amendment to the constitution of the United States.

(b) Make and enter into contracts or obligations relating to the medical disaster insurance fund as authorized or permitted under the provisions of articles 40 to 47 of this title, but neither the director nor any officer or employee of the division shall be personally liable in any private capacity for or on account of any act done or omitted or contract or other obligation entered into or undertaken in an official capacity in good faith and without intent to defraud in connection with the administration or conduct of the medical disaster insurance fund, its business, or other affairs relating thereto;

(c) Contract with physicians, surgeons, and hospitals for medical and surgical treatment, services and supplies, crutches and apparatus, and the care and nursing of injured persons entitled to benefits from said fund and, in addition, may contract for medical, surgical, hospital, and nursing services and supplies in excess of the amount and period otherwise limited in this article if said director determines that the contracting of such extra medical, surgical, hospital, and nursing services and supplies will reduce the period of disability for which said fund would be liable for the payment and compensation.

**Source: L. 90:** Entire article R&RE, p. 550, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-65-103 as it existed prior to 1990.

**8-46-305. Receipt and disbursement of moneys.** All moneys collected by the division pursuant to the provisions of this part 3 shall be transmitted to the state treasurer who shall deposit the same to the credit of the medical disaster insurance fund, and all disbursements therefrom shall be paid by the state treasurer in accordance with and subject to final awards of the director, as provided in this article.

**Source: L. 90:** Entire article R&RE, p. 550, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-65-104 as it existed prior to 1990.

**8-46-306. Applications - medical panel - awards - limitations.** (1) Payments from the medical disaster insurance fund shall be awarded by the director only after an application therefor has been filed by a claimant employee, the claimant's employer, or such employer's insurance carrier, or one on their behalf, and approved by the director for admission to the fund, in any case where the limits of liability provided under section 8-42-101 have been exhausted.

(2) The director shall, in every case where an application for payments from the medical disaster insurance fund is filed, immediately, after receipt of such application, appoint a medical panel of three medical experts to see and examine the applicant, each of whom shall render a report to the director, advising whether or not the expenditure of further sums of money will promote recovery, alleviate pain, or reduce disability, suggesting the form and manner of further treatment or services and suggesting the reasonable cost thereof.

(3) The director, upon receipt of reports from each of the medical experts appointed in accordance with subsection (2), of this section, shall either deny the application or award payments from the medical disaster insurance fund, based upon such reports and as nearly as possible in accordance with the majority opinion and suggestions of the medical panel.

(4) In making payment awards from the medical disaster insurance fund, the director shall be limited in any one case to the sum of fifty-five thousand dollars, less any amounts of money expended by the employer or the employer's insurance carrier for medical, surgical, or hospital services and the costs of any prosthetic devices, or the reasonable value of any such services or devices furnished by the employer or the employer's insurance carrier.

(5) The director shall award, and the state treasurer shall pay from the medical disaster insurance fund, the reasonable fees and expenses of the appointed members of the medical panel.

**Source:** L. 90: Entire article R&RE, p. 550, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-65-106 as it existed prior to 1990.

**8-46-307. Credit for reduced disability - when.** (1) In any determination of permanent disability, the employer or the employer's insurance carrier shall receive no credit or benefit for the reduction of disability of any claimant employee under the "Workers' Compensation Act of Colorado" directly attributable to a compensable accident or disease when such reduction of disability is accomplished by expenditures from the medical disaster insurance fund, unless it shall have been determined by a preponderance of the evidence:

(a) That the claimant employee had refused hospital, surgical, and medical services under the "Workers' Compensation Act of Colorado" necessary to reduce the employee's disability voluntarily offered by the employer; or

(b) That the claimant employee had reached maximum improvement as determined by the director prior to the filing of the application for payments from the medical disaster insurance fund.

**Source:** L. 90: Entire article R&RE, p. 551, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-65-107 as it existed prior to 1990.

**8-46-308. State treasurer to invest funds.** (1) The state treasurer shall invest any portion of the medical disaster insurance fund, including its surplus and reserves, which the director determines is not needed for immediate use. All interest earned upon such invested portion shall be credited to the fund and used for the same purposes and in the same manner as other moneys in the fund. Such moneys may be invested in the types of investments authorized in sections 24-36-109, 24-36-112, and 24-36-113, C.R.S.

(2) Repealed.

**Source:** L. 90: Entire article R&RE, p. 551, § 1, effective July 1. L. 97: (2) repealed, p. 377, § 10, effective August 6.

**Editor's note:** This section is similar to former § 8-65-108 as it existed prior to 1990.

**8-46-309. Authority to utilize other revenue.** Revenues obtained from the tax imposed pursuant to section 8-46-102 (2) (a) may be used, in the discretion of the director, for the purpose of paying the costs incurred pursuant to this article.

**Source:** L. 90: Entire section added, p. 583, § 5, effective July 1. L. 93: Entire section amended, p. 2145, § 11, effective July 1.

## ARTICLE 47

### Administration

**Editor's note:** This article was numbered as article 8 of chapter 81, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1990, resulting in the addition, relocation, and



elimination of sections as well as subject matter. For amendments to this article prior to 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors' notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

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PART 1

DIRECTOR'S POWERS AND DUTIES

**8-47-101. Division of workers' compensation - creation - powers, duties, and functions - transfer of functions - change of statutory references.** (1) There is hereby created the division of workers' compensation in the department of labor and employment. Pursuant to section 13 of article XII of the state constitution, the executive director of the department of labor and employment shall appoint the director of the division of workers' compensation, and the director shall appoint such employees as are necessary to carry out the duties and exercise the powers conferred by law upon the division of workers' compensation and the director.

(2) The director and the division of workers' compensation shall enforce and administer the provisions of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, as provided in said articles and the provisions of article 14.5 of this title.

(3) (a) The division of workers' compensation shall, on and after July 1, 1991, execute, administer, perform, and enforce the rights, powers, duties, functions, and obligations vested in the division of labor prior to July 1, 1991, concerning the duties and functions transferred to the division of workers' compensation. On July 1, 1991, all employees of the division of labor whose principal duties are concerned with the duties and functions transferred to the division of workers' compensation and whose employment in the division of workers' compensation is deemed necessary by the executive director of the department of labor and employment to carry out the purposes of this article shall be transferred to the

division of workers' compensation and shall become employees thereof. Such employees shall retain all rights to the state personnel system and retirement benefits under the laws of this state, and their services shall be deemed to have been continuous. All transfers and any abolishment of positions in the state personnel system shall be made and processed in accordance with state personnel system laws and rules and regulations.

(b) Repealed.

(c) Whenever the division of labor is referred to or designated by any contract or other document in connection with the duties and functions transferred to the division of workers' compensation, such reference or designation shall be deemed to apply to the division of workers' compensation. All contracts entered into by the said division of labor prior to July 1, 1991, in connection with the duties and functions transferred to the division of workers' compensation are hereby validated, with the division of workers' compensation succeeding to all the rights and obligations of such contracts. Any appropriations of funds from prior fiscal years open to satisfy obligations incurred under such contracts are hereby transferred and appropriated to the division of workers' compensation for the payment of such obligations.

(d) (I) Repealed.

(II) Commencing in the 1992 legislative session and at least every four years thereafter, the general assembly shall provide for the conduct of a performance review by the state auditor of the administrative law judges in the office of administrative courts who hear cases under articles 40 to 47 of this title. The review shall include, but not be limited to, the following topics: The time elapsed from the date of hearing until decisions are rendered by the administrative law judges; the time elapsed from the point at which the file is complete and the case is ready for order until the decision is rendered by the administrative law judges; the number of decisions that are reversed upon appeal to the industrial claim appeals panel and to the court of appeals respectively; the workload or number of cases assigned to each administrative law judge; and the public perception of the quality of the performance of the office of administrative courts with respect to matters arising under the "Workers' Compensation Act of Colorado".

(4) Repealed.

(5) On and after July 1, 1991, when any provision of articles 40 to 47 of this title refers to the division of labor said law shall be construed as referring to the division of workers' compensation.

(6) The revisor of statutes is authorized to change all references to the director of the division of labor, and the division of labor in articles 14.5 and 40 to 47 of this title to refer to the director of the division of workers' compensation and the division of workers' compensation.

**Source:** **L. 90:** Entire article R&RE, p. 552, § 1, effective July 1. **L. 91:** Entire section amended, p. 1333, § 46, effective July 1. **L. 93:** (3)(d)(I) amended, p. 728, § 1, effective May 6. **L. 95:** (3)(d)(I) repealed, p. 458, § 1, effective May 16; (3)(d)(I) amended, p. 636, § 17, effective July 1. **L. 96:** (4) repealed, p. 1228, § 45, effective August 7. **L. 2005:** (3)(d)(II) amended, p. 856, § 17, effective June 1. **L. 2006:** (3)(b) repealed, p. 141, § 4, effective August 7.

**Editor's note:** This section is similar to former § 8-40-102 as it existed prior to 1990.

**Cross references:** For the legislative declaration contained in the 1996 act repealing subsection (4), see section 1 of chapter 237, Session Laws of Colorado 1996.

## ANNOTATION

**Annotator's note.** (1) Since § 8-47-101 is similar to § 8-40-102 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that

provision has been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment



which vested the director of the division of labor with enforcement powers previously exercised by the industrial commission.

**The industrial commission is an administrative office of the state**, created by statute, and its jurisdiction, powers, duties and authority are fixed and limited by the creative statute and amendments thereto. *Maryland Cas. Co. v. Indus. Comm'n*, 116 Colo. 58, 178 P.2d 426 (1947).

**Thus discretionary power rests solely with the commission, and a reviewing court may not interfere** with the exercise of that discretion unless there is a clear showing of an abuse thereof. *Cosmopolitan W. Hotel v. Henry*, 172 Colo. 279, 472 P.2d 134 (1970).

**The commission must positively find those facts which are necessary to be found in order to make applicable the workmen's com-**

**pensation law.** *Resler Truck Line v. Indus. Comm'n*, 113 Colo. 287, 156 P.2d 132 (1945).

**Director's statutory obligation under this section is purely ministerial** in character. *Matthews v. Indus. Comm'n*, 44 Colo. App. 159, 609 P.2d 1127 (1980).

**Claims asserted against the state attorney general must be dismissed** where the ground for the claim is that she is charged under Colorado law with enforcing Colorado's statutory provisions governing the business of insurance, including the enforcement of workers' compensation statutes, when in fact she is not responsible for enforcing either insurance or workers' compensation laws and may become involved in prosecuting related matters only at the request of the commissioner of insurance or the director of workers' compensation. *Fuller v. Norton*, 881 F. Supp. 468 (D. Colo. 1995).

**8-47-102. Director to enforce orders.** If any person fails or refuses to comply with an order of the director, or to obey any subpoena issued by the director or agents of the division, or to furnish the statistics, data, and information required to be furnished to the division by the provisions of articles 40 to 47 of this title, or refuses to permit an inspection as provided in said articles, or being in attendance refuses to be sworn or examined, or to answer a question, or to produce a book or paper when ordered to do so by the director or any of the deputies, agents, or referees of the division, the director may apply to the district court, upon proof by affidavit of the facts, for an order, returnable in not less than three days nor more than five days, directing such person to show cause before the district court which made the order why such person should not be committed to jail. Upon the return of such order, the district court shall examine under oath such person and give the person an opportunity to be heard. If the court determines that the person has refused without legal excuse in any one of the foregoing matters, it may commit the offender to jail forthwith by warrant, there to remain until the person submits to do the act which said person was required to do or until said person is discharged according to law.

**Source: L. 90:** Entire article R&RE, p. 552, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-103 as it existed prior to 1990.

## ANNOTATION

**Annotator's note.** (1) Since § 8-47-102 is similar to § 8-46-103 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) The case included in the annotations to the section which refers to the industrial commission was decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to enforce orders.

**The industrial commission has no discretion to deny enforcement of an award** under the workmen's compensation act. *Coursey v.*

*Indus. Comm'n*, 82 Colo. 311, 259 P. 514 (1927).

**A claimant is as much entitled to the enforcement of his award as a judgment creditor is to an execution.** *Coursey v. Indus. Comm'n*, 82 Colo. 311, 259 P. 514 (1927).

**Facts relieving industrial commission of duty to enforce award should appear in return.** In an action in mandamus against the industrial commission to compel enforcement of an award under the workmen's compensation act, if there are facts which relieve the commission of its duty to enforce the award, they should be made to appear in the return. *Coursey v. Indus. Comm'n*, 82 Colo. 311, 259 P. 514 (1927).

**Two methods are given to enforce an award:** One by application to the district court under this section, another by penalty for delay

under § 8-53-126. *Coursey v. Indus. Comm'n*, 82 Colo. 311, 259 P. 514 (1927).

**8-47-103. Orders of director or appeals office - validity.** All orders of the director or industrial claim appeals office shall be valid and in force and prima facie reasonable and lawful until found otherwise in an action brought for that purpose, pursuant to the provisions of articles 40 to 47 of this title, or until altered or revoked by the director or industrial claim appeals office, as the case may be.

**Source:** L. 90: Entire article R&RE, p. 552, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-105 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** (1) Since § 8-47-103 is similar to § 8-46-105 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

(2) The case included in the annotations to this section which refers to the industrial commission was decided prior to the enactment of

1986 Senate Bill No. 12 which abolished said commission and transferred its power, duties, and functions under this section to the industrial claim appeals office.

**Discretionary power rests solely within the commission**, and a reviewing court may not interfere with the exercise of that discretion unless there is a clear showing of an abuse thereof. *Cosmopolitan W. Hotel v. Henry*, 172 Colo. 279, 472 P.2d 134 (1970).

**8-47-104. Orders and awards - technical objections.** Substantial compliance with the requirements of articles 40 to 47 of this title shall be sufficient to give effect to the orders or awards of the director or industrial claim appeals office, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

**Source:** L. 90: Entire article R&RE, p. 552, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-106 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** (1) Since § 8-47-104 is similar to § 8-46-106 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the industrial claim appeals office.

**The failure of the commission to assign a claimant a separate filing number on his**

**claim is a technicality** which cannot affect the validity of the action of the commission under this section. *Colo. Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966).

**Despite conflict in evidence, director's award proper.** Where claimant testified that he worked for an individual employer, and thereafter on cross-examination stated that he and his fellow employees worked for another employer, there being no explanation of the apparent conflict, the industrial commission is within its rights as a fact-finder, in holding, under the evidence before it, that claimant was employed by the individual defendant, and its award of compensation is proper. *Indus. Comm'n v. Montgomery*, 95 Colo. 467, 37 P.2d 532 (1934).

**8-47-105. Deposit on unpaid compensation or benefits - trust fund - surplus.**

(1) The director has the discretion, at any time, any provisions in articles 40 to 47 of this title to the contrary notwithstanding, to compute and require to be paid to the division, to be held by it in trust, an amount equal to the present value of all unpaid compensation or



other benefits in any case computed at the rate of four percent per annum. Such action may be taken after a finding by the director as to the insolvency, the threatened insolvency, or any other condition or danger which may cause the loss of, or which has delayed or may impede, hinder, or delay prompt payment of, compensation or benefits by any insurance carrier or employer. The action and finding of the director shall not be subject to review, and the director shall not be required to give any notice of hearing or hold any hearing prior to taking such action or making such finding.

(2) All moneys so paid in shall constitute a separate trust fund in the office of the state treasurer, and, after any such payment is so ordered, the employer or insurance carrier shall thereupon be discharged from any further liability under such award for which payment is made to the extent of the payment made, and the payment of the award shall then be assumed to the extent of payment made by the special trust fund so created. If, for any reason, a beneficiary's right to the compensation awarded and ordered paid into said special trust fund ceases, lapses, or in any manner terminates by virtue of the terms and provisions of articles 40 to 47 of this title so that a surplus not surviving or accruing to any other beneficiary remains in said trust fund of the amount ordered paid into it on behalf of the beneficiary, the insurance carrier or employer who has made said payment shall be entitled to a refund of the present value of said surplus, if any, computed at the rate of four percent per annum. The state treasurer shall invest any portion of the special trust fund, including its surplus and reserves, which the director determines is not needed for immediate use.

**Source:** L. 90: Entire article R&RE, p. 552, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-52-112 as it existed prior to 1990.

**8-47-106. State average weekly wage - method of computation.** The state average weekly wage shall be established by the director annually on or before July 1 of each year. The state average weekly wage shall be determined from the average weekly earnings referenced in section 8-73-102 (1), computed by the division in June on the basis of the most recent available figures, and applicable to the ensuing twelve months beginning July 1. Such state average weekly wage shall automatically form the basis for establishing maximum benefits under the "Workers' Compensation Act of Colorado" as of 12:01 a.m., July 1, 1974, and at each succeeding time and date annually thereafter.

**Source:** L. 90: Entire article R&RE, p. 553, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-113 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** Since § 8-47-106 is similar to § 8-46-113 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**As applied, this section is not unconstitutionally vague.** Although the statute does not specify whether it applies to injuries occurring in the ensuing 12 months or to benefits payable in the ensuing 12 months, case law has long established that the parties' rights and liabilities under the Workers' Compensation Act of Colorado, article 40 through 47 of this title, are established at the time of injury. *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354

(Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

**Nor is the right to equal protection violated by this section.** *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

**Under this section, workers' compensation claimants are not entitled to yearly adjustments in benefits based on the change in the state average weekly wage (AWW) each year.** The Workers' Compensation Act of Colorado contains no provision mandating such annual recalculations. To construe this section otherwise would effectively thwart the Act's stated goals of providing certainty to claimants, insurers, and employers alike by permitting unpre-

dictable increases or decreases in benefits. *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009) (decided prior to 2010 amendment of § 8-42-107.5), rev'd on other grounds, 232 P.3d 777 (Colo. 2010).

**Applied** in *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982).

**8-47-107. Adoption of rules.** The director has the power to adopt reasonable and proper rules relative to the administration of articles 40 to 47 of this title and proper rules to govern proceedings and hearings of the division, and the director has the discretion to amend the rules from time to time. No such rule shall limit the jurisdiction of an administrative law judge in the office of administrative courts to hear and decide all matters arising under articles 40 to 47 of this title; except that in any matter where the director has issued an order to enforce a provision of the "Workers' Compensation Act of Colorado", an administrative law judge in the office of administrative courts shall not hear and decide the same matter while it is pending before the director. The rules shall be promulgated in accordance with section 24-4-103, C.R.S.

**Source:** **L. 90:** Entire article R&RE, p. 553, § 1, effective July 1. **L. 94:** Entire section amended, p. 1880, § 17, effective June 1. **L. 2005:** Entire section amended, p. 857, § 18, effective June 1. **L. 2009:** Entire section amended, (SB 09-070), ch. 49, p. 177, § 5, effective August 5.

**Editor's note:** This section is similar to former § 8-46-108 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** (1) Since § 8-47-107 is similar to § 8-46-108 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, relevant cases construing that provision have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the director of the division of labor.

**A rule of the industrial commission, not pleaded,** and which does not appear in the record, should not be considered by the court in an action to set aside an award of the commission. *Indus. Comm'n v. Roper*, 91 Colo. 125, 12 P.2d 349 (1932).

**Commission has power to enforce its own rules and regulations** by the imposition of ap-

propriate sanctions. *Saxton v. Indus. Comm'n*, 41 Colo. App. 309, 584 P.2d 638 (1978).

**The director of the division of labor is granted broad discretionary power to promulgate rules and regulations under the Colorado Workers' Compensation Act.** *Hargett v. Dir., Div. of Labor*, 854 P.2d 1316 (Colo. App. 1992).

**Agency's construction of own rule remains undisturbed upon review absent plain error.** An administrative agency's construction of its own rule is generally entitled to great weight; consequently, such construction will not be disturbed upon review unless it is plainly erroneous or inconsistent with such rule or the underlying statute. *Timberline Sawmill & Lumber, Inc. v. Indus. Comm'n*, 624 P.2d 367 (Colo. App. 1981).

**Applied** in *Martinez v. Indus. Comm'n*, 632 P.2d 1044 (Colo. App. 1981).

#### **8-47-108. Workers' compensation study - report to general assembly. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 553, § 1, effective July 1. **L. 91:** Entire section repealed, p. 1336, § 47, effective July 1.

**Editor's note:** Prior to its repeal in 1991, this section was similar to former § 8-46-114 as it existed prior to 1990.



**8-47-109. Report to general assembly. (Repealed)**

**Source:** **L. 90:** Entire article R&RE, p. 553, § 1, effective July 1. **L. 91:** Entire section repealed, p. 1336, § 48, effective July 1.

**Editor's note:** Prior to its repeal in 1991, this section was similar to former § 8-52-114 as it existed prior to 1990.

**8-47-110. Public officers to enforce orders - furnish information.** It is the duty of all officers and employees of the state, counties, and municipalities, upon the request of the director, to enforce in their respective departments all lawful orders of the director insofar as the same may be applicable and consistent with the general duties of such officers and employees. It is also their duty to make to the director such reports as the director may require concerning matters within their knowledge pertaining to the purposes of articles 40 to 47 of this title and to furnish the director such facts, data, statistics, and information as, from time to time, may come to them pertaining to the purposes of said articles and the duties of the division thereunder, and particularly all information coming to their knowledge respecting the condition of all places of employment subject to the provisions of said articles with regard to the health, protection, and safety of employees and the hazard of risk of such places of employment.

**Source:** **L. 90:** Entire article R&RE, p. 554, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-111 as it existed prior to 1990.

**ANNOTATION**

**Annotator's note.** Since § 8-47-110 is similar to § 8-46-110 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

**Duty of public officers and employees to enforce.** This section continues to make a dis-

inction between public employees and employers on the one hand and private employees and employers on the other, for it makes it the duty of all officers and employees of the state, counties and municipalities, upon the request of the director, to enforce director's orders and from time to time to furnish him various types of information. *State Comp. Ins. Fund v. Alishio*, 125 Colo. 242, 250 P.2d 1015 (1952).

**8-47-111. Division efforts to ensure employer compliance with workers' compensation coverage requirements - legislative declaration.** (1) The general assembly finds, determines, and declares that it is in the best interests of the public to assure that all employers who fall under the provisions of articles 40 to 47 of this title have in effect current policies of insurance or self-insurance for workers' compensation liability.

(2) In order to implement the declaration in subsection (1) of this section, the division shall develop a procedure for verifying whether or not all employers doing business in the state of Colorado comply with the requirements of article 44 of this title. This procedure must include cross-referencing employer records of the division of unemployment insurance and the division of workers' compensation. Upon identifying employers that are not in compliance with article 44 of this title, the division, with the assistance and cooperation of the attorney general, shall use all available means under articles 40 to 47 of this title to ensure compliance. Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall furnish the division, upon request, all information required by it to accomplish the purposes of this section.

**Source:** **L. 94:** Entire section added, p. 1147, § 1, effective May 19. **L. 97:** (2) amended, p. 1476, § 18, effective June 3. **L. 2002:** (2) amended, p. 1889, § 45, effective July 1. **L. 2012:** (2) amended, (HB 12-1120), ch. 27, p. 104, § 12, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**Cross references:** For Pinnacol Assurance, see article 45 of this title.

**8-47-112. Division web site - procedures to file complaints.** The director shall clearly post on the division's web site the procedure for an injured worker to follow to file a complaint with the division regarding any issue over which the director or his or her designee has authority to pursue, settle, or enforce pursuant to articles 40 to 47 of this title.

**Source: L. 2010:** Entire section added, (SB 10-013), ch. 303, p. 1435, § 3, effective July 1.

## PART 2

### GENERAL POWERS

**8-47-201. Information to division - blanks - verification.** Every employer receiving from the division any blanks with directions to fill out the same or requests for information required for the purposes of articles 40 to 47 of this title shall properly fill out the blanks and furnish the information so requested fully and correctly. The director may require that any information requested by the division be verified under oath and may fix the time within which said information shall be returned.

**Source: L. 90:** Entire article R&RE, p. 554, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-45-104 as it existed prior to 1990.

**8-47-202. Information furnished to division - confidential use.** Every employer shall furnish the division, upon request, all information required by it to accomplish the purposes of articles 40 to 47 of this title. The information shall be for the confidential use of the division, unless otherwise ordered by the director, and shall not be open to the public nor used in any court or any action or proceeding pending therein, unless the director is a party to such action or proceeding.

**Source: L. 90:** Entire article R&RE, p. 554, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-45-103 as it existed prior to 1990.

**8-47-203. Access to files, records, and orders.** (1) Notwithstanding the provisions of section 8-47-202, the filing of a claim for compensation is deemed to be a limited waiver of the doctor-patient privilege to persons who are necessary to resolve the claim. Access to claim files maintained by the division will be permitted only as follows:

(a) Workers' compensation claim files shall be available for inspection upon request by the parties to the claim, including the claimant, the employer, and the insurer or their attorneys or other designated representatives. The parties to a claim may review other claim files relating to the said claimant.

(b) Persons who are not parties to a claim, or their attorneys or designated representatives, and who wish to inspect or obtain information from claim files may submit a request to inspect a particular file, stating the purpose for such inspection. The director may disallow such requests if the purpose of the inspection is to further commercial interests or to disseminate information to nonparties. Any such request shall be considered and determined by the division within seventy-two hours.

(c) (I) The director may permit access to other governmental entities only as required for the performance of their official duties and only if those official duties relate to enforcement of provisions of articles 40 to 47 of this title; except that the department of



revenue may access results of any inquiry made by the division to determine whether an employer has any liability pursuant to articles 22 to 29 of title 39, C.R.S. As used in this subparagraph (I), "enforcement" includes duties of governmental entities involved in the administration of the provisions of articles 40 to 47 of this title or if such duties relate to the enforcement of child support under section 26-13-122, C.R.S. This provision is not intended to restrict the rights of persons otherwise provided for in articles 40 to 47 of this title to inspect and copy files.

(II) The general assembly intends that any contract, agreement, or any other means to transfer information between the department of labor and employment and any other governmental entity related to access to claim files in effect prior to May 27, 1997, shall be conformed to the provisions of this paragraph (c), as amended, or terminated as authorized by law.

(d) Persons entitled to review claim files may obtain copies upon payment of the fee set by the division. Such persons shall not disseminate information contained in those files except as required to resolve the claim, or as permitted by the director, or as permitted by law.

(e) Claimants may waive the protection of this statute by executing a waiver for the release of information. The waiver must be dated and will be effective for ninety days thereafter.

(2) All orders entered by the director or an administrative law judge pursuant to articles 40 to 47 of this title shall be made available by the division for inspection or copying for a fee reflecting actual costs; except that the name and other identifying information concerning the claimant and employer shall be excised.

**Source:** L. 90: Entire article R&RE, p. 554, § 1, effective July 1. L. 94: (2) added, pp. 1822, 1880, §§ 1, 18, effective June 1. L. 97: (1)(c) amended, p. 1091, § 1, effective May 27. L. 2004: (1)(c)(I) amended, p. 615, § 2, effective August 4.

**Editor's note:** This section is similar to former § 8-45-105 as it existed prior to 1990.

**8-47-203.3. Release of location information concerning individuals with outstanding felony arrest warrants.** (1) Notwithstanding any provision of state law to the contrary and to the extent allowable under federal law, at the request of the Colorado bureau of investigation, the division shall provide the bureau with information concerning the location of any person whose name appears in the division's records who is the subject of an outstanding felony arrest warrant. Upon receipt of such information, it shall be the responsibility of the bureau to provide appropriate law enforcement agencies with location information obtained from the division. Location information provided pursuant to this section shall be used solely for law enforcement purposes. The division and the bureau shall determine and employ the most cost-effective method for obtaining and providing location information pursuant to this section. Neither the division nor its employees or agents shall be liable in civil action for providing information in accordance with the provisions of this subsection (1).

(2) As used in subsection (1) of this section, "law enforcement agency" means any agency of the state or its political subdivisions that is responsible for enforcing the laws of this state. "Law enforcement agency" includes but is not limited to any police department, sheriff's department, district attorney's office, the office of the state attorney general, and the Colorado bureau of investigation.

**Source:** L. 95: Entire section added, p. 1122, § 1, effective July 1.

**8-47-204. Employees of division - qualifications.** The executive director has the power to employ, pursuant to section 13 of article XII of the state constitution, such deputies, experts, statisticians, accountants, inspectors, clerks, and other employees as may be necessary to carry out the provisions of articles 40 to 47 of this title or to perform the duties and exercise the powers conferred by law upon the division.

**Source:** L. 90: Entire article R&RE, p. 555, § 1, effective July 1. L. 94: Entire section amended, p. 103, § 1, effective March 18.

**Editor's note:** This section is similar to former § 8-46-109 as it existed prior to 1990.

**8-47-205. Salaries of employees of division.** All deputies, statisticians, accountants, clerks, experts, and other employees of the division shall receive such compensation as may be fixed by law. The salaries so fixed shall be paid monthly from the fund appropriated for the use of the division after approval by the director.

**Source:** L. 90: Entire article R&RE, p. 555, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-110 as it existed prior to 1990.

**8-47-206. Employees of division - bonds.** Such employees of the division as shall be directed by the director shall furnish surety company bonds in such sum as may be fixed by the director, the premiums therefor to be paid as other expenses of the division are paid.

**Source:** L. 90: Entire article R&RE, p. 555, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-112 as it existed prior to 1990.

**8-47-207. Collection of statistics.** The director or any agents of the division may enter into any place of employment for the purpose of collecting facts and statistics, examining the provisions made for the health, protection, and safety of the employees, and bringing to the attention of every employer any rule, order, or requirement of the division, or any law, or any failure on the part of any employer to comply therewith.

**Source:** L. 90: Entire article R&RE, p. 555, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-101 as it existed prior to 1990.

#### ANNOTATION

**Annotator's note.** (1) Since § 8-47-207 is similar to § 8-46-101 as it existed prior to the 1990 repeal and reenactment of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, a relevant case construing that provision has been included in the annotations to this section.

(2) The case included in the annotations to this section which refers to the industrial commission was decided prior to the 1969 amend-

ment which vested the director of the division of labor with the power previously exercised by the industrial commission to make investigations.

**It is the function of the industrial commission** to find the facts in workmen's compensation cases, and such findings, having respectable evidentiary support, are controlling. *Indus. Comm'n v. White*, 97 Colo. 322, 49 P.2d 434 (1935).

**8-47-208. Records of employers open to inspection of division.** All books, records, and payrolls of employers or of any contractor, subcontractor, lessee, sublessee, or person showing or reflecting in any way upon the amount of wage expenditure of such employers, contractor, subcontractor, lessee, sublessee, or person and all other facts, data, and statistics appertaining to the purposes of this article shall always be open for inspection by the director or any agents of the division for the purpose of ascertaining the correctness of the reported wage expenditure, number of persons employed, and such other information as may be necessary for the uses and purposes of the division in the administration of the "Workers' Compensation Act of Colorado".

**Source:** L. 90: Entire article R&RE, p. 555, § 1, effective July 1.



**Editor's note:** (1) This section is similar to former § 8-46-102 as it existed prior to 1990.

(2) The provisions of the "Workers' Compensation Act of Colorado" are contained in articles 40 to 47 of this title.

**8-47-209. Expenses of division.** All expenses incurred by the division pursuant to the provisions of the "Workers' Compensation Act of Colorado" shall be paid from funds appropriated for the use of the division upon claims therefor which shall be itemized and sworn to by the person who incurred the same. The claims shall be allowed by the director subject to the approval of the controller. The traveling expenses of the director or of any employees of the division, incurred while on business of the division outside of the state of Colorado, shall be paid in the manner aforesaid, but only when such expenses are authorized in advance by the controller to be incurred by the division.

**Source:** L. 90: Entire article R&RE, p. 556, § 1, effective July 1.

**Editor's note:** This section is similar to former § 8-46-104 as it existed prior to 1990.

### **Workmen's Compensation**

**Editor's note:** Articles 48 to 54 were numbered as articles 9 to 15 of chapter 81, C.R.S. 1963. For amendments to these articles prior to their repeal in 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Some provisions of these articles were relocated to articles 40 to 47 of this title. For a detailed comparison, see the comparative table located in the back of the index.

#### **ARTICLE 48**

##### **Contractors and Lessees**

**8-48-101 to 8-48-103. (Repealed)**

**Source:** L. 90: Entire article repealed, p. 576, § 77, effective July 1.

#### **ARTICLE 49**

##### **Medical, Surgical, and Hospital**

**8-49-101 and 8-49-102. (Repealed)**

**Source:** L. 90: Entire article repealed, p. 576, § 77, effective July 1.

#### **ARTICLE 50**

##### **Dependency**

**8-50-101 to 8-50-117. (Repealed)**

**Source:** L. 90: Entire article repealed, p. 576, § 77, effective July 1.

#### **ARTICLE 51**

##### **Benefits**

**8-51-101 to 8-51-113. (Repealed)**

**Source:** L. 90: Entire article repealed, p. 576, § 77, effective July 1.

**ARTICLE 52****General Provisions****8-52-101 to 8-52-115. (Repealed)**

**Source:** L. 90: Entire article repealed, p. 576, § 77, effective July 1.

**ARTICLE 53****Hearing and Review Procedure****8-53-101 to 8-53-130. (Repealed)**

**Source:** L. 90: Entire article repealed, p. 576, § 77, effective July 1.

**ARTICLE 54****State Compensation Insurance Authority****8-54-101 to 8-54-127. (Repealed)**

**Source:** L. 90: Entire article repealed, p. 576, § 77, effective July 1.

**ARTICLE 55****Workers' Compensation Classification  
Appeals Board**

- |           |  |           |                                   |
|-----------|--|-----------|-----------------------------------|
| 8-55-101. | Workers' compensation classification appeals board - creation. | 8-55-103. | Hearings - conflicts of interest. |
| 8-55-102. | Right to appeal - notice of appeal procedures.                 | 8-55-104. | Review of board decisions.        |
|           |  | 8-55-105. | Repeal of article.                |

**8-55-101. Workers' compensation classification appeals board - creation.**

(1) There is hereby created, in the division of insurance in the department of regulatory agencies, the workers' compensation classification appeals board. The board shall hear grievances brought by employers against insurers and Pinnacol Assurance concerning the calculation of experience modification factors and classification assignment decisions. The board shall consist of five voting members, each of whom shall be knowledgeable about workers' compensation classification and experience modification factors, and one nonvoting member, as follows:

(a) Two members shall be either salaried employees of an insurance company that issues workers' compensation insurance policies in this state or representatives of Pinnacol Assurance. Such two members shall not both represent Pinnacol Assurance or the same insurance company. In addition, one person shall be selected to serve as an alternate member to represent the interests of the insurance industry or Pinnacol Assurance. The alternate shall represent such interests in the event the primary member recuses himself or herself.

(b) One member, who shall be a nonvoting member, shall be an employee of a workers' compensation rating organization functioning under the provisions of section 10-4-408, C.R.S. The workers' compensation rating organization shall serve as a technical resource for the board.

(c) Three members shall represent private employers. Each private employer member shall be knowledgeable with respect to workers' compensation insurance, rules, and classifications, and shall be familiar with the business environment and community in this state. No private employer member shall be an employee of an insurance company,



insurance broker, insurance agent, law firm, actuary, Pinnacol Assurance, or any association of such entities or persons. All private employer board memberships shall be held in the name of an individual. At least one private employer member shall represent the construction industry.

(2) The private employer members and the members representing insurers and Pinnacol Assurance shall be appointed by the commissioner of insurance. The workers' compensation rating organization representative shall be appointed by the chief executive officer of such organization or by another officer designated to make such appointment. The commissioner may solicit a list of nominees from any interested party before making such appointments. The commissioner shall immediately notify the workers' compensation rating organization concerning the identity of any appointees.

(3) Each member shall serve one three-year term, and, in addition:

(a) (Deleted by amendment, L. 2002, p. 1889, § 46, effective July 1, 2002.)

(b) A private employer member or member representing the insurance industry or Pinnacol Assurance may serve a second consecutive three-year term; and

(c) The member representing the workers' compensation rating organization may be reappointed without limitation.

(4) Any vacancy on the board shall be filled for the unexpired term in the same manner as the original appointment. The member appointed to fill such vacancy shall be from the same category described in subsection (1) of this section as the member vacating the position.

(5) Members of the board shall serve without compensation, but their reasonable expenses incurred when performing their duties as board members shall be reimbursed from the workers' compensation cash fund created in section 8-44-112 (7). Such expenses shall be limited to travel, food, and lodging expenses.

(6) Members of the board, in their capacity as members, shall be immune from liability in all claims for injury that lie in tort or could lie in tort, regardless of whether that may be the type of action or the form of relief chosen by the claimant.

**Source:** L. 96: Entire article added, p. 1139, § 1, effective October 1. L. 2002: IP(1), (1)(a), (1)(c), (2), and (3) amended, p. 1889, § 46, effective July 1.

**8-55-102. Right to appeal - notice of appeal procedures.** An employer may appeal to the workers' compensation classification appeals board any issue concerning the calculation of experience modification factors and classification assignment decisions under the workers' compensation laws of this state by filing written notice with said board within thirty days after the employer has exhausted all appeal review procedures provided by the insurance company. Every insurance carrier authorized to transact business in this state, including Pinnacol Assurance, shall provide employers with a written copy or summary of their appeal procedures, together with a written notice of the availability of an appeal under this article, at the beginning of each policy year and when notice is provided to the employer of a change in experience modification factors or job classification.

**Source:** L. 96: Entire article added, p. 1141, § 1, effective October 1. L. 2002: Entire section amended, p. 1890, § 47, effective July 1.

**8-55-103. Hearings - conflicts of interest.** (1) The board shall commence each term on January 1 of each year and shall terminate each term on December 31.

(2) At the beginning of each term the board shall either in person or by teleconference:

(a) Elect a chair who shall be responsible for conducting each hearing;

(b) Appoint the member representing the workers' compensation rating organization as secretary; and

(c) Establish such organizational and procedural rules as are deemed necessary.

(3) The board shall meet as needed and in accordance with the following:

(a) The board shall schedule a hearing within thirty days after receipt of an appeal.

(b) The board shall provide written notice of a hearing to the appellant, the insurer, and the workers' compensation rating organization within thirty days after receipt of an appeal, but not less than ten days before the hearing.

(c) A hearing shall be conducted only if a quorum of the board is present, either in person or by teleconference. A quorum shall consist of a simple majority of the voting members, including at least two private sector members.

(d) Any decision of the board shall be by majority vote of the voting members who are present at the hearing.

(e) A member's vote shall be cast only by such member.

(f) If a board member has a conflict of interest with respect to any matter scheduled for hearing before the board, such member shall recuse himself or herself from any discussion and decisions on said matter unless, after full disclosure of the facts giving rise to such conflict, all parties to the appeal agree to waive such conflict. For purposes of this paragraph (f), a member shall be deemed to have a conflict of interest if such member:

(I) Has a conflict that would call into question such member's ability to render an unbiased decision; and

(II) Is associated with either party to the appeal. A member is "associated" with a party to an appeal if:

(A) The member and the party to the appeal are involved in a common business enterprise or are members of a controlled group, as defined in section 1563(a) of the federal "Internal Revenue Code of 1986", as amended; or

(B) The member has a familial relationship with the party to the appeal.

(g) Notwithstanding the provisions of paragraph (f) of this subsection (3), the member representing the workers' compensation rating organization shall not be deemed to have a conflict of interest with respect to any appeal based solely on his or her affiliation with his or her organization.

(4) The secretary of the board shall carry out the administrative functions of the board and shall be responsible for providing notice of, preparing the agenda for, and arranging the facilities for each hearing and meeting. The secretary shall also prepare a memorandum after each hearing that includes the vote of the board. Such memoranda shall be signed by the chair of the board and, each month, the secretary shall deliver copies of that month's memoranda to the workers' compensation rating organization.

**Source: L. 96:** Entire article added, p. 1141, § 1, effective October 1.

**8-55-104. Review of board decisions.** (1) A decision of the board shall be final and not subject to appeal unless the employer, insurance company, or Pinnacol Assurance provides written notice to the office of the commissioner of insurance, who shall determine whether a job misclassification occurred, as required pursuant to section 8-44-108. An employer may hold disputed premium amounts in abeyance from the date an appeal is filed pursuant to section 8-55-102 until the later of:

(a) The date a final decision is made by the board concerning such appeal; or

(b) The date of any written decision of the commissioner of insurance issued pursuant to subsection (3) of this section.

(2) Each employer, insurance company, or Pinnacol Assurance, as the case may be, shall be advised of the right to appeal to the office of the commissioner of insurance.

(3) An employer, insurance company, or Pinnacol Assurance shall provide written notice of an appeal to the commissioner of insurance within thirty days after the date of the board's decision. The commissioner shall review any decision of the board properly appealed pursuant to this section and shall provide a written decision within thirty days after the request for such review.

(4) Any employer that holds disputed premium amounts in abeyance pursuant to subsection (1) of this section and loses its appeal shall pay the disputed premium amount plus interest at the rate of one percent of such disputed amount per month. Such interest shall accrue from the date of the premium rate increase to the date of payment.



**Source:** **L. 96:** Entire article added, p. 1143, § 1, effective October 1. **L. 2002:** IP(1), (2), and (3) amended, p. 1890, § 48, effective July 1.

**8-55-105. Repeal of article.** (1) This article is repealed, effective July 1, 2021.

(2) Prior to said repeal, the workers' compensation classification appeals board shall be reviewed as provided in section 24-34-104, C.R.S.

**Source:** **L. 96:** Entire article added, p. 1143, § 1, effective October 1. **L. 2001:** Entire section amended, p. 170, § 1, effective March 28. **L. 2010:** (1) amended, (HB 10-1247), ch. 77, p. 262, § 1, effective April 5.

## **Occupational Diseases**

### **ARTICLE 60**

#### **Occupational Diseases**

**8-60-101 to 8-60-131. (Repealed)**

**Source:** **L. 75:** Entire article repealed, p. 311, § 62, effective September 1.

**Editor's note:** This article was numbered as article 18 of chapter 81, C.R.S. 1963. For amendments to this article prior to its repeal in 1975, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Cross references:** For current provisions concerning occupational diseases, see articles 40 to 47 of this title.

## **Medical Insurance Provisions**

**Editor's note:** Articles 65 and 66 were numbered as articles 19 and 20 of chapter 81, C.R.S. 1963. For amendments to these articles prior to their repeal in 1990, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Some provisions of these articles were relocated to articles 40 to 47 of this title. For a detailed comparison, see the comparative tables located in the back of the index.

### **ARTICLE 65**

#### **Colorado Medical Disaster Insurance Fund**

**8-65-101 to 8-65-108. (Repealed)**

**Source:** **L. 90:** Entire article repealed, p. 576, § 77, effective July 1.

### **ARTICLE 66**

#### **Colorado Major Medical Insurance Fund Act**

**8-66-101 to 8-66-112. (Repealed)**

**Source:** **L. 90:** Entire article repealed, p. 576, § 77, effective July 1.

**LABOR III - EMPLOYMENT SECURITY****ARTICLE 70****Definitions - General Provisions**

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on and after May 18, 1979, see § 8-70-143.

8-70-101.	Short title.	8-70-128.	Employment does not include - employer's trade or business.
8-70-102.	Legislative declaration.	8-70-129.	Employment does not include - spouse - minor.
8-70-103.	Definitions.	8-70-130.	Employment does not include - instrumentalities of United States.
8-70-104.	Additional definitions. (Repealed)	8-70-131.	Employment does not include - school - college - university.
8-70-105.	Banks as instrumentalities of United States.	8-70-132.	Employment does not include - educational institution.
8-70-106.	No vested rights or immunities.	8-70-133.	Employment does not include - hospital.
8-70-107.	Disposition of funds in event of unconstitutionality.	8-70-134.	Employment does not include - unemployment compensation system.
8-70-108.	Conformity with federal statutes.	8-70-135.	Employment does not include - paper routes.
8-70-109.	Agricultural labor.	8-70-136.	Employment does not include - brokers.
8-70-110.	Benefits - classifications.	8-70-137.	Employment does not include - organization exempt from income tax.
8-70-111.	Benefit year - definitions.	8-70-138.	Employment does not include - in-home services. (Repealed)
8-70-112.	Claims - classifications.	8-70-139.	Employment does not include - insurance agents.
8-70-113.	Employer - definition.	8-70-140.	Employment does not include - nonprofit organizations - governmental entities - Indian tribes.
8-70-114.	Employing unit - definitions - rules - employee leasing company certification fund - repeal.	8-70-140.1.	Employment does not include - foreign government service.
8-70-115.	Employment - "Federal Unemployment Tax Act".	8-70-140.2.	Employment does not include - nonresident alien service.
8-70-116.	Employment - location of services.	8-70-140.5.	Employment does not include - drivers of taxis or limousines.
8-70-117.	Employment - base of operations.	8-70-140.7.	Employment does not include - land professionals.
8-70-118.	Employment - nonprofit organizations.	8-70-140.8.	Employment does not include - owners.
8-70-119.	Employment - hospitals - institutions of higher education.	8-70-141.	Wages - definition.
8-70-120.	Employment - agricultural labor.	8-70-142.	Wages - remuneration not included as wages.
8-70-121.	Employment - domestic services.	8-70-143.	Applicability of legislation.
8-70-122.	Employment - American employer.		
8-70-123.	Employment - vessels - aircraft.		
8-70-124.	Employment - credit - state unemployment fund.		
8-70-125.	Employment - educational institutions.		
8-70-125.5.	Employment - Indian tribes.		
8-70-125.7.	Employment - property tax work-off program participants.		
8-70-126.	Employment does not include - agricultural labor.		
8-70-127.	Employment does not include - domestic service.		

**8-70-101. Short title.** Articles 70 to 82 of this title shall be known and may be cited as the "Colorado Employment Security Act".

**Source:** L. 36, 3rd Ex. Sess.: p. 13, § 1. CSA: C. 167A, § 1. L. 41: p. 761, § 1. CRS 53: § 82-1-1. C.R.S. 1963: § 82-1-1.



## ANNOTATION

**Law reviews.** For article, "An Anomalous Tax Situation", see 17 Dicta 278 (1940). For article, "The Conflict Between Collective Bargaining and Unemployment Insurance", see 28 Rocky Mt. L. Rev. 185 (1956). For note, "Supplemental Unemployment Benefits and State Unemployment Compensation", see 29 Rocky Mt. L. Rev. 232 (1957). For note, "The Unemployment Compensation Recipient — Should He Accept a Job?", see 44 Den. L.J. 147 (1967).

**The supreme court has upheld the constitutionality of the employment security act** from charges of unconstitutionality. *Miller v. Indus. Comm'n*, 173 Colo. 476, 480 P.2d 565 (1971).

**Act is not an unconstitutional denial of equal protection.** Claim of Woloson, 796 P.2d 1 (Colo. App. 1989).

**8-70-102. Legislative declaration.** As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the general assembly to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The general assembly, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

**Source:** L. 36, 3rd Ex. Sess.: p. 13, § 2. **CSA:** C. 167A, § 2. **L. 41:** p. 761, § 2. **CRS 53:** § 82-1-2. **C.R.S. 1963:** § 82-1-2.

## ANNOTATION

**Law reviews.** For article, "Unemployment Insurance in Colorado — Eligibility and Disqualification", see 25 Rocky Mt. L. Rev. 180 (1953). For note, "The Unemployment Compensation Recipient — Should He Accept a Job?", see 44 Den. L.J. 147 (1967).

**This act was passed to achieve social security for labor.** *Park Floral Co. v. Indus. Comm'n*, 104 Colo. 350, 91 P.2d 492 (1939).

It is clear from the declaration of policy that this act was enacted to avoid economic insecurity resulting from involuntary unemployment. *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973).

**This section sets forth guidelines for the "interpretation and application" of the employment security act.** This statement is a constituent part of the act. *Sandoval v. Indus. Comm'n*, 110 Colo. 108, 130 P.2d 930 (1942); *Indus. Comm'n v. Lyle Adjustment Co.*, 160 Colo. 241, 417 P.2d 5 (1966).

**And unemployment compensation acts are to be liberally construed** to further their remedial and beneficial purposes. *Indus. Comm'n v. Sirokman*, 134 Colo. 481, 306 P.2d 669 (1957);

*Tague v. Coors Porcelain Co.*, 30 Colo. App. 158, 490 P.2d 96 (1971).

**The employment security act must be construed liberally in favor of the claimant when possible.** *Denver Symphony Ass'n v. Indus. Comm'n*, 34 Colo. App. 343, 526 P.2d 685 (1974).

**This act has its legal basis in the police power of the state.** Its purpose is to assure a measure of security against the great hazard of unemployment in our economic life. *Indus. Comm'n v. Northwestern Mut. Life Ins. Co.*, 103 Colo. 550, 88 P.2d 560 (1939).

**For unemployment compensation is a matter related to the public welfare** so as to authorize the general assembly, in the exercise of the police powers, to enact a law authorizing payment of benefits to unemployed persons and levying a tax on employers to defray the cost thereof. *Cottrell Clothing Co. v. Teets*, 139 Colo. 558, 342 P.2d 1016 (1959).

**And the policy of the employment security act is to provide some protection to those persons unemployed through no fault of their own.** *Richlow Mfg. Co. v. Nicholas*, 38 F. Supp.

864 (D. Colo.), rev'd on other grounds, 126 F.2d 16 (10th Cir. 1941); Sandoval v. Indus. Comm'n, 110 Colo. 108, 130 P.2d 930 (1941); Donnell v. Indus. Comm'n, 149 Colo. 228, 368 P.2d 777 (1962); Montaus v. Indus. Comm'n, 171 Colo. 92, 464 P.2d 518 (1970); Gatewood v. Russell, 29 Colo. App. 11, 478 P.2d 679 (1970); Int'l. Typographical Union v. Indus. Comm'n, 44 Colo. App. 29, 609 P.2d 634 (1980); Denver Post Corp. v. Indus. Comm'n, 677 P.2d 436 (Colo. App. 1984).

**Thus the act does not confer benefits upon a partner who voluntarily agrees to dissolve a partnership,** receive a distribution of assets, and thereupon voluntarily agrees to relinquish his duties at the business. Indus. Comm'n v. Lyle Adjustment Co., 160 Colo. 241, 417 P.2d 5 (1966).

**Purpose of employment security act, as stated in this section, is subverted by § 8-73-108(4)(f)(I)** which reads "but a job shall not ... control notwithstanding", because this provision makes an invidious distinction between (1) those who obtain a better job which terminates prior to 90 days because of lack of work with no fault of their own and (2) those who obtain a

better job which terminates prior to 90 days because of some other factor other than lack of work with no fault of their own, and such a distinction involves an unconstitutional over classification forbidden by the fourteenth amendment of the United States constitution. Spann v. Indus. Comm'n, 181 Colo. 153, 508 P.2d 385 (1973).

**Act is independent of federal social security act.** This act has an independent basis, and the federal social security act does not place any limitations upon the courts' interpretation or the guide of interpretation contained in the act itself. Indus. Comm'n v. Northwestern Mut. Life Ins. Co., 103 Colo. 550, 88 P.2d 560 (1939).

**Determinations made under employment security act are not binding on the parties under any other statutory or contractual relationship** or on any other agency or court. City of Colo. Springs v. Indus. Comm'n, 720 P.2d 601 (Colo. App. 1985), aff'd, 749 P.2d 412 (Colo. 1988).

**Applied in** Olsgard v. Indus. Comm'n, 190 Colo. 472, 548 P.2d 910 (1976); Pierce v. Indus. Comm'n, 38 Colo. App. 85, 553 P.2d 402 (1976).

**8-70-103. Definitions.** As used in articles 70 to 82 of this title, unless the context otherwise requires:

- (1) "Agricultural labor" has the meaning set forth in section 8-70-109.
- (1.5) "Alternative base period" means the last four completed calendar quarters immediately preceding the benefit year.
- (2) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year.
- (3) "Benefits" means the money payments payable to an individual with respect to his unemployment. The different classifications of benefits are set forth in section 8-70-110.
- (4) "Benefit year" has the meaning set forth in section 8-70-111.
- (5) "Calendar day" means a full day beginning and ending at 12 midnight. As used in connection with appeal or protest periods, calendar days begin to be counted on the day after the date appearing on a notice issued by the division and continue consecutively for the number of days in the appeal or protest period. If the last day of any period set forth in articles 70 to 82 of this title is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.
- (6) "Calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31.
- (6.3) "Chargeable payroll" means the sum of chargeable wages.
- (6.5) "Chargeable wages" means those wages paid to an individual employee during a calendar year on which the employer of that employee is required to pay premiums as provided by article 76 of this title, including all wages subject to a tax under federal law, which imposes a tax against which credit may be taken for premiums required to be paid into a state unemployment fund. For each calendar year, chargeable wages is the first ten thousand dollars paid to an individual; except that, effective January 1, 2012, chargeable wages for each calendar year is the first eleven thousand dollars paid to an individual and except that, after December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid, chargeable wages is the first eleven thousand dollars paid to an individual, adjusted by the change in the average weekly



earnings prescribed in section 8-73-102, rounded to the nearest one hundred dollars. As used in articles 70 to 82 of this title, chargeable wages paid includes chargeable wages constructively paid as well as chargeable wages actually paid.

(7) "Claims" includes any of the divisions of the classifications set forth in section 8-70-112.

(8) "Division" means the division of unemployment insurance.

(8.5) "Electronic" has the meaning set forth in section 24-71.3-102 (5), C.R.S.; except that "electronic" shall not include use of the telephone to transmit audio or voice communication.

(9) "Employer" has the meaning set forth in section 8-70-113.

(10) "Employing unit" has the meaning set forth in section 8-70-114.

(11) "Employment" has the meaning set forth in sections 8-70-115 to 8-70-125, exclusive of the exceptions set forth in sections 8-70-126 to 8-70-140.7.

(12) "Employment office" means a free public employment office or branch thereof operated by this state or maintained as a part of a state-controlled system of public employment offices.

(12.5) "Fully employed" means any employee who is employed thirty-two hours or more for any week and is not included in the definition of "partially employed" as set forth in subsection (19) of this section.

(13) "Fund" means the unemployment compensation fund, established in section 8-77-101 (1), to which all premiums required and from which all benefits under articles 70 to 82 of this title and bonds issued under section 8-71-103 (2) (d) are paid and from which payments may be made to the Colorado housing and finance authority under section 29-4-710.7, C.R.S.

(14) "Hospital" means an institution which has been licensed, certified, or approved by the department of public health and environment as a hospital.

(15) (a) "Institution of higher education" means an educational institution which:

(I) Admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such a certificate; and

(II) Is legally authorized in this state to provide a program of education beyond high school; and

(III) Provides an educational program for which it awards a bachelor's or higher degree or a program which is acceptable for full credit toward such a degree, a program of postgraduate or postdoctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(IV) Is a public or other nonprofit institution.

(b) Notwithstanding any of the provisions of paragraph (a) of this subsection (15), all colleges and universities in this state are institutions of higher education for purposes of this section.

(16) "Insured work" means employment for employers.

(17) (a) "Interested party" to any benefit decision means the individual who is claiming benefits, the division, and any employer who has complied with the reporting requirements of the division with respect to wages or other information regarding such individual.

(b) "Interested party" to a premium liability determination means the division and the employer whose business has been issued a liability determination by the division.

(18) "Inverse chronological order", when applied to the charging of employers' accounts, means that the most recent base period employer is the first employer charged and all other employers shall follow in reverse order of dates of employment.

(19) "Partially employed" refers to an individual whose wages payable to him by his regular employer for any week of less than full-time work are less than the weekly benefit amount he would be entitled to receive if totally unemployed and eligible or, in any established payroll period not longer than one month, are less than full-time work in which wages payable to him by his regular employer are less than an amount determined in accordance with the general rule proportionately equivalent for such pay period to the individual's weekly benefit amount. Any employee who is employed thirty-two hours or

more for any week is deemed to be employed full time for such week and is not included in the definition of “partially employed” under this subsection (19).

(20) “Payments in lieu of premiums” means the money payments made into the fund by an employer pursuant to the provisions of sections 8-76-108 to 8-76-110.

(21) “Payroll period” means a period of not more than thirty-one consecutive days for which a payment of remuneration is ordinarily made to the employee by the employing unit employing him. If the services performed during one-half or more of any payroll period by an employee for the employing unit employing him constitute employment, all the services of the employee for such period shall be deemed to be employment; but, if the services performed during more than one-half of any such payroll period by an employee for the employing unit employing him do not constitute employment, none of the services of the employee for such period shall be deemed to be employment.

(22) “Period of unemployment” commences only after registration by the individual at an employment office, except as the division, by regulation, otherwise may prescribe.

(23) “Political subdivision” means a county, municipality, school district, local junior college district, special district formed pursuant to title 32, C.R.S., cooperative agency formed pursuant to part 2 of article 1 of title 29, C.R.S., or regional commission formed pursuant to section 30-28-105, C.R.S.

(23.5) “Premiums” means the money payments to the unemployment compensation fund required by articles 70 to 82 of this title.

(24) “State” includes the states of the United States of America, the District of Columbia, the commonwealth of Puerto Rico, and the Virgin Islands.

(25) to (27) (Deleted by amendment, L. 2009, (HB 09-1363), ch. 363, p. 1877, § 2, effective July 1, 2009.)

(28) “Totally unemployed” means an individual who performs no services in any week with respect to which no wages are payable to him. Should such week occur within an established payroll period in which the individual is not totally separated from his regular employer, he shall be deemed not totally unemployed but partially employed, as defined in subsection (19) of this section, and subject to the conditions pertaining to partial employment.

(29) “Wages” has the meaning set forth in section 8-70-141.

(30) “Week” means such period of seven consecutive days as the director of the division may prescribe by regulations.

(31) “Weekly benefit amount” means the amount of benefits an individual is entitled to receive for one week of total unemployment.

**Source:** L. 36, 3rd Ex. Sess.: p. 49, § 19. L. 37: p. 1270, § 12. CSA: C. 167A, § 19. L. 39: pp. 581, 586, §§ 13, 1. L. 41: pp. 802, 814, 818, §§ 19, 1, 1. L. 43: pp. 610, 612, §§ 11, 13. L. 45: p. 715, § 8. L. 47: pp. 888, 891, §§ 4, 1, 2. L. 49: p. 730, § 11. L. 51: pp. 822, 823, §§ 15-18. L. 53: p. 627, § 7. CRS 53: § 82-1-3. L. 55: pp. 528, 529, §§ 1, 1. L. 57: p. 516, § 1. L. 58, 1st Ex. Sess.: p. 24, § 1. L. 59: p. 559, § 1. L. 60: p. 155, § 1. L. 63: p. 664, §§ 1, 2. C.R.S. 1963: § 82-1-3. L. 65: pp. 830, 831, §§ 1, 2. L. 71: pp. 924-931, §§ 1-5. L. 73: p. 957, § 1. L. 75: (10)(f.1) added and IP(10)(g) and (11)(f) amended, p. 321, §§ 1, 2, effective June 20. L. 76: (10)(f.1) amended and (19.5) added, p. 360, § 1, effective April 20; (22)(b)(II) amended, p. 299, § 19, effective May 20; (3)(a), (7), (8)(a), IP(10)(g), (10)(g)(I), and (11)(f) amended and (10)(a)(II) and (10)(f.1) repealed, pp. 335, 352, §§ 2, 22, effective October 1. L. 77: (11)(d) amended, p. 472, § 1, effective July 1; (8)(b), (8)(c), (10)(g), and (11)(a)(I) R&RE, (8)(c.3), (8)(c.7), (10)(f.3), (10)(k), and (22)(c) added, and (10)(a), (10)(f), IP(10)(h)(I), (10)(h)(II), (11)(a)(I)(G), (20), and (22)(a) amended, pp. 457, 458, 460, 461, 462, §§ 1-12, effective July 7; (11)(f) repealed, p. 471, § 27, effective January 1, 1978. L. 79: (4) and (10)(k) R&RE, (4.3) added, and (10)(g)(I), IP(10)(g)(III), and (10)(g)(III)(E) amended, pp. 344, 345, §§ 1-3, effective September 30. L. 80: (10)(g)(I) and (10)(k) amended, p. 462, § 1, effective July 1. L. 81: (4.5) added, p. 482, § 1, effective July 1; (8)(e), (10)(j), (11)(e), (13), and (22)(a) amended, (20.5) added, and (6) repealed, pp. 489, 507, §§ 1, 29, effective July 1; (11)(b) amended, p. 2023, § 4, effective July 14; (11)(o) added, p. 508, § 1, effective July 1, 1983. L. 82: (10)(g)(I) amended, p. 234, § 1, effective July 1. L. 83: (10)(f.3)(I)(A), (10)(f.3)(I)(B), (11)(h), and



(11)(l) amended, p. 434, § 1, effective April 12; (8)(d), (9), IP(10)(a), and (10)(a)(III) amended, (10)(a)(IV) and (18.5) added, and (11)(m) and (11)(o)(I) repealed, pp. 428, 429, 433, §§ 1, 2, 14, effective June 3; (2)(e), (20.3), and (20.4) added and (22)(a) R&RE, pp. 2041, 2042, §§ 1-3, effective October 1. **L. 84:** IP(10)(a), (10)(a)(III), and (18) amended, (22)(a.5) added, (22)(b) R&RE, and (10)(a)(IV) repealed, pp. 313, 314, 320, §§ 1, 2, 3, 14, effective July 1. **L. 85:** (22)(a.5)(II) amended, p. 363, § 1, effective March 1; (3)(b), (10)(f.3)(I)(B), (22)(b)(IV)(C), (22)(b)(IV)(D), (22)(b)(V), and (22)(b)(VIII) amended, (22)(a.5)(I)(D), (22)(a.5)(I.5), (22)(b)(IV)(G), (22)(b)(XV), and (2)(b)(XVI) added, and (22)(b)(II), (22)(b)(VI), (22)(b)(XIII), and (22)(b)(XIV) repealed, pp. 359, 360, 361, §§ 1, 2, 3, 4, 7, effective April 4; (11)(p) added, p. 362, § 1, effective April 5; (1) and (3)(a) amended, p. 365, § 1, effective July 1; (8)(a) and (11)(c) amended, p. 372, § 1, effective July 1. **L. 86:** IP(11)(l) amended and (11)(q) added, p. 541, § 1, effective May 28; (19) and (23) amended and (5) repealed, pp. 487, 502, §§ 81, 125, effective July 1; (20.4) amended, p. 541, § 2, effective July 1. **L. 87:** (10)(f.3)(I) amended, p. 403, § 1, effective April 16; (19.5) amended, p. 405, § 1, effective June 1. **L. 89:** (10)(f.3)(II)(A) and (22)(b)(IV)(G) amended and (22)(b)(IV)(H) added, p. 424, § 1, effective July 1. **L. 90:** Entire section R&RE, p. 585, § 1, effective April 3; (11)(p) repealed, p. 609, § 8, effective April 16; (12.5) added and (17) amended, p. 606, § 1, effective April 16; (20.4) amended, p. 1763, § 2, effective June 8; (22)(b)(I)(A) amended, p. 557, § 9, effective July 1. **L. 94:** (14) amended, p. 2723, § 317, effective July 1. **L. 96:** (11) amended, p. 380, § 1, effective April 17. **L. 97:** (23) amended, p. 119, § 1, effective July 1. **L. 98:** (5) amended, p. 88, § 2, effective March 23. **L. 2002:** (8.5) added, p. 340, § 15, effective April 19. **L. 2003:** (8.5) amended, p. 1982, § 4, effective May 22. **L. 2009:** (1.5) added, (SB 09-247), ch. 405, p. 2228, § 1, effective July 1; (6.3), (6.5), and (23.5) added and (13), (17)(b), (20), and (25) to (27) amended, (HB 09-1363), ch. 363, p. 1877, § 2, effective July 1. **L. 2011:** (6.5) amended, (HB 11-1288), ch. 212, p. 914, § 1, effective July 1. **L. 2012:** (8) amended, (HB 12-1120), ch. 27, p. 77, § 2, effective June 1. **L. 2012, 1st Ex. Sess.:** (6.5) and (13) amended, (HB 12S-1002), ch. 2, p. 2424, § 2, effective June 1.

**Editor's note:** (1) As of publication date, the revisor of statutes has not received the notice specified in subsection (6.5) of this section.

(2) The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

## ANNOTATION

**Law reviews.** For note, "Rural Property and the Law in Southern Colorado", see 47 Den. L.J. 82 (1970). For article, "The Employer's Fruitless Quest For Independent Contractor Status," see 21 Colo. Law. 459 (1992).

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under the act to the division of employment and training.

**Under this section, the industrial commission determines the coverage under the act.** Each case must be decided upon its own facts, and where these are in dispute the finding of the commission is final. *Equitable Life Ins. Co. v. Indus. Comm'n*, 105 Colo. 144, 95 P.2d 4 (1939).

**Interested party.** Absent allegation or evidence that department of labor and employment was aggrieved by decision of industrial commission, division of employment and department of

labor and employment were not proper parties to bring the appeal from decision of industrial commission denying an award of unemployment compensation. *Division of Emp. ex rel. Sanchez v. Colo. Indus. Comm'n*, 31 Colo. App. 259, 500 P.2d 1192 (1972).

**Benefits not indicative of employee's unemployment status.** Employee benefits such as medical, life, sickness, and accident insurance and pension contributions provided by the employer are not indicative of an employee's unemployment status under this section. *Denver Post, Inc. v. Dept. of Labor & Emp.*, 199 Colo. 466, 610 P.2d 1075 (1980).

**To determine whether there is single employing unit** or a transfer of the claimant's employment, evidence indicating a common ownership must be considered by the commission. *Giacopelli v. Indus. Comm'n*, 622 P.2d 111 (Colo. App. 1980).

**No unemployment if working desired hours.** Where a claimant testified in substance that he could work as many hours as he desired,

he was neither totally nor partially unemployed within the meaning of this section, even though his efforts failed to produce any commissions and he received no salary or wages. *Trujillo v. Indus. Comm'n*, 42 Colo. App. 401, 594 P.2d 1065 (1979).

**To qualify as unemployed under the statutory definition of an unemployed person two conditions must co-exist**, namely, no service must be performed during the week and no wages are payable to him with respect to services performed in that week. *Indus. Comm'n v. Sirokman*, 134 Colo. 481, 306 P.2d 669 (1957).

**Question of whether claimant is unemployed is a purely mathematical inquiry:** If he performs no services and receives no compensation, then he is totally unemployed; if he does receive compensation, but in an amount less than the amount of benefits he could recover if totally unemployed, then he is still unemployed, though only partially. *Trujillo v. Indus. Comm'n*, 42 Colo. App. 401, 594 P.2d 1065 (1979).

**Where claimants deemed partially unemployed.** Because the claimants for unemployment compensation benefits continued to receive employee benefits during the periods for which they now claim unemployment compensation, the claimants were partially unemployed within the meaning of this section. *Denver Post, Inc. v. Dept. of Labor & Emp.*, 199 Colo. 466, 610 P.2d 1075 (1980).

**Person unemployed within meaning of section.** A person whose employment is terminated by reason of closing of the department in which she is employed, and who receives a separation allowance pursuant to a union contract based upon the period of service, is an unemployed person within the meaning of this section, since no service was performed during the week for which compensation is claimed and no wages were payable to her for service performed in that week. *Indus. Comm'n v. Sirokman*, 134 Colo. 481, 306 P.2d 669 (1957).

**Claimant was not "employed"** within the meaning of the unemployment compensation act

by virtue of her leave of absence agreement since that agreement created no rights in claimant inasmuch as she was not guaranteed reemployment and the leave could be cancelled at any time for activities the company deemed "prejudicial" to it. *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 38 Colo. App. 298, 559 P.2d 252 (1976).

**Subsection (21) requires two-step analysis in determining employment status of claimant:** Whether the claimant performed services and received compensation in any particular week; and whether the claimant was "totally separated" from his regular employer during the established payroll period. *Denver Post, Inc. v. Dept. of Labor & Emp.*, 199 Colo. 466, 610 P.2d 1075 (1980).

An individual who is otherwise totally unemployed but is not totally separated from his regular employer shall be deemed "partially unemployed" and subject to regulations governing partial unemployment. *Bartholomay v. Indus. Comm'n*, 642 P.2d 50 (Colo. App. 1982).

**Performance of minimal services does not entitle one to benefits as employee.** Where a claimant performed at least minimal services designed to benefit a corporation while serving as president of the corporation, he was not entitled to benefits as an employee. *Dailey v. Division of Emp.*, 30 Colo. App. 38, 488 P.2d 243 (1971) (decided under § 82-1-3 (21), C.R.S. 1963, defining "employee" prior to 1971 amendment).

**Determination of whether one is acting for the benefit or at the command of another** is generally one of fact for the commission. *Weld County Kirby Co. v. Indus. Comm'n*, 676 P.2d 1253 (Colo. App. 1983).

**Applied** in *Yanish v. Indus. Comm'n*, 38 Colo. App. 492, 558 P.2d 1007 (1976); *Herrera v. Indus. Comm'n*, 197 Colo. 23, 593 P.2d 329 (1979); *Auto Damage Appraisers, Inc. v. Indus. Comm'n*, 666 P.2d 1113 (Colo. App. 1983); *Mountain's Shadow Inn, Inc. v. Colo. Dept. of Labor & Emp.*, 672 P.2d 522 (Colo. 1983); *Diamond Circle Corp. v. Blocher*, 691 P.2d 769 (Colo. App. 1984).

## 8-70-104. Additional definitions. (Repealed)

**Source:** L. 39: p. 583, § 14. CSA: C. 167A, § 21. L. 41: p. 809, § 20. L. 43: p. 611, § 12. L. 45: p. 715, § 9. L. 47: p. 889, § 5. L. 49: pp. 730, 731, §§ 12, 13. L. 51: p. 823, § 20. L. 53: p. 632, § 8. CRS 53: § 82-1-4. C.R.S. 1963: § 82-1-4. L. 67: p. 327, § 1. L. 75: Entire section repealed, p. 206, § 6, effective July 16.

**8-70-105. Banks as instrumentalities of United States.** (1) For all purposes of articles 70 to 82 of this title and in conformity with federal laws, national banks doing business in Colorado and state bank members of the federal reserve system shall be deemed and held to be instrumentalities of the United States, as referred to in articles 70 to 82 of this title.

(2) Banks doing a commercial banking business in Colorado and maintaining an



account with the federal reserve bank or with a member of the federal reserve system, for the purposes of articles 70 to 82 of this title, shall not be deemed to be instrumentalities of the United States.

**Source:** L. 41: p. 287, §§ 1, 2. CSA: C. 167A, § 23. CRS 53: § 82-1-5. C.R.S. 1963: § 82-1-5.

**8-70-106. No vested rights or immunities.** The general assembly reserves the right to extend the time of operation, amend, or repeal all or any part of articles 70 to 74 and 76 to 81 of this title at any time; and there shall be no vested private right of any kind against such extension, amendment, or repeal. All the rights, privileges, or immunities conferred by said articles or by acts done pursuant thereto shall exist subject to the power of the general assembly to amend or repeal said articles at any time.

**Source:** L. 56: Ex. Sess., p. 26, § 1. CRS 53: § 82-1-6. C.R.S. 1963: § 82-1-6.

**8-70-107. Disposition of funds in event of unconstitutionality.** (1) Articles 70 to 74 and 76 to 81 of this title are enacted for the purpose of participating in the advantages available to the state of Colorado under the federal "Social Security Act", as amended. In the event that Title IX of the federal "Social Security Act" or any amendments to the federal act are amended or repealed by congress or are held unconstitutional by the supreme court of the United States, with the result that no portion of the premiums required under articles 70 to 74 and 76 to 81 of this title may be credited against the tax imposed by Title IX of the federal "Social Security Act", the division shall requisition from the unemployment trust fund all moneys in the trust fund standing to the credit of the state of Colorado, and such moneys, together with any other moneys in the unemployment compensation fund, shall be refunded to the contributors proportionate to their unexpended balances in the fund.

(2) In the event that the provisions of articles 70 to 74 and 76 to 81 of this title requiring the payment of premiums and benefits are held invalid under the constitution of this state by the supreme court of this state or the supreme court of the United States or are held invalid under the United States constitution by the supreme court of the United States or the supreme court of this state, the division shall requisition from the unemployment trust fund all moneys in the trust fund standing to the credit of the state of Colorado, and such moneys, together with any other moneys in the unemployment compensation fund, shall be held in custody by the state treasurer in the same manner as provided in section 8-77-105 until such time as the general assembly provides for the disposition of the moneys; except that the general assembly shall not dispose of the moneys other than for unemployment compensation purposes or for reimbursements to the contributors under the provisions of articles 70 to 74 and 76 to 81 of this title, proportionate to their unexpended balances in the fund.

**Source:** L. 56: Ex. Sess., p. 26, § 2. CRS 53: § 82-1-7. C.R.S. 1963: § 82-1-7. L. 81: (3) amended, p. 490, § 2, effective July 1. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1878, § 3, effective July 1.

**Cross references:** For Title IX of the "Social Security Act", see 42 U.S.C. §§ 1101 to 1110.

#### ANNOTATION

**Applied** in *Powell v. Denver Pub. Schools*, 659 P.2d 61 (Colo. App. 1983).

**8-70-108. Conformity with federal statutes.** If any provisions contained in articles 70 to 82 of this title are determined to be in nonconformity with federal statutes, as determined by the United States secretary of labor or an assistant secretary of labor, the division, with the concurrence of the attorney general of the state of Colorado, is authorized to administer

said articles so as to conform with the provisions of the federal statutes until such time as the general assembly meets in its next regular session and has an opportunity to amend said articles.

**Source:** **L. 77:** Entire section added, p. 463, § 13, effective July 7. **L. 81:** Entire section amended, p. 482, § 2, effective July 1. **L. 94:** Entire section amended, p. 1627, § 19, effective May 31.

#### ANNOTATION

**Applied** in *Bd. of County Comm'rs v. Indus. Comm'n*, 650 P.2d 1297 (Colo. App. 1982); *Indus. Comm'n v. Bd. of County Comm'rs*, 690 P.2d 839 (Colo. 1984).

**8-70-109. Agricultural labor.** (1) "Agricultural labor" means any remunerated service performed:

(a) On a farm in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(b) In the employ of the owner, tenant, or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by an act of nature, if the major part of the service is performed on a farm;

(c) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15 (g) of the "Agricultural Marketing Act", as amended (46 Stat. 1550, sec. 3; 12 U.S.C. section 1141j), or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(d) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one-half of the commodity with respect to which the service is performed; except that the provisions of this paragraph (d) are not applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(e) In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in paragraph (d) of this subsection (1), but only if such operators produced more than one-half of the commodity with respect to which the service is performed; except that the provisions of this paragraph (e) are not applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(f) On a farm operated for profit if the service is not in the course of the employer's trade.

(2) As used in this section, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities and orchards.

**Source:** **L. 79:** Entire section added, p. 357, § 1, effective May 18. **L. 90:** Entire section R&RE, p. 588, § 2, effective April 3.



## ANNOTATION

**Annotator's note.** Since the substantive provisions of this section are identical to former § 8-70-103 (10)(f.3), relevant cases construing that provision have been included under this section.

**Activities not constituting agriculture within meaning of act.** The growing of mushrooms in confined areas under cover does not come within the classification of "agriculture" so as to exempt persons engaged in such business and their employees from the operation of the provisions of this and following section, concerning unemployment compensation. *Great W. Mushroom Co. v. Indus. Comm'n*, 103 Colo. 39, 82 P.2d 751 (1938); *Park Floral Co. v. Indus. Comm'n*, 104 Colo. 350, 91 P.2d 492 (1939).

The business of harvesting living native trees on private ranchland or on public land was not

done "on a farm". *McFarland v. Indus. Comm'n*, 723 P.2d 154 (Colo. App. 1986).

The word "exclusively" pertaining to supplying and storing water for farming purposes means without any exception or solely, and therefore, reservoir company which allowed for recreational use of water did not meet requirements for exemption as agricultural labor. *Cache La Poudre Reservoir Co., v. Indus. Claim Appeals Office*, 757 P.2d 173 (Colo. App. 1988).

**Phrase "used exclusively", for purposes of agricultural labor exemption, applies to all uses of the water and not just consumptive uses.** *Cache La Poudre Reservoir Co., v. Indus. Claim Appeals Office*, 757 P.2d 173 (Colo. App. 1988).

**Applied in** *Nazzaro v. Indus. Comm'n*, 671 P.2d 983 (Colo. App. 1983).

**8-70-110. Benefits - classifications.** (1) Benefits are divided into classifications, as follows:

(a) **Regular benefits:** Benefits payable to an individual under this article or under any other state law, including benefits payable to federal civilian employees and to ex-servicemen pursuant to chapter 85 of title 5 of the United States Code, other than extended benefits;

(b) **Extended benefits:** Benefits payable to an individual under part 1 of article 75 of this title, including benefits payable to federal civilian employees and to former members of the armed forces pursuant to chapter 85 of title 5 of the United States Code, for weeks of unemployment in his or her eligibility period;

(c) **Additional benefits:** Benefits payable to exhaustees, as defined in section 8-75-101 (2), by reason of conditions of high unemployment or by reason of special factors under the provisions of any state law;

(d) **Benefits not effectively charged:** Those regular benefits, including the state share of extended benefits, paid but not charged to any active employer account.

**Source:** L. 90: Entire section added, p. 589, § 3, effective April 3. L. 2010: (1)(b) amended, (SB 10-028), ch. 397, p. 1891, § 4, effective June 9.

**Cross references:** For chapter 85 of title 5 of the United States Code, see 5 U.S.C. § 8501 et seq.

**8-70-111. Benefit year - definitions.** (1) "Benefit year" means the period of fifty-two consecutive calendar weeks beginning with the first week of a claims series established by the filing of a valid initial claim; except that the benefit year shall be fifty-three weeks if filing a new valid claim would result in overlapping any quarter of the base year of a previously filed new claim.

(2) As used in this section:

(a) A "valid initial claim" means an application for the determination of benefit rights which includes the claimant's social security number and which establishes that the claimant has met the eligibility condition set forth in section 8-73-107 (1) (e).

(b) A calendar week shall be deemed to be entirely within that calendar quarter which contains the first day of such week.

**Source:** L. 90: Entire section added, p. 589, § 3, effective April 3.

**8-70-112. Claims - classifications.** (1) Claims are divided into classifications, as follows:

- (a) Initial claim, which establishes a benefit year and is valid as defined in section 8-70-111 (2) (a); or
- (b) Additional claim, which reopens a claim series within an existing benefit year after a second or subsequent period of unemployment; or
- (c) Reopened claim, which reopens a claim within an existing benefit year when there has been no intervening employment since the last claim for a week of unemployment.

**Source:** L. 90: Entire section added, p. 590, § 3, effective April 3.

**8-70-113. Employer - definition.** (1) "Employer" means:

(a) (I) Any employing unit that, after December 31, 1985, and prior to January 1, 1999, had in employment at least one individual performing services at any time; except that this paragraph (a) shall not apply to employing units for which service in employment, as defined in sections 8-70-118 to 8-70-121, is performed.

(II) Any employing unit that, after December 31, 1998:

(A) Paid wages of one thousand five hundred dollars or more during any calendar quarter in the calendar year or the preceding calendar year; or

(B) Employed at least one individual in employment for some portion of the day on each of twenty days during the calendar year or during the preceding calendar year, each day being in a different calendar week.

(III) After December 31, 1998, this paragraph (a) shall not apply to employing units for which service in employment, as defined in sections 8-70-118 to 8-70-121, is performed.

(IV) For purposes of this paragraph (a), employment shall include service that would constitute employment but for the fact that such service is deemed to be performed entirely within another state pursuant to an arrangement entered into in accordance with section 8-72-110 (3) by the division and an agency charged with the administration of any other state or federal unemployment compensation law.

(V) For the purposes of this paragraph (a), if any calendar week includes both December 31 and January 1, the days of that week up to January 1 shall be deemed one calendar week and the days beginning January 1 another such week.

(b) Any employing unit for which service in employment as defined in section 8-70-118 is performed after December 31, 1971, except as provided in subsections (2) and (3) of this section. For purposes of this paragraph (b), employment shall include service which would constitute employment but for the fact that such service is deemed to be performed entirely within another state pursuant to an arrangement entered into in accordance with section 8-72-110 (3) by the division and an agency charged with the administration of any other state or federal unemployment compensation law.

(c) Any employing unit for which service in employment as defined in section 8-70-119 is performed, except as provided in subsections (2) and (3) of this section;

(d) Any employing unit for which agricultural labor as defined in section 8-70-109 is performed and is defined as employment in section 8-70-120;

(e) Any employing unit for which domestic service in employment as defined in section 8-70-121 is performed;

(f) Any employing unit (whether or not an employing unit at the time of acquisition) which acquired the organization, trade, or business, or substantially all of the assets of an employer subject to articles 70 to 82 of this title, or which acquired a part of the organization, trade, or business of an employer subject to articles 70 to 82 of this title, if such part would have been an employer under this section had it constituted the entire organization, trade, or business;

(g) Any employing unit that is not defined as an employer under this section but for which, within either the current or the preceding calendar year, service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for premiums required to be paid into a state unemployment fund;

(h) Any employing unit that, as a condition for approval of articles 70 to 82 of this title for full credit against the tax imposed by the "Federal Unemployment Tax Act" for



premiums paid, is required, pursuant to such act, to be an employer under articles 70 to 82 of this title;

(i) Any employing unit which, having become an employer under paragraphs (a) to (h) of this subsection (1), has not under section 8-76-106, ceased to be an employer subject to articles 70 to 82 of this title;

(j) For the effective period of its election pursuant to section 8-76-107, any employing unit which has become subject to articles 70 to 82 of this title; or

(k) Any Indian tribe for which service in employment as defined under section 8-70-125.5 is performed.

(2) In determining whether or not an employing unit for which service other than agricultural labor is also performed is an employer under paragraphs (b) and (e) of subsection (1) of this section, the wages earned or the employment of an employee performing service in agricultural labor after December 31, 1977, shall not be taken into account. If an employing unit is determined to be an employer of agricultural labor, such employing unit shall be determined to be an employer for the purposes of paragraph (a) of subsection (1) of this section.

(3) In determining whether or not an employing unit for which service other than domestic service is also performed is an employer under paragraph (b), (c), or (d) of subsection (1) of this section, the wages earned or the employment of an employee performing domestic service after December 31, 1977, shall not be taken into account.

**Source:** L. 90: Entire section added, p. 590, § 3, effective April 3. L. 98: (1)(a) amended, p. 82, § 1, effective August 5. L. 2001: (1)(k) added, p. 1547, § 1, effective December 21, 2000. L. 2009: (1)(g) and (1)(h) amended, (HB 09-1363), ch. 363, p. 1878, § 4, effective July 1.

**Editor's note:** The federal "Consolidated Appropriations Act, 2001", Pub.L. 106-554, which became law on December 21, 2000, required all states to amend their laws regarding how Indian tribes are treated for unemployment insurance purposes. The 2001 act enacting subsection (1)(k) provided for an effective date of December 21, 2000. (See L. 2001, p. 1550.)

**8-70-114. Employing unit - definitions - rules - employee leasing company certification fund - repeal.** (1) "Employing unit" means any individual or type of organization, including any partnership, limited liability partnership, limited liability company, limited liability limited partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or legal representative of a deceased person, who employs one or more individuals performing services within this state. All individuals performing services within this state for any employing unit that maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of articles 70 to 82 of this title. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of articles 70 to 82 of this title, whether such individual was hired or paid directly by such employing unit or by the agent or employee if the employing unit had actual or constructive knowledge of the work. Nothing in this section shall be construed to mean that a common paymaster may be considered a single employing unit for purposes of considering the services performed by another employing unit subject to a single or common payroll.

(2) (a) For purposes of this section:

(I) "Coemployer" means either an employee leasing company or a work-site employer.

(II) "Coemployment relationship" means a relationship that is intended to be an ongoing relationship rather than a temporary or project specific one, wherein the rights, duties, and obligations of an employer that arise out of an employment relationship have been allocated between coemployers pursuant to an employee leasing company contract and this section. In a coemployment relationship:

(A) The employee leasing company is entitled to enforce only such employer rights and is subject to only those obligations specifically allocated to the employee leasing company by the employee leasing company contract and this section;

(B) The work-site employer may enforce those rights and shall provide and perform those employer obligations allocated to the work-site employer by the employee leasing company contract and this section; and

(C) The work-site employer may enforce any right and shall perform any obligation of an employer not specifically allocated to the employee leasing company by the employee leasing company contract or this section.

(III) (A) "Covered employee" or "work-site employee" means an individual who is in an employment relationship with both an employee leasing company and a work-site employer and has received written notice of the coemployment with the employee leasing company.

(B) The provisions of sub-subparagraph (A) of this subparagraph (III) relate solely to the employee leasing contract and not to any contract for workers' compensation insurance or entitlement to workers' compensation benefits.

(IV) "Department" means the department of labor and employment.

(V) "Employee leasing company" means any person, business, or other entity that provides services to a work-site employer, as defined in subparagraph (VII) of this paragraph (a), pursuant to an employee leasing company contract, as defined in subparagraph (VI) of this paragraph (a).

(VI) "Employee leasing company contract" means any written staff leasing contract, extended employee staffing or supply contract, or other contract under which an employee leasing company procures or receives from a work-site employer specified coemployer responsibilities for specified employees, designating itself as employer of such employees, and retaining the right of direction and control of such employees with regard to those employer responsibilities, including the rights and responsibilities set forth in paragraph (b) of this subsection (2). An employee leasing company may have other responsibilities pursuant to an employee leasing company contract, including provision of professional guidance with regard to employment matters.

(VII) "Work-site employer" means any person, business, or other entity that procures the services of an employee leasing company under an employee leasing company contract and otherwise retains direction and control of the employees specified in the contract regarding responsibilities not specified in the contract pertaining to the business of the work-site employer.

(b) Notwithstanding subsection (1) of this section, an employee leasing company shall be considered an employing unit or the coemployer of a work-site employer's employees if, pursuant to an employee leasing company contract with the work-site employer, it has the following rights and responsibilities:

(I) The employee leasing company, as the employing unit or the co-employer, assigns employees to the work-site employer's locations;

(II) The employee leasing company, as the employing unit or co-employer, retains the right to set the employees' rate of pay;

(III) The employee leasing company, as the employing unit or co-employer, retains the right to pay the employee from its own account or accounts;

(IV) The employee leasing company, as the employing unit or co-employer, retains the right to direct and control the employees and such rights and responsibilities may be shared as specified in the employee leasing company contract;

(V) The employee leasing company, as the employing unit or co-employer, has the right to discharge, reassign, or hire employees to perform services for the work-site employer and the employee leasing company;

(VI) The employee leasing company, as the employing unit or co-employer, has the responsibility for payment of wages to the workers pursuant to the employee leasing company contract. The employee leasing company, as the employing unit or co-employer, has responsibility for reporting, withholding, and paying any applicable taxes and premiums with respect to the employee's wages or payment of sponsored employee benefit plans pursuant to the employee leasing company contract.

(VII) (A) Each employee leasing company shall pay wages and collect, report, and pay all payroll-related taxes and premiums from its own accounts for all covered employees. Each employee leasing company shall be responsible for the payment of unemployment



compensation insurance premiums and provide, maintain, and secure all records and documents required of work-site employers under the unemployment insurance laws of this state for covered employees.

(B) No later than the end of the calendar quarter immediately following August 5, 2009, each employee leasing company shall notify the division of unemployment insurance as to whether the employee leasing company elects to report and pay unemployment insurance premiums as the employing unit under its own unemployment accounts and premium rates or whether it elects to report unemployment premiums attributable to covered employees under the respective unemployment accounts and premium rates for each work-site employer. Under either election, the employee leasing company shall have the responsibility for unemployment compensation insurance as required of an employer pursuant to the "Colorado Employment Security Act", articles 70 to 82 of this title. If the employee leasing company fails to make an election, the employee leasing company shall report unemployment premiums attributable to covered employees under the respective unemployment accounts and premium rates for each work-site employer.

(C) The election made in sub-subparagraph (B) of this subparagraph (VII) shall be binding on all employers and the employing unit's related enterprises, subsidiaries, or other entities that share common ownership management or control with the employee leasing company. Employee leasing companies electing to report and pay unemployment insurance as the employing unit under its own unemployment accounts and premium rates following August 5, 2009, are permitted to change the election one time after the initial election to report unemployment premiums attributable to covered employees under the respective unemployment accounts of each work-site employer by notifying the division no later than the end of the current calendar quarter. An employee leasing company's election to pay unemployment premiums under the respective unemployment accounts and premium rates of the work-site employer is final and may not be reversed.

(VIII) An employee leasing company, as the employing unit or coemployer, may aggregate all employees for the purpose of sponsoring and administering workers' compensation plans pursuant to article 44 of this title and fully insured health coverage plans, as defined in section 10-16-102 (22.5), C.R.S., employee pension benefit plans, and provision of benefits pursuant to such plans. As employing units or coemployers, employee leasing companies shall be entitled to sponsor fully insured employer plans and offer employee benefits to the full extent afforded employers by law. A health plan sponsored by an employee leasing company with an aggregate of more than fifty employees shall comply with all the provisions of Colorado law that apply to large employer health plans, including consumer and provider protections, mandated benefits, nondiscrimination and fair marketing rules, preexisting limitations, and other required health plan policy provisions, and the carrier underwriting the plan shall be responsible for assuring compliance with this requirement pursuant to section 10-16-214 (5), C.R.S. Notwithstanding any provision of this section to the contrary, any workers' compensation insurance carrier may issue an insurance policy that insures either the employee leasing company or the work-site employer as the employer pursuant to the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title. Article 41 of this title shall apply to both the employee leasing company and the work-site employer, regardless of whether the policy is issued to the employee leasing company or the work-site employer. Notwithstanding any provision of this section to the contrary, any insurance carrier may issue an insurance policy that insures the employee leasing company as the employer pursuant to article 16 of title 10, C.R.S. An insurance carrier that issues an insurance policy to an employee leasing company shall be entitled to rely upon a copy of the certification filed by the employee leasing company with the department under paragraph (e) of this subsection (2), if such certification is currently valid, for the purpose of determining whether the leasing company is an "employer" under Colorado law.

(IX) The employee leasing company retains the right to provide for the welfare and benefit of the employees through such programs as professional guidance including, but not limited to, employment training, safety, and compliance matters;

(X) The employee leasing company, as the employing unit or co-employer, has the responsibility for addressing employee complaints, claims, or requests related to employ-

ment, except as otherwise provided pursuant to an existing collective bargaining agreement; except that some or all of the rights and responsibilities described in this subparagraph (X) may be shared with the work-site employer;

(XI) The employee leasing company, as the employing unit or co-employer, intends to retain the right to maintain the employment relationship between the employee leasing company and its employees on a long-term, and not temporary, basis;

(XII) The employees of the employee leasing company know of and consent to co-employment by the employee leasing company;

(XIII) The employee leasing company maintains employee records relating to employees of the employee leasing company; and

(XIV) Except as otherwise provided in the employee leasing company contract, the work-site employer has the responsibility for those policies and procedures related to the actual conduct of the work that leads to the work-site employer's conduct of its business and the production of its goods or services.

(c) (Deleted by amendment, L. 97, p. 207, § 2, effective April 8, 1997.)

(d) If an employee leasing company does not meet the requirements of this subsection (2), the work-site employer shall be considered the employing unit.

(e) Each employee leasing company shall maintain and have open for inspection by the department a listing of its work-site employers and their collective employees and shall maintain the records and reports as required by the "Colorado Employment Security Act", as described in articles 70 to 82 of this title. Each employee leasing company shall annually certify with an independent opinion of counsel to the department that it is in compliance with the rights and responsibilities set forth in paragraph (b) of this subsection (2) and that it is offering to all clients in its service agreements those items required in paragraph (b) of this subsection (2). The executive director of the department shall prescribe forms and promulgate rules to promote the efficient administration of this paragraph (e). The department may require employee leasing companies to submit documentation to show compliance with the provisions of paragraph (b) of this subsection (2) and may conduct any necessary review to verify that the employee leasing company is an employing unit or coemployer under this section. Each employee leasing company shall file an annual renewal of its certification on or before June 30 of each year.

(f) Each employee leasing company shall maintain and provide upon request to a carrier, as defined in section 10-16-102 (8), C.R.S., with which the employee leasing company requests a contract, the certification required in paragraph (e) of this subsection (2).

(g) (I) Each employee leasing company operating within this state as of August 5, 2008, shall complete its initial certification not later than sixty days after August 5, 2008. The initial certification shall be valid until the end of the state's first fiscal year that is more than one year after August 5, 2008.

(II) An employee leasing company not operating within this state as of August 5, 2008, shall complete its initial certification prior to commencement of operations within this state.

(III) Each employee leasing company shall annually certify and provide evidence to the department that it meets one of the following criteria to provide securitization of unemployment premiums:

(A) Execute and file a surety bond or deposit with the division money or a letter of credit equivalent to fifty percent of the average annual amount of unemployment premium assessed within the previous calendar year for all covered employees regardless of the election made pursuant to subparagraph (VII) of paragraph (b) of this subsection (2). For a new employee leasing company, the initial bond amount will be the standard premium rate, as determined pursuant to section 8-76-103, multiplied by fifty percent of the estimated projected chargeable payroll for the current calendar year as estimated by the employee leasing company. This sub-subparagraph (A) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.



(A.5) On and after the repeal of sub-subparagraph (A) of this subparagraph (III), execute and file a surety bond or deposit with the division money or a letter of credit equivalent to fifty percent of the average annual amount of unemployment premium assessed within the previous calendar year for all covered employees regardless of the election made pursuant to subparagraph (VII) of paragraph (b) of this subsection (2). For a new employee leasing company, the initial bond amount is the unrated premium rate, as determined pursuant to section 8-76-102.5, multiplied by fifty percent of the estimated projected chargeable payroll for the current calendar year as estimated by the employee leasing company.

(B) Provide the most recent independently audited financial statement prepared by a certified public accountant pursuant to generally accepted accounting principles, which statement may not be older than thirteen months. The audit shall also include items that demonstrate an accounting working capital of not less than one hundred thousand dollars. For the purposes of this sub-subparagraph (B), "working capital" of an employee leasing company means the employee leasing company's current assets minus the employee leasing company's current liabilities as determined by generally accepted accounting principles.

(C) Provide sufficient evidence on an annual basis that it has been accredited by a bonded, independent, and qualified assurance organization approved by the director of the division that provides satisfactory assurance of compliance acceptable to the department.

(IV) The department may, at its discretion, reduce or waive the bonding, money, or letter of credit requirements in sub-subparagraph (A) of subparagraph (III) of this paragraph (g). This waiver or reduction may be reviewed at any time, and in the department's discretion, it may require the employee leasing company to resume compliance with sub-subparagraph (A) of subparagraph (III) of this paragraph (g) or provide evidence of compliance with sub-subparagraph (B) or (C) of subparagraph (III) of this paragraph (g) immediately.

(V) An employee leasing company shall, within fifteen days following any deduction from a money deposit or sale of deposited securities under the provisions of sub-subparagraph (A) of subparagraph (III) of this paragraph (g), deposit sufficient additional moneys or securities to make whole the employee leasing company's deposit at the prior level. Any cash remaining from the department's sale of such securities shall be a part of the employee leasing company's escrow account. The department may, at any time, review the adequacy of the deposit made by any employee leasing company. If, as a result of such review, the department determines that an adjustment is necessary, it shall require the employee leasing company to make an additional deposit within thirty days after receipt of written notice of the department's determination or shall return to the employee leasing company such portion of the deposit as the department no longer considers necessary, whichever action is appropriate.

(VI) Upon filing an annual certification under this section, an employee leasing company shall pay a fee, as determined by rule of the department, not to exceed five hundred dollars. Fees collected pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the employee leasing company certification fund, referred to in this section as the "fund", which is hereby created in the state treasury. Moneys in the fund shall be subject to annual appropriation by the general assembly for implementation of this section. The moneys in the fund and interest earned on the moneys in the fund shall not revert to the general fund or be transferred to any other fund and shall be exempt from section 24-75-402, C.R.S. No fee charged pursuant to this section shall exceed the amount reasonably necessary for the administration of this section.

(VII) The department shall maintain a list of employee leasing companies that submit certifications required under paragraph (e) of this subsection (2) that is readily available to the public by electronic or other means.

(VIII) All records, reports, and other information obtained from an employee leasing company under this section, except to the extent necessary for the proper administration of this section by the department, shall be held confidential and shall not be published or open to public inspection other than to public employees in the performance of their public duties, pursuant to provisions governing records and reports in this title.

(3) (a) The status of an employee leasing company as the employing unit or a co-employer of a work-site employer's employees shall be revoked by the division if such employee leasing company fails to file the required reports or pay the premiums due under the provisions of articles 70 to 82 of this title. The effective date of a revocation shall be the first day of the quarter for which the reports and premiums are due. In the event of a revocation, the work-site employer shall become liable for the reports and premiums due.

(b) The provisions of paragraph (a) of this subsection (3) shall apply if any portion of an employing unit's business activity can be characterized as an employee leasing company, as defined in subsection (2) of this section.

(c) The provisions of paragraph (a) of this subsection (3) shall not apply if an employee leasing company acts as an agent for a work-site employer pursuant to the provisions of subsection (1) of this section, files the required reports, and pays the premiums due under an account established for the work-site employer.

(d) The provisions of paragraph (a) of this subsection (3) shall not apply to any temporary help contracting firm, as defined in section 8-73-105.5. However, if any portion of such firm's business activity can be characterized as an employee leasing company, as defined in subsection (2) of this section, that portion of the firm's business shall be subject to the provisions of this subsection (3).

(4) An employee leasing company shall not report wages for any work-site employer that would not otherwise be subject to articles 70 to 82 of this title.

(5) An employee leasing company or business management company shall not report remuneration paid:

(a) For services performed by individuals who are clients and who are sole proprietors or partners in a partnership; or

(b) For any other services which would not otherwise constitute employment pursuant to articles 70 to 82 of this title.

(6) (a) Nothing in this section shall exempt a work-site employer or any employee from any other licensing requirements imposed by local, state, or federal law. An employee who is licensed, registered, or certified by a unit of local, state, or federal government shall, for the purposes of such license, registration, or certification, be considered an employee of the work-site employer. An employee leasing company shall not be deemed to engage in any occupation, trade, profession, or other activity that is subject to licensing, registration, or certification requirements, or is otherwise regulated by a governmental entity, solely by entering into and maintaining an employee leasing company contract with a work-site employer or work-site employees who are subject to such requirements or regulation.

(b) **Collective bargaining agreements.** Nothing contained in this subsection (6) or in any employee leasing company contract shall affect, modify, or amend any collective bargaining agreement, or the rights or obligations of any work-site employer, employee leasing company, or work-site employee under the federal "National Labor Relations Act", 29 U.S.C. sec. 151 et seq., or the federal "Railway Labor Act", 45 U.S.C. sec. 151 et seq.

(c) **Tax or premium credits and other incentives.** For purposes of determination of employment-based tax or premium credits, such as economic development, enterprise zone, development zone, and other such economic incentives provided by the state or any other governmental entity, work-site employees shall be deemed employees solely of the work-site employer. A work-site employer shall be entitled to the benefit of any tax or premium credit, economic incentive, or other benefit arising as the result of the employment of work-site employees of the work-site employer. If the grant or amount of any credit, benefit, or other incentive is based on number of employees, then each work-site employer shall be treated as employing only those work-site employees coemployed by the work-site employer. Work-site employees working for other work-site employers of the employee leasing company shall not be counted. Upon request by a work-site employer or an agency or department of this state, each employee leasing company shall provide employment information reasonably required by any agency or department of this state responsible for administration of any tax or premium credit or economic incentive and necessary to support any request, claim, application, or other action by a work-site employer seeking the tax or premium credit or economic incentive.



(d) **Disadvantaged business.** With respect to a bid, contract, purchase order, or agreement entered into with the state or a political subdivision of the state, a work-site employer's status or certification as a small, minority-owned, disadvantaged, or women-owned business enterprise or as a historically underutilized business is not affected because the work-site employer has entered into an employee leasing company contract or uses the services of an employee leasing company.

(e) **Taxes, premiums, fees, other assessments.** (I) A tax, premium, fee, surcharge, penalty, or any other assessment on a work-site employer or employee leasing company on the basis of the number of employees shall be assessed:

(A) Against the work-site employer for the work-site employees under the employee leasing company contract with the employee leasing company; and

(B) Against the employee leasing company for the employees of the employee leasing company who are not work-site employees for any work-site employers in the state.

(II) For a tax or premium imposed or calculated upon the basis of total payroll, an employee leasing company may apply any small business allowance or exemption available to the work-site employer for the work-site employees for purposes of computing the tax or premium.

(III) The provisions of this paragraph (e) shall not apply to the reporting, withholding, and paying of taxes or premiums pursuant to subparagraphs (VI) and (VII) of paragraph (b) of subsection (2) of this section.

(7) **Employment arrangements.** Nothing in this section or in any employee leasing company contract shall:

(a) Diminish, abolish, or remove rights of covered employees of a work-site employer or obligations of such work-site employer to a covered employee existing prior to the effective date of the employee leasing company contract;

(b) Affect, modify, or amend any contractual relationship or restrictive covenant between a covered employee and any work-site employer in effect at the time an employee leasing company contract becomes effective. Nor shall it prohibit or amend any contractual relationship or restrictive covenant that is entered into subsequently between a work-site employer and a covered employee. An employee leasing company shall have no responsibility or liability in connection with, or arising out of, any such existing or new contractual relationship or restrictive covenant unless the employee leasing company has specifically agreed otherwise in writing.

(c) Create any new or additional enforceable right of a covered employee against an employee leasing company that is not specifically provided by the employee leasing company contract or this section.

(8) **Prohibited acts and enforcement.** (a) A person shall not offer or provide employee leasing company services or use the names employee leasing company, professional employer organization, PEO, staff leasing, employee leasing, administrative employer, or other title representing employee leasing services without first obtaining certification from the department under this section.

(b) A person shall not knowingly provide false or fraudulent information to the department in conjunction with any certifications or in any report required under this section.

(c) The executive director of the department may take disciplinary action against an employee leasing company for a violation of paragraph (a) or (b) of this subsection (8), for the conviction in a court of law for a crime arising from the operation of an employee leasing company relating to fraud or deceit or the ability of the employee leasing company to operate as such, for knowingly making a material misrepresentation to the department or other governmental agency, or for a willful violation of this section or any order or rule issued by the department under this section.

(d) Upon finding, after notice and opportunity for hearing, that an employee leasing company has violated one or more provisions of this section, the director of the division may:

(I) Place the certified employee leasing company on probation for a period and subject to conditions that the director of the division specifies;

(II) Impose an administrative penalty in an amount not to exceed one thousand dollars for each material violation; and

(III) Refuse to accept the certification and rescind the employee leasing company's ability to make unemployment insurance contributions for work-site employees under its unemployment insurance account.

**Source:** **L. 90:** Entire section added, p. 591, § 3, effective April 3. **L. 93:** Entire section amended, p. 705, § 1, effective May 6. **L. 97:** (2) to (4) amended and (6) added, p. 207, § 2, effective April 8. **L. 98:** (1) amended, p. 68, § 1, effective March 23. **L. 99:** (2)(b)(VIII) and (2)(e) amended and (2)(f) added, p. 146, § 1, effective March 25. **L. 2007:** (6) amended, p. 553, § 1, effective August 3. **L. 2008:** (2)(a), (2)(b)(VII), (2)(b)(VIII), and (2)(e) amended and (2)(g), (7), and (8) added, pp. 916, 920, §§ 1, 2, effective August 5. **L. 2009:** (2)(b)(VI), (2)(b)(VII), IP(2)(g)(III), (2)(g)(III)(A), (3)(a), (3)(c), (6)(c), and (6)(e) amended, (HB 09-1363), ch. 363, p. 1879, § 5, effective July 1; IP(2)(b), (2)(b)(VII), and (2)(g)(III)(A) amended, (SB 09-258), ch. 250, p. 1123, § 1, effective August 5. **L. 2010:** (2)(b)(VII)(B) and (2)(b)(VII)(C) amended, (HB 10-1422), ch. 419, p. 2065, § 12, effective August 11. **L. 2011:** (2)(g)(III)(A) amended and (2)(g)(III)(A.5) added, (HB 11-1288), ch. 212, p. 926, § 9, effective July 1. **L. 2012, 1st Ex. Sess.:** (2)(g)(III)(A) amended, (HB 12S-1002), ch. 2, p. 2425, § 3, effective June 1.

**Editor's note:** (1) Amendments to subsections (2)(b)(VII) and (2)(g)(III)(A) by Senate Bill 09-258 and House Bill 09-1363 were harmonized.

(2) As of publication date, the revisor of statutes has not received the notice specified in subsection (2)(g)(III)(A) of this section.

**Cross references:** For the legislative declaration contained in the 1997 act amending subsections (2) to (4) and enacting subsection (6), see section 1 of chapter 77, Session Laws of Colorado 1997.

## ANNOTATION

**Annotator's note.** Since the substantive provisions of this section are identical to former § 8-70-103 (9), relevant cases construing that provision have been included under this section.

**Quadriplegic who entered into employment agreements with his attendants was an "employing unit"** liable for unemployment compensation taxes. The fact that an insurance carrier provided the funds to pay the attendants did not change their status as employees of the quadriplegic who was responsible for hiring,

firing, training, and directing the attendants in the performance of their activities and ensuring that they were paid. *Richards v. Division of Employment*, 801 P.2d 22 (Colo. App. 1990).

**This section does not give the industrial claim appeals office the authority to treat various separate entities as a single employing unit** based on elements of common ownership and control. *Accord Human Res., Inc. v. Indus. Claim Appeals Office*, \_\_ P.3d \_\_ (Colo. App. 2010).

**8-70-115. Employment - "Federal Unemployment Tax Act".** (1) (a) "Employment", subject to other provisions of this subsection (1), includes any service performed prior to January 1, 1972, which was employment as defined in this subsection (1) prior to such date and service performed after December 31, 1971, by an employee as defined in section 3306 (i) of the "Federal Unemployment Tax Act" and any service performed after December 31, 1977, by an employee, as defined in subsection (o) of section 3306 of the "Federal Unemployment Tax Act", including service in interstate commerce.

(b) Notwithstanding any other provision of this subsection (1) and notwithstanding the provisions of section 8-80-101, service performed by an individual for another shall be deemed to be employment, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the division that such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual



performing the service, if exercised pursuant to the requirements of any state or federal statute or regulation, shall not be considered.

(c) To evidence that such individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service, the individual and the person for whom services are performed may either show by a preponderance of the evidence that the conditions set forth in paragraph (b) of this subsection (1) have been satisfied, or they may demonstrate in a written document, signed by both parties, that the person for whom services are performed does not:

(I) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for the said person for a finite period of time specified in the document;

(II) Establish a quality standard for the individual; except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

(III) Pay a salary or hourly rate but rather a fixed or contract rate;

(IV) Terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(V) Provide more than minimal training for the individual;

(VI) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(VII) Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;

(VIII) Pay the individual personally but rather makes checks payable to the trade or business name of the individual; and

(IX) Combine his business operations in any way with the individual's business, but instead maintains such operations as separate and distinct.

(d) A document may satisfy the requirements of paragraph (c) of this subsection (1) if such document demonstrates, by a preponderance of the evidence, the existence of such factors listed in subparagraphs (I) to (IX) of paragraph (c) of this subsection (1) as are appropriate to the parties' situation.

(2) Where the parties use a written document pursuant to paragraph (c) of subsection (1) of this section, such document may be the contract for performance of service or a separate document. Such document shall create a rebuttable presumption of an independent contractor relationship between the parties, where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to unemployment insurance benefits unless unemployment compensation coverage is provided by the independent contractor or some other entity, and that the independent contractor is obligated to pay federal and state income tax on any moneys paid pursuant to the contract relationship.

(3) Where the parties use a written document pursuant to paragraph (c) of subsection (1) of this section, and one of the parties is a professional whose license to practice a particular occupation under the laws of the state of Colorado requires such professional to exercise a supervisory function with regard to an entire project, such supervisory role shall not affect such professional's status as part of the independent contractor relationship.

**Source:** L. 90: Entire section added, p. 592, § 3, effective April 3; entire section R&RE, p. 1766, § 10, effective June 8. L. 91: Entire section amended, p. 1366, § 1, effective May 18; entire section amended, p. 1343, § 1, effective June 5.

**Editor's note:** Amendments to this section by House Bill 91-1279 and Senate Bill 91-238 were harmonized.

#### ANNOTATION

**Law reviews.** For article, "The Independent Contractor Versus the Employee — Tax Consequences", see 18 Colo. Law. 1091 (1989). For

article, "Independent Contractors in Colorado", see 34 Colo. Law. 53 (December 2005).

**Annotator's note.** Since the substantive pro-

visions of this section are identical to former § 8-70-103 (10)(a), relevant cases construing that provision have been included under this section.

**This section is not unconstitutional** as an impairment of obligation of contracts between operator and drivers of concrete delivery trucks. *Weitzel Redi-Mix, Inc. v. Indus. Comm'n*, 728 P.2d 364 (Colo. App. 1986).

This section is not unconstitutional because real estate salesmen and insurance agents are statutorily exempted. *Nat'l Claims Assoc. v. Div. of Emp.*, 786 P.2d 495 (Colo. App. 1989).

**Workers are deemed covered by the Colorado Employment Security Act unless they are free from control and directions in their work and are also engaged in an independent, but related, trade or business.** *Metro Denver Maint. v. Dept. of Labor*, 738 P.2d 49 (Colo. App. 1987).

**The definition of "employment", appearing in this section, is broad and inclusive, and it cannot be so construed as to limit the meaning to the relationship of master and servant without violating the legislative intent.** *Indus. Comm'n v. Northwestern Mut. Life Ins. Co.*, 103 Colo. 550, 88 P.2d 560 (1939).

**Whether a common-law employer-employee relationship (master-servant) exists is not determinative of whether an employee is covered by this act.** *Metro Denver Maint. v. Dept. of Labor*, 738 P.2d 49 (Colo. App. 1987).

**No improper delegation** to the division to define what constitutes covered employment. *Allstate Prod. v. Dept. of Labor*, 782 P.2d 880 (Colo. App. 1989).

**As used in this section, "service" means an active participation in, and not a passive connection with, some given operation, so merely owning or residing on a farm upon, or in connection with, which an individual performs no service whatsoever, ipso facto, does not make an employee self-employed as a farmer.** *Dellacroce v. Indus. Comm'n*, 111 Colo. 129, 138 P.2d 280 (1943).

**The term "employment" includes a broader concept of employment than the common law doctrine embodied in federal law.** *Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47 (Colo. App. 1987).

**"Is free from control and direction in the performance of the service" language of subsection (10) does not preclude consideration of future control.** *Weld County Kirby Co. v. Indus. Comm'n*, 676 P.2d 1253 (Colo. App. 1983).

Terms "control and direction" mean an overall right to control the actions of an employee. *Indus. Comm'n v. Northwestern Mut. Life Ins. Co.*, 103 Colo. 550, 88 P.2d 560 (1939); *Rent-a-Mom v. Indus. Comm'n*, 727 P.2d 403 (Colo. App. 1986).

Employer's right to terminate contractual relationship is one factor in determining whether

"control" exists and cannot be sole factor in determining if employment relationship exists. *Rent-a-Mom v. Indus. Comm'n*, 727 P.2d 403 (Colo. App. 1986).

**The term "customarily engaged in" is not unconstitutionally vague.** *Allstate-Prod. v. Dept. of Labor*, 782 P.2d 880 (Colo. App. 1989).

**This section places the burden of proof on the putative employer to demonstrate that both conditions set forth in subsection (1)(b) exist.** Under this section, services performed by an individual for another are deemed to be "employment" unless the putative employer can demonstrate that (1) the individual is free from control and direction in the performance of the service, both under the contract and in fact, and (2) the individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. *Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office*, 129 P.3d 1094 (Colo. App. 2005); *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008).

**Determination of whether an employer has met its burden of proving the requirements set forth in this section is a question of fact, and the commission's order may be set aside if there is no substantial evidence to support it.** *Rent-a-Mom v. Indus. Comm'n*, 727 P.2d 403 (Colo. App. 1986); *Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47 (Colo. App. 1987); *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008).

**There are two ways in which a putative employer may satisfy the "control and direction" and "independent trade" conditions of subsection (1)(b).** The putative employer may present general evidence demonstrating both conditions. Alternatively, it may produce a written document that satisfies all the applicable factors set forth in subsection (1)(c). *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008).

**A writing need not necessarily satisfy all nine factors enumerated in subsection (1)(c) to create the rebuttable presumption of an independent contractor relationship.** The writing must satisfy those factors that are applicable or potentially applicable. *Long View Sys. Corp. USA v. Indus. Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008).

**In determining whether one is acting under the control of another for the purposes of this section, the court primarily is concerned with what is done under a contract and not what the contract says.** *Jackson Cartage, Inc. v. Van Noy*, 738 P.2d 47 (Colo. App. 1987).

**Stockbroker, unable to perform functions without the supervision of a broker-dealer and prohibited by employer from performing similar functions for others, was engaged in covered employment for purposes of this sec-**



tion. Claim of Woloson, 796 P.2d 1 (Colo. App. 1989).

**The common law control test used to distinguish servants from independent contractors is the same as that used to distinguish independent contractors from employees under the "Workers' Compensation Act of Colorado",** so the cases under article 40 of title 8 are relevant to article 70 of title 8. Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office, 859 P.2d 278 (Colo. App. 1993).

**Control and direction over a putative employee by a third party.** The plain language of subsection (1)(b) does not support a conclusion that control and direction over a putative employee by someone other than the putative employer renders the situation one of employment; unless the person providing control and direction is shown to be an agent of the putative employer. Long View Sys. Corp. USA v. Indus. Claim Appeals Office, 197 P.3d 295 (Colo. App. 2008).

**Company was held liable to pay unemployment compensation taxes** for claims adjusters, vocational rehabilitation counselors, and medical benefits coordinators because there was insufficient evidence that such persons are engaged in an independent business, and such persons are not statutorily exempted. Nat'l Claims Assoc. v. Div. of Emp., 786 P.2d 495 (Colo. App. 1989).

**Whether a worker is in covered employment depends upon the nature of the services performed** and some services by a worker may constitute covered employment and other services by the same worker may not. Black Sheep, Inc. v. Div. of Emp., 804 P.2d 871 (Colo. App. 1990).

**Services found to be covered employment.** Facts showing that petitioner had the right to terminate workers and that workers were paid by petitioner at a rate established by him to perform specified services on material that was provided by him constituted substantial evidence to support the commission's finding that workers were within the statutory definition of covered employment. Allen Co., Inc. v. Indus. Comm'n, 735 P.2d 889 (Colo. App. 1986), aff'd, 762 P.2d 677 (Colo. 1988).

Services provided by claimant as a direct seller of consumer products at a location other than a permanent retail establishment constituted employment for purposes of the Colorado Employment Security Act when contract between employer and claimant did not provide that the employee was not to be treated as an employee for federal payroll withholding tax purposes as required by subsection (11) (I). Autry Bros., Inc. v. Cross, 773 P.2d 248 (Colo. App. 1989).

**The following do not demonstrate general control but are designed to ensure that the**

**end result is accomplished:** Giving floor plans to workers, retaining the right to inspect all work, and requiring workers to obtain company approval of any additional work requested by customers if they wish to be paid for such work. Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office, 859 P.2d 278 (Colo. App. 1993).

**A requirement that workers be covered by workers' compensation insurance is not evidence of an employment relationship** because independent contractors may be deemed to be employees under article 41 of title 8 and because such a requirement is common. Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office, 859 P.2d 278 (Colo. App. 1993).

**Setting ethics guidelines and the times at which workers must report to work and call customers to schedule installations** does not constitute control over the means and methods of installing floor covering and does not evidence an employment relationship. Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office, 859 P.2d 278 (Colo. App. 1993).

**To be customarily engaged in an independent business, a worker must actually and customarily provide similar services to others.** The performance of occasional or insubstantial services for others does not establish that a worker is customarily engaged in an independent business. Carpet Exch. of Denver, Inc. v. Indus. Claim Appeals Office, 859 P.2d 278 (Colo. App. 1993); Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office, 129 P.3d 1094 (Colo. App. 2005).

**It is reasonable to infer that a worker maintains an independent business if a written agreement demonstrates that an employer doesn't require a worker to work exclusively for such employer.** If other evidence demonstrates that such inference isn't accurate, then the worker is entitled to unemployment compensation. Home Health Care Prof. v. Colo. Dept. of Labor, 937 P.2d 851 (Colo. App. 1996).

**Musicians not independent contractors pursuant to subsection (1)(b).** Musicians who were free to play other musical engagements, who worked mainly out of their homes, who did not maintain business addresses or telephone numbers, and who earned 95 to 99% of their income as musicians with the band in question were not customarily engaged in independent trades, occupations, professions, or businesses related to the services they performed with the band, despite a "memorandum of understanding" that satisfied the advisements required by subsection (1)(c). Barge v. Indus. Claim Appeals Office, 905 P.2d 25 (Colo. App. 1995).

**Applied in Insul-lite Window & Door Mfg. v. Indus. Comm'n,** 723 P.2d 151 (Colo. App. 1986); Locke v. Longacre, 772 P.2d 685 (Colo. App. 1989).

**8-70-116. Employment - location of services.** (1) "Employment" means an individual's service, wherever performed within the United States, the Virgin Islands, or Canada, if:

- (a) The service is not covered under the unemployment compensation law of any other state, the Virgin Islands, or Canada; and
- (b) The place from which the service is directed or controlled is in Colorado.

**Source: L. 90:** Entire section added, p. 592, § 3, effective April 3.

**8-70-117. Employment - base of operations.** "Employment" means that the entire service of an individual is performed within this state or both within and without this state if the service is localized in this state; or that the service is not localized in any state but some of the service is performed in this state and that the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state; or that the base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed but that the individual's residence is in this state. For purposes of this section, service shall be deemed to be localized within a state if the service is performed entirely within the state or if the service is performed both within and without the state but the service performed without the state is incidental to the individual's service within the state or, for example, is temporary or transitory in nature or consists of isolated transactions.

**Source: L. 90:** Entire section added, p. 592, § 3, effective April 3.

**8-70-118. Employment - nonprofit organizations.** "Employment" means services performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational, or other organization which is excluded from the term "employment", as defined in the "Federal Unemployment Tax Act" solely by reason of section 3306 (c) (8) of that act, and which has had four or more individuals in employment for some portion of a day in each of twenty different weeks, whether or not such weeks were consecutive, within either the current or the preceding calendar year, regardless of whether they were employed at the same moment of time.

**Source: L. 90:** Entire section added, p. 592, § 3, effective April 3.

**Editor's note:** See § 8-70-140 for services that are not included in the use of the term "employment" as used in this section.

#### ANNOTATION

**Meeting definition of covered statutory "employment".** The minimum four-employee requirement for coverage under the act is not

limited to persons working in Colorado. *Laub v. Indus. Claim Appeals Office*, 983 P.2d 815 (Colo. App. 1999).

**8-70-119. Employment - hospitals - institutions of higher education.** "Employment" means services performed after December 31, 1971, by an individual in the employ of this state or any of its instrumentalities (or in the employ of this state and one or more other states or their instrumentalities) for a hospital or institution of higher education located in this state, if the service is excluded from the term "employment" as defined in the "Federal Unemployment Tax Act" solely by reason of section 3306 (c) (7) of that act, and means services performed after December 31, 1977, in the employ of this state or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing, and one or more other states or political subdivisions, if such service is excluded from the term "employment" as defined in the "Federal Unemployment Tax Act" by reason of section 3306 (c) (7) and is not excluded from employment under section 8-70-140.



**Source:** L. 90: Entire section added, p. 593, § 3, effective April 3.

**Editor's note:** See § 8-70-140 for additional services that are not included in the use of the term "employment" as used in this section.

**8-70-120. Employment - agricultural labor.** (1) "Employment" means services performed after December 31, 1977, by an individual in agricultural labor as defined in section 8-70-109 when:

(a) Such service is performed for a person who, during any calendar quarter in either the current or the preceding calendar year, paid remuneration in cash of twenty thousand dollars or more to individuals employed in agricultural labor, including agricultural labor performed by an alien referred to in paragraph (b) of this subsection (1), or for some portion of a day in each of twenty different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor, including agricultural labor performed by an alien referred to in paragraph (b) of this subsection (1), ten or more individuals, regardless of whether they were employed at the same moment of time; and

(b) Such service is not agricultural labor if performed by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to sections 214 (c) and 101 (a) (15) (H) of the federal "Immigration and Nationality Act".

(2) For the purposes of sections 8-70-115 to 8-70-125, any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of such crew leader:

(a) If such crew leader holds a valid certificate of registration under the federal "Migrant and Seasonal Agricultural Worker Protection Act" or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(b) If such individual is not an employee of such other person within the meaning of section 8-70-115.

(3) For the purposes of this section, in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under subsection (2) of this section:

(a) Such other person and not the crew leader shall be treated as the employer of such individual; and

(b) Such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his own behalf or on behalf of such other person) for the service in agricultural labor performed for such other person.

(4) For the purposes of this section, a crew leader is an individual who:

(a) Furnishes individuals to perform service in agricultural labor for any other person;

(b) Pays (either on his own behalf or on behalf of such other person) the individuals so furnished by him for the service in agricultural labor performed by them; and

(c) Has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

**Source:** L. 90: Entire section added, p. 593, § 3, effective April 3. L. 94: (1)(b) amended, p. 637, § 1, effective July 1. L. 98: (1)(b) amended, p. 68, § 2, effective March 23.

**8-70-121. Employment - domestic services.** "Employment" means domestic services performed after December 31, 1977, in a private home, local college club, or local chapter of a college fraternity or sorority for a person who paid cash remuneration of one thousand dollars or more after December 31, 1977, in the current calendar year or the preceding calendar year to individuals employed in such domestic service in any calendar quarter.

**Source:** L. 90: Entire section added, p. 594, § 3, effective April 3.

**8-70-122. Employment - American employer.** (1) "Employment" means services of an individual who is a citizen of the United States performed outside the United States (except in Canada) after December 31, 1971, in the employ of an American employer (other than service which is deemed employment under the provisions of section 8-70-117 or the parallel provisions of another state's law) if:

(a) The employer's principal place of business in the United States is located in this state; or

(b) The employer has no place of business in the United States but the employer is an individual who is a resident of this state; or the employer is a corporation which is organized under the laws of this state; or the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(c) None of the criteria of paragraphs (a) and (b) of this subsection (1) is met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits based on the service, under the law of this state.

(2) For purposes of this section:

(a) An "American employer" means an individual person who is a resident of the United States; or a partnership if two-thirds or more of the partners are residents of the United States; or a trust if all of the trustees are residents of the United States; or a corporation organized under the laws of the United States or of any state.

(b) "United States" includes the District of Columbia, the commonwealth of Puerto Rico, and the Virgin Islands.

**Source:** L. 90: Entire section added, p. 594, § 3, effective April 3. L. 92: IP(1) amended, p. 1793, § 1, effective April 10.

**8-70-123. Employment - vessels - aircraft.** Notwithstanding section 8-70-117, "employment" means services performed after December 31, 1971, by an officer or member of the crew of an American vessel or an American aircraft on or in connection with such vessel or aircraft, if the office from which the operations of such vessel or aircraft operating within or within and without the United States are ordinarily and regularly supervised, managed, directed, and controlled is within this state.

**Source:** L. 90: Entire section added, p. 595, § 3, effective April 3.

**8-70-124. Employment - credit - state unemployment fund.** Notwithstanding any other provisions of sections 8-70-115 to 8-70-125, "employment" means services with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for premiums required to be paid into a state unemployment fund or which, as a condition for full credit against the tax imposed by the "Federal Unemployment Tax Act", is required to be covered under articles 70 to 82 of this title.

**Source:** L. 90: Entire section added, p. 595, § 3, effective April 3. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1881, § 6, effective July 1.

**8-70-125. Employment - educational institutions.** With respect to weeks of unemployment which begin after December 31, 1977, "employment" means services performed in the employ of an educational institution, including an institution of higher education as defined in section 8-70-103 (15); and the payment or denial of benefits based on such employment shall be subject to the conditions set forth in section 8-73-107 (3).

**Source:** L. 90: Entire section added, p. 595, § 3, effective April 3.

**8-70-125.5. Employment - Indian tribes.** (1) "Employment" means service performed in the employ of an Indian tribe, as defined in section 3306 (u) of the "Federal



Unemployment Tax Act", 26 U.S.C. sec. 3301 et seq. ("FUTA"), if such service is excluded from "employment", as defined in FUTA solely by reason of section 3306 (c) (7) of FUTA, and is not otherwise excluded from "employment" under the provisions of articles 70 to 82 of this title.

(2) Benefits based on service in employment defined in this section shall be payable in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to the provisions of articles 70 to 82 of this title.

**Source: L. 2001:** Entire section added, p. 1547, § 2, effective December 21, 2000.

**Editor's note:** The federal "Consolidated Appropriations Act, 2001", Pub.L. 106-554, which became law on December 21, 2000, required all states to amend their laws regarding how Indian tribes are treated for unemployment insurance purposes. The 2001 act enacting this section provided for an effective date of December 21, 2000. (See L. 2001, p. 1550.)

**8-70-125.7. Employment - property tax work-off program participants.** "Employment" includes services performed by participants in a property tax work-off program established pursuant to article 3.7 of title 39, C.R.S.

**Source: L. 2010:** Entire section added, (HB 10-1076), ch. 162, p. 567, § 4, effective August 11.

**8-70-126. Employment does not include - agricultural labor.** "Employment" does not include services performed by an individual in agricultural labor, as defined in section 8-70-109, except as provided in section 8-70-120.

**Source: L. 90:** Entire section added, p. 595, § 3, effective April 3.

**8-70-127. Employment does not include - domestic service.** Except as provided in section 8-70-121, "employment" does not include domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

**Source: L. 90:** Entire section added, p. 595, § 3, effective April 3.

**8-70-128. Employment does not include - employer's trade or business.** (1) "Employment" does not include casual labor not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for the service is fifty dollars or more and unless the service is performed by an individual who is regularly employed by the employer to perform such service. For purposes of this section, an individual is deemed to be regularly employed during a calendar quarter only if:

(a) On at least twenty-four days during such calendar quarter, the individual performs services for the employer which are not in the course of the employer's trade or business; or

(b) On at least twenty-four days during the previous calendar quarter, the individual performed services for the employer which were not in the course of the employer's trade or business.

**Source: L. 90:** Entire section added, p. 595, § 3, effective April 3.

**8-70-129. Employment does not include - spouse - minor.** "Employment" does not include services performed by an individual in the employ of his spouse and service performed by a child under the age of twenty-one in the employ of his father or mother.

**Source: L. 90:** Entire section added, p. 596, § 3, effective April 3.

**8-70-130. Employment does not include - instrumentalities of United States.** “Employment” does not include services performed in the employ of the United States government, a national bank or state bank that is a member of the federal reserve system, or a federal savings and loan association or a state building and loan association that is a member of the federal home loan bank system, which institutions were, prior to January 1, 1972, exempt from articles 70 to 82 of this title, or any other instrumentality of the United States exempt under the constitution of the United States from the premiums imposed by articles 70 to 82 of this title; except that, to the extent that the congress of the United States permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of articles 70 to 82 of this title shall be applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, employing units, individuals, and services. If this state is not certified for any year by the United States secretary of labor under section 3304 of the federal “Internal Revenue Code of 1986”, as amended, the payments required of such instrumentalities with respect to such year shall be refunded by the division from the fund in the same manner and within the same period as is provided in section 8-79-108 with respect to premiums erroneously collected.

**Source:** **L. 90:** Entire section added, p. 596, § 3, effective April 3. **L. 2000:** Entire section amended, p. 1837, § 2, effective August 2. **L. 2009:** Entire section amended, (HB 09-1363), ch. 363, p. 1881, § 7, effective July 1.

#### ANNOTATION

**Annotator’s note.** Since the substantive provisions of this section are identical to former § 8-70-103 (11)(e), relevant cases construing that provision have been included under this section.

**The American National Red Cross is an instrumentality of the United States, and as such is immune** from taxation under the Colorado employment security act, unless that immunity has been waived by the 1960 amendments to the federal unemployment tax act. the U.S. district court concludes that the 1960

amendments to the federal unemployment tax act do not waive the immunity of the Red Cross from taxation under the Colorado employment security act although that act recognizes the right of the states to provide and administer a fund for the same purpose under state law, and the contributions made by employers to the state fund are by the federal act made a credit against the federal tax. *Am. Nat’l Red Cross v. Dept. of Emp.*, 263 F. Supp. 581 (D. Colo. 1965), *aff’d sub nom. Dept. of Emp. v. United States*, 385 U.S. 355, 87 S. Ct. 464, 17 L. Ed.2d 414 (1966).

**8-70-131. Employment does not include - school - college - university.** (1) “Employment” does not include services performed in the employ of a school, college, or university, if such service is performed:

(a) By a student who is enrolled and is regularly attending classes at such school, college, or university; or

(b) By the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and such employment will not be covered by any program of unemployment insurance.

**Source:** **L. 90:** Entire section added, p. 596, § 3, effective April 3.

#### ANNOTATION

**Annotator’s note.** Since the substantive provisions of this section are identical to former § 8-70-103 (11)(g), relevant cases construing that provision have been included under this section.

**Exemption to unemployment taxation for student employed at a school does not apply to a student employed by a higher education center,** as it is not a school at which a student can be enrolled and it is independent of the



colleges with which it contracts for authority over the colleges' facilities. Colo. State v. Korin, 876 P.2d 103 (Colo. App. 1994).

**This section, on its face and as applied, is not violative of equal protection.** Hyde v. Indus. Comm'n, 195 Colo. 67, 576 P.2d 541 (1978).

**The general assembly's intent was not to limit the student employment disqualification** simply to employees who are regularly attending formal, structured classes; rather, its intent was to embrace all persons who are essentially students. Hyde v. Indus. Comm'n, 195 Colo. 67, 576 P.2d 541 (1978).

**Thesis preparation and preparation for comprehensive exams** constituted "regularly attending classes" within the meaning of this section. Hyde v. Indus. Comm'n, 195 Colo. 67, 576 P.2d 541 (1978).

**"Employment" does not include full-time student employed at school.** The term "employment", as used in the unemployment compensation act, shall not include service performed in the employ of a school, college, or university by a full-time college student. Indus. Comm'n v. Redmond, 183 Colo. 14, 514 P.2d 623 (1973).

**8-70-132. Employment does not include - educational institution.** "Employment" does not include services performed by an individual who is enrolled at a nonprofit or public educational institution, which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program and such institution has so certified to the employer; except that this section shall not apply to service performed in a program established for or on behalf of an employer or group of employers.

**Source: L. 90:** Entire section added, p. 596, § 3, effective April 3.

**8-70-133. Employment does not include - hospital.** "Employment" does not include services performed in the employ of a hospital, as defined in section 8-70-103 (14), if such service is performed by a patient of the hospital.

**Source: L. 90:** Entire section added, p. 597, § 3, effective April 3.

**8-70-134. Employment does not include - unemployment compensation system.** "Employment" does not include services with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress. The division is authorized to enter into agreements with the proper agencies under such act of congress, which agreements shall become effective ten days after publication thereof in the manner provided in section 8-72-102 for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under articles 70 to 82 of this title, acquired rights to unemployment compensation under such act of congress or who have, after acquiring potential rights to unemployment compensation under such act of congress, acquired rights to benefits under articles 70 to 82 of this title.

**Source: L. 90:** Entire section added, p. 597, § 3, effective April 3.

**8-70-135. Employment does not include - paper routes.** "Employment" does not include services performed by an individual under the age of eighteen years in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, or services performed by an individual in the delivery or distribution of newspapers whose remuneration primarily consists of the difference between the amount he pays or is obligated to pay for the said newspapers and the amount he receives or is entitled to receive on distribution or resale thereof.

**Source: L. 90:** Entire section added, p. 597, § 3, effective April 3.

**8-70-136. Employment does not include - brokers.** (1) "Employment" does not include services performed by an individual as a licensed real estate broker or as a direct

seller engaged in the trade or business of selling, or soliciting the sale of, a consumer product in a home or in an establishment other than a permanent retail establishment or as an individual engaged in the trade or business of the delivering or distribution of newspapers or shopping news, including any services directly related to such trade or business if:

(a) All the remuneration, whether or not paid in cash, for the performance of such services is directly related to sales or other output, including the performance of services, instead of the number of hours worked; and

(b) The services are performed pursuant to a written contract between such person and the person for whom the services are performed and if such contract provides that the person shall not be treated as an employee with respect to such services for federal tax purposes.

**Source:** L. 90: Entire section added, p. 597, § 3, effective April 3. L. 98: IP(1) amended, p. 69, § 3, effective March 23. L. 2008: IP(1) amended, p. 511, § 30, effective April 17.

#### ANNOTATION

**Annotator's note.** Since the substantive provisions of this section are identical to former § 8-70-103 (11)(l), relevant cases construing that provision have been included under this section.

**Contract language that excluded salesperson as an employee "for any purpose" plainly**

**and unambiguously includes federal tax purposes** and therefore contract meets requirements of this section for exclusion from coverage under the act. *AlSCO Aluminum v. Div. of Emp. & Training*, 835 P.2d 540 (Colo. App. 1992).

**Applied** in *Division of Emp. and Training v. Moen*, 767 P.2d 1230 (Colo. App. 1988).

**8-70-137. Employment does not include - organization exempt from income tax.** "Employment" does not include services performed in any calendar quarter in the employ of any organization exempt from income tax under section 501 (a) of the "Internal Revenue Code", other than an organization described in section 401 (a), or under section 521 of said code, if the remuneration for such service is less than fifty dollars.

**Source:** L. 90: Entire section added, p. 597, § 3, effective April 3.

**8-70-138. Employment does not include - in-home services. (Repealed)**

**Source:** L. 90: Entire section added, p. 598, § 3, effective April 3; entire section repealed, p. 1845, § 33, effective May 31.

**8-70-139. Employment does not include - insurance agents.** "Employment" does not include services performed by an individual for a person as an insurance agent or an insurance solicitor, if all such services performed by such individual for such person are performed for remuneration solely by way of commission.

**Source:** L. 90: Entire section added, p. 598, § 3, effective April 3.

#### ANNOTATION

**Annotator's note.** Since the substantive provisions of this section are identical to former § 8-70-103 (11)(a), relevant cases construing that provision have been included under this section.

**Solicitors of a mutual benefit association are "insurance agents"** within the meaning of

those words, and contributions by such an association to the unemployment compensation fund should be refunded. *Brannaman v. Int'l. Serv. Union Ass'n*, 108 Colo. 409, 118 P.2d 457 (1941).



**8-70-140. Employment does not include - nonprofit organizations - governmental entities - Indian tribes.** (1) For the purposes of sections 8-70-118, 8-70-119, and 8-70-125.5, "employment" does not include services performed:

(a) In the employ of a church or a convention or association of churches or in the employ of an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches or in the employ of an elementary or secondary school that is operated primarily for religious purposes; or

(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(c) In the employ of a governmental entity referred to in section 8-70-119 or an Indian tribe referred to in section 8-70-125.5 if such service is performed by an individual in the exercise of such individual's duties:

(I) As an elected official;

(II) As a member of a legislative body or a member of the judiciary of a state or political subdivision thereof, or of an Indian tribe;

(III) As a member of the state National Guard or Air National Guard;

(IV) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency;

(V) In a position that, pursuant to the laws of this state or Indian tribal law, is designated as a major, nontenured policymaking or advisory position, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week;

(VI) As an election official or election worker if the amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than one thousand dollars; or

(d) By an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency, or injury or of providing remunerative work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market; or

(e) By an individual receiving work relief or work training as part of an unemployment work relief or work training program assisted or financed in whole or in part by public funds or by an Indian tribe; or

(f) Prior to January 1, 1978, for a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution and, after December 31, 1977, by an inmate of a custodial or penal institution.

**Source:** **L. 90:** Entire section added, p. 598, § 3, effective April 3. **L. 98:** (1)(a) and IP(1)(c) amended and (1)(c)(VI) added, p. 69, § 4, effective March 23; IP(1)(c) and (1)(c)(V) amended and (1)(c)(VI) added, p. 583, § 18, effective April 30. **L. 2001:** IP(1), IP(1)(c), (1)(c)(II), (1)(c)(V), and (1)(e) amended, p. 1547, § 3, effective December 21, 2000.

**Editor's note:** The federal "Consolidated Appropriations Act, 2001", Pub.L. 106-554, which became law on December 21, 2000, required all states to amend their laws regarding how Indian tribes are treated for unemployment insurance purposes. The 2001 act amending the introductory portions to subsections (1) and (1)(c) and subsections (1)(c)(II), (1)(c)(V), and (1)(e) provided for an effective date of December 21, 2000. (See L. 2001, p. 1550.)

## ANNOTATION

**Annotator's note.** Since the substantive provisions of this section are identical to former § 8-70-103 (10)(g), relevant cases construing

that provision have been included under this section.

**What constitutes "church".** A religious or-

ganization which does not constitute a distinct religious denomination or mode of worship is not a "church" for purposes of subsection (10)(g)(I). *Young Life v. Division of Emp. & Training*, 650 P.2d 515 (Colo. 1982) (decided prior to 1982 amendment of subsection (10)(g)(I)).

**Religious purposes exemption.** Exemption to the unemployment compensation law for an organization that operates primarily for religious purposes is not construed as narrowly as traditional tax exemption statutes and should not be lightly granted. This exemption does not involve the determination of religious motivations and should be applied only if the religious influence is pervasive in the organization that applies for the exemption, not the organization that founded the organization applying for the exemption. *Prince-Walker v. Indus. Claim App. Office*, 870 P.2d 588 (Colo. App. 1993), *aff'd sub nom. Samaritan Institute v. Prince-Walker*, 883 P.2d 3 (Colo. 1994).

**The entity did not engage in religious activity** where the entity's primary activity was to

provide administrative services for centers that provide counseling. Pastoral counseling provided by centers in another state was not sufficient to support a claim of religious activity. *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3 (Colo. 1994).

**Because work and activities of store affiliated with an organization of churches are secular in nature**, primary purpose of the activity is not religious and store is not exempt from the definition of "employment". *Harbert v. Indus. Claim Appeals Office*, 2012 COA 23, \_\_\_ P.3d \_\_\_.

**Administrative position within work-relief program disqualified.** An employee occupying an administrative position within a work-relief program financed wholly by public funds is disqualified from the receipt of unemployment compensation benefits by subsection (10)(g)(V). *Hernandes v. Indus. Comm'n*, 659 P.2d 58 (Colo. App. 1983).

**8-70-140.1. Employment does not include - foreign government service.** "Employment" does not include service performed in the employ of a foreign government, including service as a consular or other officer or employee or a nondiplomatic representative.

**Source: L. 94:** Entire section added, p. 637, § 2, effective July 1.

**8-70-140.2. Employment does not include - nonresident alien service.** "Employment" does not include services performed by a nonresident alien individual for the period such individual is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101 of the federal "Immigration and Nationality Act", 8 U.S.C. sec. 1101 (a) (15), as amended, to carry out any purpose specified in subparagraph (F), (J), (M), or (Q) of section 101 of such federal act.

**Source: L. 94:** Entire section added, p. 637, § 2, effective July 1. **L. 96:** Entire section amended, p. 380, § 2, effective April 17.

**8-70-140.5. Employment does not include - drivers of taxis or limousines.** (1) "Employment" does not include services performed by an individual who is working as a driver under a lease or contract with a taxi or limousine motor common carrier that holds a certificate pursuant to article 10.1 of title 40, C.R.S. Any such lease or contract may contain the following provisions:

(a) That the driver may either lease or contract for a motor vehicle owned by such carrier or may own the motor vehicle driven and lease it to the carrier, which may then re-lease such motor vehicle to the driver;

(b) That the driver shall be instructed in the method of the carrier's operation, that the driver is familiar with federal, state, and municipal statutes, ordinances, and regulations, and that the carrier shall enforce compliance by the driver with such federal, state, and municipal statutes, ordinances, and regulations;

(c) That certain enumerated transportation services shall be accomplished personally by the driver;

(d) That certain characteristics on the body of the vehicle being used, including color and requirements for any written displays, are required for the sake of uniformity;

(e) That certain periodic driver safety training is required;



(f) That the common carrier has certain control over any assistant working with the driver for purposes of enforcement of and compliance with federal, state, and municipal statutes, ordinances, and regulations;

(g) That a specific number of hours is allotted in the form of shifts in which the driver shall complete a particular shipment of goods for the purpose of meeting the transportation equipment needs of drivers and the transportation needs of the public;

(h) That certain procedures for radio telecommunication between drivers and the carrier are mandated;

(i) That the driver shall work only for the carrier with whom such driver has contracted while such driver is operating the motor vehicle;

(j) That the driver is prohibited from advertising any services offered while driving for the carrier;

(k) That the carrier shall pay the driver's fees when the carrier accepts charge vouchers from the driver for services rendered to customers by such driver;

(l) That such lease or contract may be terminated by any party to such lease or contract; except that the driver may be required to complete an accepted trip; and

(m) That no length be specified for the term of such lease or contract.

(2) Leases or contracts containing the provisions specified in paragraphs (a), (b), (e), (f), (g), (h), and (i) of subsection (1) of this section shall be prima facie evidence that an independent contractor relationship exists between the parties to such lease or contract. This presumption may be overcome by clear and convincing evidence of an employment relationship between the parties to such lease or contract considering only factors not in the lease. Leases or contracts containing other optional provisions specified in subsection (1) of this section shall not change the characterization of the relationship between the driver and the carrier pursuant to such lease or contract.

**Source:** L. 92: Entire section added, p. 1798, § 3, effective June 6. L. 2011: IP(1) amended, (HB 11-1198), ch. 127, p. 416, § 5, effective August 10.

**8-70-140.7. Employment does not include - land professionals.** (1) "Employment" does not include services performed for a private for profit person or entity by a land professional, if:

(a) Substantially all remuneration paid in cash or otherwise for the performance of the services is directly related to the completion by the land professional of the specific tasks contracted for rather than to the number of hours worked by the individual; and

(b) The services performed by the land professional are performed under a contract between the land professional and the person or entity for whom the services are performed that provides that the land professional is to be treated as an independent contractor and not as an employee with respect to the services provided under the contract.

(2) For the purposes of this section, "land professional" means an individual who has been engaged primarily in:

(a) Negotiating for the acquisition or divestiture of mineral rights;

(b) Negotiating business agreements that provide for the exploration for or development of minerals;

(c) Determining ownership of minerals through the research of public and private records; and

(d) Reviewing the status of title, acting to cure title defects, and otherwise acting to reduce title risk associated with ownership of minerals, managing rights or obligations derived from ownership of interests in minerals, or unitizing or pooling of interest in minerals.

**Source:** L. 95: Entire section added, p. 177, § 1, effective April 7.

**8-70-140.8. Employment does not include - owners.** "Employment" does not include services performed by members of a limited liability company, sole proprietors, or partners in a partnership.

**Source:** L. 98: Entire section added, p. 69, § 5, effective March 23.

**8-70-141. Wages - definition.** (I) "Wages" means:

(a) All remuneration for personal services, including the cash value of all remuneration paid in any medium other than cash, other than remuneration paid in other than cash to an agricultural worker or a domestic worker. When an employing unit during a calendar year acquires the experience of an employer as provided in section 8-76-104 and if, immediately after such acquisition, the successor employer continues to employ an individual who immediately prior to the acquisition was an employee of the predecessor, any remuneration previously paid to the individual by the predecessor shall be considered as having been paid by the successor.

(b) (I) Any employer contribution under a qualified cash or deferred arrangement, as defined in 26 U.S.C. sec. 401 (k), to the extent not included in gross income by reason of 26 U.S.C. sec. 402 (e) (3); and

(II) Any amount treated as an employer contribution under 26 U.S.C. sec. 414 (h) (2); and

(III) Any employer contribution under a nonqualified deferred compensation plan. For the purposes of this subparagraph (III), "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in section 8-70-142 (1) (c). Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for the purposes of this paragraph (b) as of the date that the services are performed or the date that there is no substantial risk of forfeiture of the rights to such amount, whichever date is later, and shall not thereafter be treated as "wages" for the purposes of this section.

(IV) Any payment included in the definition of wages in the "Federal Unemployment Tax Act".

(c) Tips which are received while performing services that constitute employment and which are made known to the employer through a written statement furnished to him by the employee; and

(d) (I) With respect to weeks of unemployment beginning on or after January 1, 1978, wages for insured work paid for previously uncovered services. For the purposes of this paragraph (d), "previously uncovered services" means services which were not employment as defined in sections 8-70-126 to 8-70-140.8 and were not services covered pursuant to section 8-76-107 at any time during the one-year period ending December 31, 1975, and:

(A) Which are agricultural labor as defined in section 8-70-103 or domestic service as defined in section 8-70-121; or

(B) Which are services performed by an employee of this state or a political subdivision thereof, as provided for in section 8-70-119, or by an employee of a nonprofit educational institution which is not an institution of higher education, as provided for in section 8-70-103 (15).

(II) "Previously uncovered services" shall not apply to services to the extent that assistance under Title II of the "Emergency Jobs and Unemployment Assistance Act of 1974" was paid on the basis of such services.

**Source:** L. 90: Entire section added, p. 599, § 3, effective April 3. L. 96: IP(1)(d)(I) amended, p. 381, § 3, effective April 17. L. 2006: (1)(b)(I) and IP(1)(d)(I) amended, p. 1517, § 87, effective June 1.

**ANNOTATION**

**Annotator's note.** Since the substantive provisions of this section are identical to former § 8-70-103 (22), relevant cases construing that provision have been included under this section.

**Definition of "services".** Consulting agreement that required claimant to make himself available if needed was a contract for "services" regardless of whether claimant actually performed any work, hence payments to claimant under the contract were wages as defined in

this section. *Magin v. Division of Emp.*, 899 P.2d 369 (Colo. App. 1995).

**A separation allowance comes within the definition of the term "wages"** as contained in this section, for the allowance, which is based upon length of service and weekly wage, is an obligation which the employer is legally bound to pay under the terms of the union contract. *Indus. Comm'n v. Sirokman*, 134 Colo. 481, 306 P.2d 669 (1957).



**Receipt of employee benefits does not constitute wages** for purposes of this section. *Denver Post, Inc. v. Dept. of Labor & Emp.*, 199 Colo. 466, 610 P.2d 1075 (1980).

**The term "wages" shall not include** the payments made to the claimant after being in-

jured while discharging her duties because payments were not made as remuneration for personal services. *City and County of Denver v. Indus. Comm'n*, 707 P.2d 1008 (Colo. App. 1985), cert. denied, 733 P.2d 680 (Colo. 1987).

**8-70-142. Wages - remuneration not included as wages.** (1) "Wages" does not include:

(a) The amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents by an employer under a plan or system established by an employer which makes provision for his employees generally, or for his employees generally and their dependents, or for any class or classes of his employees and their dependents, on account of:

(I) Sickness or accident disability, but, in the case of payments made to an employee or any of his dependents, this paragraph (a) shall exclude from the term "wages" only payments which are received under the workers' compensation law; or

(II) Medical or hospitalization expenses in connection with sickness or accident disability; or

(III) Death;

(b) Any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to or on behalf of an employee after the expiration of six calendar months following the last calendar month in which the employee worked for such employer;

(c) Any payment made to or on behalf of an employee or his beneficiary:

(I) From or to a trust described in 26 U.S.C. section 401 (a) which is exempt from tax under 26 U.S.C. section 501 (a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or

(II) Under or to a bond purchase plan which, at the time of such payment, is a qualified bond purchase plan described in 26 U.S.C. section 405 (a); or

(III) Under a simplified employee pension if, at the time of payment, it is reasonable to believe that the employee will be entitled to a deduction for such payment under 26 U.S.C. section 219 (b) (2); or

(IV) Under or to an annuity contract described in 26 U.S.C. section 403 (b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise); or

(V) Under or to an exempt governmental deferred compensation plan, as defined in 26 U.S.C. section 3121 (v) (3); or

(VI) To supplement pension benefits under a plan or trust described in any of the provisions of this subsection (1) which are designed to take into account all or some portion of the increase in the cost of living, as determined by the United States secretary of labor, since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3 (2) (B) (ii) of the federal "Employee Retirement Income Security Act of 1974", as amended; or

(VII) Under or to an annuity plan which, at the time of such payment, is a plan described in 26 U.S.C. section 403 (a); or

(VIII) Under a cafeteria plan (within the meaning of 26 U.S.C. section 125);

(d) The payment by an employer, without deduction from the remuneration of the employee, of the tax imposed upon an employee under 26 U.S.C. section 3101 or any payment required from any employee under articles 70 to 82 of this title if the remuneration is paid to the employee for domestic service in a private home or for agricultural labor;

(e) Remuneration paid to or on behalf of an employee if and to the extent that, at the time of the payment of such remuneration, it is reasonable to believe that a corresponding deduction is allowable under 26 U.S.C. section 217;

(f) Any payment or series of payments, except for any payment or series of payments which would have been paid if the employee's employment relationship had not been terminated, by an employer to an employee or any of his dependents which is paid:

(I) Upon or after the termination of an employee's employment relationship because of death or retirement for disability; and

(II) Under a plan established by the employer which makes provision for his employees generally or any class or classes of employees and their dependents;

(g) Remuneration for agricultural labor paid in any medium other than cash;

(h) Any contribution, payment, or service provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents under the provisions of 26 U.S.C. section 120 (relating to amounts received under qualified group legal services plans);

(i) Any payment made or benefit furnished to or for the benefit of an employee if, at the time of such payment or such furnishing, it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under 26 U.S.C. section 127 or 129;

(j) The value of any meals or lodging furnished by or on behalf of the employer if, at the time of such furnishing, it is reasonable to believe that the employee will be able to exclude such items from income under 26 U.S.C. section 119;

(k) Remuneration for service not in the course of the employer's trade or business paid to an employee in any medium other than cash;

(l) Any payment made by an employer to the survivors or the estate of a former employee after the calendar year in which such employee died;

(m) (I) Remuneration for duty in a branch of the United States military reserve or in the National Guard if such duty is served during a period of time that does not exceed seventy-two hours in duration from start of service to end of service during any one-month period;

(II) Remuneration for required annual training as part of duty pursuant to subparagraph (I) of this paragraph (m), for a period of time of approximately two weeks;

(n) Any payment made to or on behalf of an employee or such employee's beneficiary under an arrangement to which section 26 U.S.C. sec. 408 (p) applies, other than any elective contributions under section 26 U.S.C. sec. 408 (p)(2)(A)(I);

(o) Any payment made to or for the benefit of an employee if, at the time of such payment, it is reasonable to believe that the employee will be able to exclude such payment from income pursuant to section 26 U.S.C. sec. 106 (b);

(p) The amount of any payment, including any amount paid by an employer into a fund to provide for any such payment, made to or on behalf of an employee under a plan or system established by an employer that makes provision for his or her employees generally, or for classes of his or her employees, for the purpose of supplementing unemployment benefits; except that this paragraph (p) shall not apply if the employee has the option to receive a lump-sum payment instead of periodically distributed, supplemental unemployment benefits.

**Source:** L. 90: Entire section added, p. 600, § 3, effective April 3. L. 95: (1)(m) added, p. 520, § 1, effective May 16. L. 98: (1)(n) and (1)(o) added, p. 70, § 6, effective March 23. L. 2004: (1)(p) added, p. 175, § 1, effective August 4.

**8-70-143. Applicability of legislation.** Legislation which amends, repeals, or adds to the provisions of articles 70 to 82 of this title shall become applicable to unemployment compensation claims on the first day (Sunday) of the first calendar week subsequent to the effective date of such legislation unless a different applicability date is specifically provided for by the general assembly.

**Source:** L. 90: Entire section added, p. 602, § 3, effective April 3.



**ARTICLE 71****Unemployment Insurance**

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

**PART 1**

8-71-104.

Head of division. (Repealed)

8-71-105.

Unemployment compensation commission. (Repealed)

**DIVISION OF UNEMPLOYMENT INSURANCE**

8-71-106.

State employment service. (Repealed)

8-71-101. Division of unemployment insurance created - director.

**PART 2**

8-71-102. Powers, duties, and functions - acceptance of moneys.

**WORK FORCE INVESTMENT ACT**

8-71-103. Organization of division - authority to issue bonds.

8-71-201 to

8-71-224.

Repealed.

**PART 1****DIVISION OF EMPLOYMENT AND TRAINING**

**8-71-101. Division of unemployment insurance created - director.** There is hereby created a division of unemployment insurance within the department of labor and employment, the head of which is the director of the division.

**Source:** L. 36, 3rd Ex. Sess.: p. 34, § 10. CSA: C. 167A, § 10. L. 39: p. 573, § 7. L. 41: p. 784, § 10. CRS 53: § 82-2-1. L. 55: p. 529, § 2. C.R.S. 1963: § 82-2-1. L. 68: p. 117, § 106. L. 76: Entire section amended, p. 336, § 3, effective October 1. L. 2012: Entire section amended, (HB 12-1120), ch. 27, p. 78, § 3, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**8-71-102. Powers, duties, and functions - acceptance of moneys.** (1) The functions of the division comprise all administrative functions of the state in relation to the administration of articles 70 to 82 of this title. The director of the division shall perform the powers, duties, and functions prescribed under articles 70 to 82 of this title under the direction and supervision of the executive director of the department of labor and employment, as prescribed by section 24-1-105 (4), C.R.S. Any vacancy in the office of director of the division shall be filled in the manner provided by law.

(2) The division may accept and expend moneys from gifts, grants, donations, and other nongovernmental contributions for the purposes for which the division is authorized.

**Source:** L. 36, 3rd Ex. Sess.: p. 34, § 10. L. 37: p. 1264, § 8. CSA: C. 167A, § 10. L. 39: p. 573, § 7. L. 41: p. 784, § 10. CRS 53: § 82-2-2. C.R.S. 1963: § 82-2-2. L. 83: Entire section amended, p. 403, § 2, effective May 25. L. 2008: Entire section amended, p. 1762, § 1, effective June 2. L. 2012: Entire section amended, (HB 12-1120), ch. 27, p. 78, § 4, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**8-71-103. Organization of division - authority to issue bonds.**

(1) (Deleted by amendment, L. 2012.)

(2) (a) The division constitutes an enterprise for purposes of section 20 of article X of the state constitution, as long as the division retains authority to issue revenue bonds and the division receives less than ten percent of its total annual revenues in grants, as defined in section 24-77-102 (7), C.R.S., from all Colorado state and local governments combined. For as long as it constitutes an enterprise pursuant to this section, the division is not subject to section 20 of article X of the state constitution.

(b) (I) Except as provided in subparagraph (II) of this paragraph (b), the enterprise established pursuant to this subsection (2) has all the powers and duties authorized by articles 70 to 82 of this title pertaining to unemployment insurance and unemployment compensation. The unemployment compensation fund, created in section 8-77-101, constitutes part of the enterprise established pursuant to this subsection (2).

(II) The employment support fund established in section 8-77-109 (1) shall not be included in or administered by the enterprise established pursuant to this subsection (2).

(c) Nothing in this subsection (2) limits or restricts the authority of the division to expend its revenues consistent with the provisions of articles 70 to 82 of this title.

(d) (I) Upon receiving the certifications specified in subparagraphs (III) and (IV) of this paragraph (d), the division may issue revenue bonds for the same purposes and on the same terms, and levy and apply the proceeds of bond assessments for the same purposes and in the same manner, as the Colorado housing and finance authority may issue bonds and levy and apply the proceeds of bond assessments under section 29-4-710.7, C.R.S., substituting references to the division for references to the authority under that section. Bond assessments levied by the division may be used to pay revenue bonds issued by the division under this paragraph (d) or revenue bonds issued by the Colorado housing and finance authority under section 29-4-710.7, C.R.S.

(II) Any bonds issued pursuant to this paragraph (d) must be executed and delivered by the director of the division and may be in the form, may be sold and may have the same terms as provided in section 43-4-807 (1) (b) and (1) (c), C.R.S., may contain the provisions permitted by section 43-4-807 (1) (d), C.R.S., shall be legal investments for the entities described in, subject to the terms set forth in, section 43-4-807 (3), C.R.S., and shall be exempt from taxation and assessments in the state as provided in section 43-4-807 (4), C.R.S. The division may invest or deposit any proceeds and interest from the sale of such bonds as provided in section 43-4-807 (2), C.R.S. The division shall have the power to enter into all other contracts or agreements, which contracts and agreements are not subject to the "Procurement Code", articles 101 to 112 of title 24, C.R.S., that are necessary or incidental to the exercise of its powers and duties under this paragraph (d), including the power to engage the services of consultants, financial advisors, underwriters, bond insurers, letter of credit banks, rating agencies, and agents and other persons whose services may be required or deemed advantageous by the division, and the power to enter into interest rate exchange agreements for bonds that have been issued in accordance with this paragraph (d). The amount of outstanding liability for bonds issued pursuant to this paragraph (d) or section 29-4-710.7, C.R.S., is not taken into account for purposes of rate setting under article 76 of this title.

(III) The division may not issue its bonds pursuant to this paragraph (d) until the monthly balance in the unemployment compensation fund is equal to or less than nine-tenths of one percent of the total wages reported by ratable employers for the calendar year, or for the most recent available four consecutive quarters prior to the last computation date, and the governor, the state treasurer, and the executive director of the department of labor and employment have each certified in writing to the division:

(A) That other funding alternatives to the issuance of bonds by the division under this paragraph (d) have been considered and that the issuance of such bonds is the most cost-effective means for the division to maintain adequate balances in the unemployment compensation fund or to repay moneys advanced to the state pursuant to 42 U.S.C. sec. 1321;



(B) The amount of money required to maintain adequate balances in the unemployment compensation fund or to repay moneys advanced to the state pursuant to 42 U.S.C. sec. 1321, or both; and

(C) The amount of bonds to be issued.

(IV) In addition to the written certifications specified in subparagraph (III) of this paragraph (d), the executive director of the department of labor and employment shall certify in writing that the issuance of bonds as authorized by law would not result in decertification of Colorado's unemployment insurance program, impact any cap application, affect the receipt of emergency unemployment compensation funds, create an ineligibility for receipt of federal funds, or result in other penalties or sanctions under the federal "Social Security Act", as amended, or the "Federal Unemployment Tax Act", as amended, 26 U.S.C. sec. 3301 et seq.

**Source:** L. 36, 3rd Ex. Sess.: p. 34, § 10. L. 37: p. 1264, § 8. CSA: C. 167A, § 10. L. 39: p. 573, § 7. L. 41: p. 784, § 10. L. 43: p. 607, § 7. CRS 53: § 82-2-3. C.R.S. 1963: § 82-2-3. L. 86: Entire section amended, p. 487, § 82, effective July 1. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1876, § 1, effective July 1. L. 2012: Entire section amended, (HB 12-1120), ch. 27, p. 78, § 5, effective June 1. L. 2012, 1st Ex. Sess.: (2)(b)(I) and (2)(d) amended, (HB 12S-1002), ch. 2, p. 2426, § 4, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

#### **8-71-104. Head of division. (Repealed)**

**Source:** L. 36, 3rd Ex. Sess.: p. 34, § 10. L. 37: p. 1264, § 8. CSA: C. 167A, § 10. L. 39: p. 573, § 7. L. 41: p. 784, § 10. CRS 53: § 82-2-4. C.R.S. 1963: § 82-2-4. L. 76: Entire section amended, p. 336, § 4, effective October 1. L. 86: Entire section amended, p. 488, § 83, effective July 1. L. 2012: Entire section repealed, (HB 12-1120), ch. 27, p. 104, § 8, effective June 1.

**Editor's note:** The effective date for the repeal of this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

#### **8-71-105. Unemployment compensation commission. (Repealed)**

**Source:** L. 36, 3rd Ex. Sess.: p. 34, § 10. L. 37: p. 1264, § 8. CSA: C. 167A, § 10. L. 39: p. 573, § 7. L. 41: p. 784, § 10. CRS 53: § 82-2-5. C.R.S. 1963: § 82-2-5. L. 86: Entire section repealed, p. 502, § 125, effective July 1.

#### **8-71-106. State employment service. (Repealed)**

**Source:** L. 36, 3rd Ex. Sess.: p. 41, § 12. L. 37: p. 1268, § 10. CSA: C. 167A, § 12. L. 39: p. 576, § 9. L. 41: p. 791, § 12. L. 51: p. 818, § 11. CRS 53: § 82-2-6. C.R.S. 1963: § 82-2-6. L. 91: Entire section amended, p. 1283, § 1, effective June 8. L. 2012: Entire section repealed, (HB 12-1120), ch. 27, p. 103, § 7, effective June 1.

**Editor's note:** The effective date for the repeal of this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

## PART 2

## WORK FORCE INVESTMENT ACT

**8-71-201 to 8-71-224. (Repealed)**

**Source:** L. 2012: Entire part repealed, (HB 12-1120), ch. 27, p. 103, § 7, effective June 1.

**Editor's note:** The effective date for the repeal of this part 2 by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

## ARTICLE 72

## Administration of Division

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-72-101.	Duties and powers of division.		concerning individuals with out-
8-72-102.	Rules.		standing felony arrest warrants.
8-72-103.	Publications.	8-72-112.	Division - reporting - veterans
8-72-104.	Personnel.		programs.
8-72-105.	Advisory council - sunset review.	8-72-113.	Annual report - federal stimulus
	(Repealed)		moneys to expand unemploy-
8-72-106.	Employment stabilization.		ment benefits - repeal.
8-72-107.	Records and reports - fee - viola-	8-72-114.	Employee misclassification - in-
	tion - penalty.		vestigations - enforcement -
8-72-108.	Oaths - witnesses - subpoenas.		advisory opinions - rules - em-
8-72-109.	State-federal cooperation.		ployee misclassification advi-
8-72-110.	Reciprocal interstate agreements -		sory opinion fund - statewide
	repeal.		study - report - definitions -
8-72-111.	Release of location information		legislative declaration - repeal.

**8-72-101. Duties and powers of division.** (1) It is the duty of the division to administer articles 70 to 82 of this title; and it has the power to employ such persons, make such expenditures, require such reports, make such investigations, set such reasonably necessary standards, create and require the use of such forms, adopt such administrative methods and procedures, and take such other action as it deems necessary or suitable to that end. The division shall determine its own organization and methods of procedure in accordance with the provisions of articles 70 to 82 of this title.

(2) Repealed.

(3) (a) Whenever any event occurs that may have a material effect on the adequacy of the fund, whether to increase costs or decrease revenues or otherwise, the division shall promptly analyze the potential effect and provide the analysis to the governor and the general assembly. For purposes of this subsection (3), "event" includes proposed federal or state legislation and administrative or judicial adjudications.

(b) The department of labor and employment shall update the general assembly annually on the status of the fund during the hearing conducted pursuant to section 2-7-203, C.R.S. By August 31, 2012, and by each August 31 thereafter, the division shall report to the joint budget committee, the economic and business development committee of the house of representatives, and the business, labor, and technology committee of the senate, or their successor committees, regarding the status of the fund. The report shall include at least the following from the prior calendar year:

(I) Total fund revenues and expenditures;

(II) The highest and lowest trust fund balance from the prior calendar year and a comparison of those balances to the following three solvency measures: The reserve ratio, the high-cost multiple, and the average high-cost multiple;



(III) An analysis of the responsiveness of the funding mechanism to changes in economic conditions, both positive and negative;

(IV) An analysis of any material concerns identified by the division in fund solvency, revenue, and expenditures;

(V) An analysis of the impact of total premiums assessed to employers by employer size and employer experience;

(VI) The total amount of overpayments paid to claimants and the total amount of overpayments recovered; and

(VII) An analysis of measures taken by the division to reduce the total number and amount of overpayments and fraudulent payments.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. CSA: C. 167A, § 11. L. 41: p. 785, § 11. L. 51: p. 814, § 9. CRS 53: § 82-3-1. C.R.S. 1963: § 82-3-1. L. 64: p. 149, § 86. L. 76: (2) amended, p. 336, § 5, effective October 1. L. 81: (1) amended, p. 509, § 1, effective July 1; (2) amended, p. 491, § 3, effective July 1. L. 83: (2) amended, p. 825, § 4, effective July 1. L. 84: (1) amended, p. 316, § 4, effective July 1. L. 89: (3) added, p. 424, § 2, effective July 1. L. 96: (2) repealed, p. 1228, § 46, effective August 7. L. 2011: (3) amended, (HB 11-1288), ch. 212, p. 915, § 2, effective July 1.

**Cross references:** For the legislative declaration contained in the 1996 act repealing subsection (2), see section 1 of chapter 237, Session Laws of Colorado 1996.

**8-72-102. Rules.** (1) The director of the division has the power to adopt, amend, or rescind, in accordance with section 24-4-103, C.R.S., reasonable and necessary rules relating to the administration of the "Colorado Employment Security Act" and governing hearings and proceedings under such act.

(2) The director shall adopt rules establishing a procedure for an individual or employer filing a petition for review pursuant to section 8-74-106 (1) (a) or (1) (b) or an appeal pursuant to section 8-73-107 (1) (c) (I) (A), 8-74-103 (1), 8-74-104 (1), 8-76-113 (1) or (2), or 8-81-101 (4) (c), or an interested party presenting additional information pursuant to section 8-74-102 (1), to contest a determination by the director that the individual, employer, or interested party failed to comply with a deadline set forth in the applicable section by providing proof that the petition for review, appeal, or additional information was timely mailed.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. CSA: C. 167A, § 11. L. 41: p. 785, § 11. CRS 53: § 82-3-2. C.R.S. 1963: § 82-3-2. L. 81: Entire section R&RE, p. 509, § 3, effective July 1. L. 86: Entire section amended, p. 488, § 84, effective July 1. L. 2007: Entire section amended, p. 802, § 1, effective August 3.

**Cross references:** For the "Colorado Employment Security Act", see articles 70 to 82 of this title.

**8-72-103. Publications.** The director of the division shall determine what information should be made public in order to carry out the provisions of articles 70 to 82 of this title. Materials of the division circulated in quantity outside the executive branch shall be issued in accordance with the provisions of section 24-1-136, C.R.S.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. CSA: C. 167A, § 11. L. 41: p. 785, § 11. CRS 53: § 82-3-3. C.R.S. 1963: § 82-3-3. L. 64: p. 149, § 87. L. 76: Entire section amended, p. 337, § 6, effective October 1. L. 83: Entire section amended, p. 826, § 5, effective July 1.

**8-72-104. Personnel.** Subject to other provisions of articles 70 to 82 of this title and the state personnel system regulations, the division is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. The division may

delegate to any such person so appointed such power as it deems reasonable and proper for the effective administration of articles 70 to 82 of this title. In its discretion, the division may bond any person handling moneys or signing checks under articles 70 to 82 of this title.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. CSA: C. 167A, § 11. L. 41: p. 785, § 11. CRS 53: § 82-3-4. C.R.S. 1963: § 82-3-4.

#### **8-72-105. Advisory council - sunset review. (Repealed)**

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. CSA: C. 167A, § 11. L. 41: p. 785, § 11. L. 43: p. 607, § 8. CRS 53: § 82-3-5. C.R.S. 1963: § 82-3-5. L. 77: Entire section amended, p. 473, § 1, effective July 1. L. 86: Entire section amended, p. 409, § 7, effective March 26.

**Editor's note:** Subsection (2)(a) provided for the repeal of this section, effective July 1, 1990. (See L. 86, p. 409.)

**8-72-106. Employment stabilization.** The division, with the advice and aid of such advisory councils as it may appoint and through its appropriate sections, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining, and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the state, of reserves for public works to be used in times of business depression and unemployment; to promote the reemployment of unemployed workers throughout the state in every way that may be feasible; and, to these ends, to carry on investigations and research studies, the results of which, if circulated in quantity outside the division, shall be issued in accordance with the provisions of section 24-1-136, C.R.S.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. CSA: C. 167A, § 11. L. 41: p. 785, § 11. CRS 53: § 82-3-6. C.R.S. 1963: § 82-3-6. L. 64: p. 149, § 88. L. 83: Entire section amended, p. 826, § 6, effective July 1.

**8-72-107. Records and reports - fee - violation - penalty.** (1) Each employing unit shall keep true and accurate work records, containing such information as the division may prescribe. Such records shall be retained for a period of not less than five years and shall be open to inspection and be subject to being copied by the division or its authorized representatives at any reasonable time and as often as may be necessary. The division or any referee may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which it or the referee deems necessary for the effective administration of articles 70 to 82 of this title. Information thus obtained, or obtained from any individual pursuant to the administration of articles 70 to 82 of this title, except to the extent necessary for the proper presentation of a claim, or withholding tax or unemployment insurance account numbers if such numbers are obtained from the department of revenue pursuant to section 39-21-113, C.R.S., shall be held confidential and shall not be published or be open to public inspection (other than to public employees in the performance of their public duties, to an agent of a state or local child support enforcement agency pursuant to section 8-72-109 (9), or to an agent of the division designated as such in writing for the purpose of accomplishing certain of the division's functions) in any manner revealing the individual's or employing unit's identity. Any interested party or such party's authorized representative, in preparation for and prior to any hearing on a claim governed by articles 70 to 82 of this title, shall be entitled to examine and, upon the payment of a reasonable fee to the division, obtain a copy of any materials contained in such records to the extent necessary for proper presentation of the party's position at the hearing. Notwithstanding said provisions of this subsection (1), any applicant for work shall be entitled to examine and copy, or obtain a copy from the division upon payment of the costs of duplication, any



letters of reference or other similar documents pertaining to the applicant that are in possession of the division. Any employee or member of the division or any referee who violates any provision of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.

(2) The division may request the comptroller of the currency of the United States to cause an examination of the correctness of any return or report of any national banking association rendered pursuant to the provisions of articles 70 to 82 of this title. In connection with such request, the division may transmit any such report or return to the comptroller of the currency of the United States as provided in section 1606 (c) of the federal internal revenue code.

(3) Repealed.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. L. 37: p. 1265, § 9. CSA: C. 167A, § 11. L. 41: p. 785, § 11. CRS 53: § 82-3-7. C.R.S. 1963: § 82-3-7. L. 69: p. 668, § 2. L. 73: pp. 958, 963, §§ 2, 1. L. 76: (1) and (3) amended, p. 337, § 7, effective October 1. L. 77: (3) amended, p. 475, § 1, effective July 1. L. 81: (1) amended, p. 483, § 3, effective July 1; (2) amended, p. 491, § 4, effective July 1. L. 83: (2) amended, p. 2042, § 4, effective October 1. L. 84: (3) amended, p. 316, § 5, effective July 1. L. 86: (3) amended, p. 702, § 8, effective July 1. L. 91: (3) repealed, p. 1360, § 2, effective September 1. L. 97: (1) amended, p. 559, § 1, effective July 1. L. 2009: (1) amended, (HB 09-1363), ch. 363, p. 1881, § 8, effective July 1.

#### ANNOTATION

**Applied** in *Nesbit v. Indus. Comm'n*, 43 Colo. App. 398, 607 P.2d 1024 (1979).

**8-72-108. Oaths - witnesses - subpoenas.** (1) In the discharge of the duties imposed by articles 70 to 82 of this title, the division or its duly authorized representative shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of articles 70 to 82 of this title.

(2) In case of contempt or refusal to obey a subpoena issued to any person, any court of this state within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contempt or refusal to obey is found or resides or transacts business, upon application by the division or its duly authorized representative, shall have jurisdiction to issue to such person an order requiring him to appear before the division or its duly authorized representative to produce evidence if so ordered or give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who, without just cause, fails or refuses to attend and testify or to answer any lawful inquiry, or to produce books, papers, correspondence, memoranda, and other records, if it is in his power so to do in obedience to a subpoena of the division or its duly authorized representative, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment. Each day such violation continues shall be deemed a separate offense.

(3) No person may be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the division or its duly authorized representative or in obedience to the subpoena of the division or its duly authorized representative in any cause or proceeding before the division or its duly authorized representative on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for

or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise; except that such individual so testifying is not exempt from prosecution and punishment for perjury in the first degree committed in so testifying.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. L. 37: p. 1265, § 9. CSA: C. 167A, § 11. L. 41: p. 785, § 11. CRS 53: § 82-3-8. C.R.S. 1963: § 82-3-8. L. 72: p. 562, § 30. L. 76: (2) amended, p. 338, § 8, effective October 1.

**8-72-109. State-federal cooperation.** (1) (a) In the administration of articles 70 to 82 of this title, the division shall cooperate with the United States department of labor to the fullest extent consistent with the provisions of articles 70 to 82 of this title, and shall take such action through the adoption of appropriate rules, regulations, administrative methods, and standards as may be necessary to secure to the state and its citizens all the advantages available under the provisions of the federal "Social Security Act", as amended, section 3302 of the "Federal Unemployment Tax Act", the "Wagner-Peyser Act", as amended, and the "Federal-State Extended Unemployment Compensation Act of 1970".

(b) In the administration of the provisions of article 75 of this title, which are enacted to conform with the requirements of the "Federal-State Extended Unemployment Compensation Act of 1970", the division shall take such action as may be necessary:

(I) To ensure that the provisions are so interpreted and applied as to meet the requirements of such federal act as interpreted by the United States department of labor; and

(II) To secure to this state the full reimbursement of the federal share of extended benefits paid under articles 70 to 82 of this title that are reimbursable under the federal act.

(2) The division shall comply with the regulations of the secretary of labor or his successor relating to the receipt or expenditure by this state of money granted under any of said acts and shall make such reports, in such form and containing such information as the secretary of labor may from time to time require, and shall comply with such provisions as the secretary of labor, from time to time, may find necessary to assure the correctness and verification of such reports. The division shall afford reasonable cooperation with every agency of the United States charged with the administration of any employment security law.

(3) The division is authorized to make such investigations, obtain and transmit such information, make available such services and facilities, and exercise such of the other powers provided in articles 70 to 82 of this title with respect to the administration of articles 70 to 82 of this title as it deems necessary or appropriate to facilitate the administration of any state or federal unemployment insurance or public employment service law and in like manner to accept and utilize information, services, and facilities made available to the state by the agency charged with the administration of any such other unemployment insurance or public employment service law.

(4) Upon request therefor the division shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment the name, address, ordinary occupation, and employment status of each recipient of benefits and such recipient's right to further benefits under articles 70 to 82 of this title.

(5) The division may make the state's records relating to the administration of articles 70 to 82 of this title available to the railroad retirement board and may furnish the railroad retirement board, at the expense of such board, such copies thereof as the railroad retirement board deems necessary for its purposes.

(6) (a) The division may afford reasonable cooperation with every agency of the United States charged with the administration of any law providing for payment of benefits arising out of unemployment. In so doing, the division may use its personnel and equipment and accept and use federal funds and make payments therefrom, but in so doing it is not required to neglect or to carry on with less efficiency its own program, and the state of Colorado and its employees shall be free from liability except in case of gross negligence or attempt to defraud the United States.

(b) The director of the division is authorized to enter into agreements with every agency of the United States charged with administration of income or wage verification for the



purpose of exchanging information among agencies as a method of controlling the overpayment of unemployment benefits.

(7) The director of the division is authorized to enter into agreements with other departments and divisions of the state for the purpose of obtaining such information as he deems necessary for the proper administration of articles 70 to 82 of this title and providing for payment of the costs thereof.

(8) The director of the division is authorized to enter into agreements with other departments and divisions of the state for the purpose of establishing an income and eligibility system for the exchange of information among agencies administering federally assisted human service programs. Such system shall conform to all requirements and restrictions of section 1137 of the federal "Social Security Act", as amended.

(9) (a) Information obtained by a state or local child support enforcement agency pursuant to subsection (8) of this section may be used only for the purposes authorized by said subsection (8) and may not be disclosed by such agency to any person or entity for the purposes of establishing, modifying, or collecting child support obligations or locating individuals owing such obligations unless safeguards for the confidentiality of such information, consistent with section 303 (e) (1) (B) of the federal "Social Security Act", as amended, are established by agreement. Neither the division nor its employees shall be liable in civil action for providing information in accordance with subsection (8) of this section.

(b) The limitations on disclosure of information obtained pursuant to subsection (8) of this section set forth in paragraph (a) of this subsection (9) shall apply to any agent of a state or local child support enforcement agency specified in section 8-72-107 (1).

(10) On a quarterly basis, the director of the division shall provide wage and claim information contained in division records to the secretary of the federal department of health and human services for purposes of the national directory of new hires pursuant to all requirements and restrictions set forth in section 453 of the federal "Social Security Act", as amended.

**Source:** L. 36, 3rd Ex. Sess.: p. 35, § 11. CSA: C. 167A, § 11. L. 39: p. 574, § 8. L. 41: p. 785, § 11. L. 45: p. 713, § 5. L. 51: p. 815, § 10. CRS 53: § 82-3-9. C.R.S. 1963: § 82-3-9. L. 71: p. 931, § 6. L. 81: (7) added, p. 483, § 4, effective July 1. L. 85: (8) added, p. 361, § 5, effective April 4. L. 97: (9) added, p. 560, § 2, effective July 1; (10) added, p. 1263, § 3, effective July 1. L. 2011: (6) amended, (HB 11-1288), ch. 212, p. 915, § 3, effective July 1.

**Cross references:** (1) For the legislative declaration contained in the 1997 act enacting subsection (10), see section 1 of chapter 236, Session Laws of Colorado 1997.

(2) For the "Federal Unemployment Tax Act", see 26 U.S.C. § 3301 et seq.; for the "Wagner-Peyser Act", see 29 U.S.C. § 49 et seq.; for the "Federal-State Extended Unemployment Compensation Act of 1970", see Pub.L. 91-373, codified at 26 U.S.C. § 3304.

(3) For the "Social Security Act" generally, see 42 U.S.C. § 301 et seq.; for section 1137 of the act, see 42 U.S.C. § 1320b-7; for section 303 of the act, see 42 U.S.C. § 503; for section 453 of the act, see 42 U.S.C. § 653.

**8-72-110. Reciprocal interstate agreements - repeal.** (1) The division is authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states, or of the federal government, or both, whereby potential rights to benefits under articles 70 to 82 of this title may constitute the basis for payment of benefits by another state or by the federal government, and potential rights to benefits accumulated under the law of another state or of the federal government may constitute the basis for the payment of benefits by this state. Such benefits shall be paid under such provisions of articles 70 to 82 of this title, or under the provisions of the law of such state or of the federal government, or under such combination of the provisions of both laws as may be agreed upon as being fair and reasonable to all affected interests. No such arrangement shall be entered into unless it contains provisions for reimbursement to the fund for such benefits as are paid on the basis of wages and service, subject to the law of another state or of the federal government,

and provisions for reimbursement from the fund for such benefits paid by another state or by the federal government on the basis of wages and service, subject to articles 70 to 82 of this title. Reimbursements paid from the fund pursuant to this section shall be deemed to be benefits for the purposes of articles 70 to 82 of this title.

(2) (a) (I) The division is authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby wages for insured work paid in another state or by the federal government are deemed to be wages for insured work under articles 70 to 82 of this title; and wages for insured work paid under articles 70 to 82 of this title are deemed to be wages on the basis of which unemployment insurance is payable under such law of another state or of the federal government. No such arrangement shall be entered into unless it contains provision for reimbursement to the fund for the benefits paid under articles 70 to 82 of this title on the basis of the wages and provision for reimbursement from the fund for the benefits paid under such other law on the basis of wages for insured work as the division finds will be fair and reasonable to all affected interests. Reimbursements paid from the fund pursuant to this section shall be deemed to be benefits for the purposes of articles 70 to 82 of this title; except that no charge shall be made to a premium-paying employer's account under sections 8-76-101 to 8-76-104. With the exception of benefit overpayments, such noncharging shall not apply to reimbursing employer accounts that will be charged in accordance with section 8-76-103 in the same amount and to the same extent as if the reimbursement to another state had been benefits based solely on wages paid by an employer covered by articles 70 to 82 of this title.

(II) This paragraph (a) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

(b) (I) The division may enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby wages for insured work paid in another state or by the federal government are deemed to be wages for insured work under articles 70 to 82 of this title; and wages for insured work paid under articles 70 to 82 of this title are deemed to be wages on the basis of which unemployment insurance is payable under a corresponding law of another state or of the federal government. No such arrangement may be entered into unless it contains provision for reimbursement to the fund for the benefits paid under articles 70 to 82 of this title on the basis of the wages and provision for reimbursement from the fund for the benefits paid under such other law on the basis of wages for insured work as the division finds will be fair and reasonable to all affected interests. Reimbursements paid from the fund pursuant to this section are deemed to be benefits for the purposes of articles 70 to 82 of this title; except that no charge may be made to a premium-paying employer's account under sections 8-76-101 to 8-76-104. With the exception of benefit overpayments, the noncharging shall not apply to reimbursing employer accounts that will be charged in accordance with section 8-76-102.5 in the same amount and to the same extent as if the reimbursement to another state had been benefits based solely on wages paid by an employer covered by articles 70 to 82 of this title.

(II) This paragraph (b) is effective on and after the repeal of paragraph (a) of this subsection (2).

(3) The division is authorized to enter into arrangements with the appropriate agencies of other states or the federal government whereby individuals performing services in this and other states for employing units under circumstances not specifically provided for in sections 8-70-126 to 8-70-140.7 or under similar provisions in the unemployment compensation laws of such other states shall be deemed to be engaged in employment performed entirely within this state or within one of such other states and whereby potential rights and benefits accumulated under the unemployment compensation laws of several states or under such a law of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms that the department finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund. An individual applying for unemployment insurance benefits through an interstate



agreement authorized by this section who is not a Colorado resident and is unable to produce a Colorado driver's license or Colorado identification card shall produce one of the other documents required by section 24-76.5-103 (4) (a), C.R.S., or a valid driver's license or state identification card issued in another state, or, in the case of individuals residing in Canada, a valid Canadian identification card or valid Canadian driver's license, and execute an affidavit as described in section 24-76.5-103 (4) (b), C.R.S., stating that he or she is a United States citizen, a legal permanent resident, or otherwise lawfully present in the United States pursuant to federal law.

(4) The division is further authorized to enter into arrangements with the appropriate agencies of other states or of the federal government for the determination, adjustment, collection, and assessment of premiums by employers with respect to employment within and without this state.

(5) For the purposes of establishing and maintaining free public employment offices, the division is authorized to enter into agreements with the railroad retirement board or any other agency of the United States charged with the administration of an employment security law, with any political subdivision of this state, or with any private, nonprofit organization. As a part of any such agreement, the division may accept moneys, services, or quarters as a contribution to the employment security administration fund.

**Source:** L. 37: p. 1265, § 9. CSA: C. 167A, § 11. L. 39: p. 574, § 8. L. 41: p. 785, § 11. L. 51: p. 815, § 10. CRS 53: § 82-3-10. L. 54: p. 138, § 1. C.R.S. 1963: § 82-3-10. L. 69: pp. 669, 681, §§ 3, 1. L. 73: p. 958, § 3. L. 79: (5) amended, p. 345, § 4, effective September 30. L. 81: (2) amended, p. 483, § 5, effective July 1; (4) amended, p. 492, § 5, effective July 1. L. 90: (3) amended, p. 602, § 4, effective April 3; (2) amended, p. 607, § 3, effective April 16. L. 96: (3) amended, p. 381, § 4, effective April 17. L. 2007: (3) amended, p. 635, § 1, effective August 3. L. 2009: (2) and (4) amended, (HB 09-1363), ch. 363, p. 1882, § 9, effective July 1. L. 2011: (2) amended, (HB 11-1288), ch. 212, p. 926, § 10, effective July 1. L. 2012, 1st Ex. Sess.: (2)(a)(II) amended, (HB 12S-1002), ch. 2, p. 2427, § 5, effective June 1.

**Editor's note:** As of publication date, the revisor of statutes has not received the notice specified in subsection (2)(a)(II) of this section.

**8-72-111. Release of location information concerning individuals with outstanding felony arrest warrants.** (1) Notwithstanding any provision of state law to the contrary and to the extent allowable under federal law, at the request of the Colorado bureau of investigation, the division shall provide the bureau with information concerning the location of any person whose name appears in the division's records who is the subject of an outstanding felony arrest warrant. Upon receipt of such information, it shall be the responsibility of the bureau to provide appropriate law enforcement agencies with location information obtained from the division. Location information provided pursuant to this section shall be used solely for law enforcement purposes. The division and the bureau shall determine and employ the most cost-effective method for obtaining and providing location information pursuant to this section. Neither the division nor its employees or agents shall be liable in civil action for providing information in accordance with the provisions of this subsection (1).

(2) As used in subsection (1) of this section, "law enforcement agency" means any agency of the state or its political subdivisions that is responsible for enforcing the laws of this state. "Law enforcement agency" includes but is not limited to any police department, sheriff's department, district attorney's office, the office of the state attorney general, and the Colorado bureau of investigation.

**Source:** L. 95: Entire section added, p. 1123, § 2, effective July 1.

**8-72-112. Division - reporting - veterans programs.** The division, by September 30, 2002, and on or before September 30 each year thereafter, shall provide sufficient information to enable the Colorado board of veterans affairs to complete the report required by section 28-5-703 (3), C.R.S.

**Source: L. 2002:** Entire section added, p. 355, § 6, effective July 1.

**Cross references:** For the legislative declaration contained in the 2002 act enacting this section, see section 1 of chapter 121, Session Laws of Colorado 2002.

**8-72-113. Annual report - federal stimulus moneys to expand unemployment benefits - repeal.** (1) (a) By December 31, 2009, and by each December 31 thereafter until federal stimulus moneys have been exhausted, the division, in connection with its reporting requirements set forth in section 8-73-114 (6), shall report on the total accumulated federal stimulus moneys expended as of December 1 of the year in which the report is submitted in connection with the expansion of unemployment insurance benefits enacted by Senate Bill 09-247 in 2009. The report shall delineate the portions of the federal stimulus moneys expended in connection with each area of expansion of unemployment insurance benefits enacted pursuant to Senate Bill 09-247.

(b) As used in this section, "federal stimulus moneys" means unemployment compensation modernization incentive payments made to the state's unemployment trust fund in accordance with the federal "American Recovery and Reinvestment Act of 2009", Pub.L. 111-5, for enacting unemployment compensation modernization as required by the federal act.

(2) (a) This section is repealed, effective when the state has exhausted all of the federal stimulus moneys provided to the state to fund the expansion of unemployment insurance benefits enacted by Senate Bill 09-247 in 2009.

(b) The director of the division shall notify the revisor of statutes, in writing, when the condition specified in paragraph (a) of this subsection (2) has been satisfied.

**Source: L. 2009:** Entire section added, (SB 09-247), ch. 405, p. 2234, § 7, effective July 1.

**8-72-114. Employee misclassification - investigations - enforcement - advisory opinions - rules - employee misclassification advisory opinion fund - statewide study - report - definitions - legislative declaration.** (1) The general assembly hereby finds and declares that:

(a) Misclassification of employees as independent contractors in violation of the "Colorado Employment Security Act" and, in particular, the provisions of article 70 of this title defining the employment relationship, may pose a significant problem in this state and leads to underpayment of employment taxes and premiums that employers are obligated to pay the state for covered employment;

(b) Businesses that misclassify employees gain an unfair competitive advantage over businesses that properly classify employees and pay appropriate taxes and premiums to the state;

(c) When employees are misclassified, the protections available to properly classified employees against economic insecurity are unavailable to those misclassified employees, and the stream of revenue that should be paid to the state to provide protections to misclassified employees is not available.

(2) As used in this section:

(a) "Act" means the "Colorado Employment Security Act".

(b) "Complainant" means the person who files a complaint with the division pursuant to this section.

(c) "Director" means the director of the division.

(d) Repealed.



(e) "Executive director" means the executive director of the department of labor and employment.

(f) "Misclassification of employees" means erroneously classifying a person as an independent contractor, free from control and direction of the employer in the performance of service for the employer, when the employer cannot show an exception, pursuant to section 8-70-103 (11), to the general rule that service being performed for the employer is presumed to be employment for purposes of the act.

(g) "Respondent" means the person against whom a complaint is filed pursuant to this section.

(3) (a) The division shall be responsible for accepting and investigating complaints regarding misclassification of employees and enforcing the requirements of the act regarding classification of employees and payment of premiums.

(b) Any person may file a written complaint with the division alleging that a person engaged in employment is being misclassified by an employer as an independent contractor. The complainant shall specify in the complaint the facts showing that the person classified as an independent contractor is engaged in employment, as defined in article 70 of this title.

(c) The director may investigate a complaint filed pursuant to this subsection (3) and shall focus on the investigation of the most egregious complaints or those complaints alleging intentional acts of misclassification of employees undertaken in order to gain a competitive advantage or to avoid the payment of premiums.

(d) No later than thirty days after receipt of a complaint, the director shall determine whether or not an investigation is warranted. If the director determines that an investigation is warranted, the director shall notify the complainant and respondent that an investigation will be conducted and shall conduct the investigation in accordance with the act and the rules adopted pursuant to the act. The complainant and respondent shall cooperate and provide information as necessary to facilitate the investigation.

(e) (I) Upon conclusion of an investigation, the director shall issue a written order either dismissing the complaint or finding that the employer has engaged in the misclassification of employees and has failed to pay appropriate premiums for covered employment as defined in article 70 of this title.

(II) If the director finds that an employer has engaged in the misclassification of employees, the director shall order the employer to pay back premiums owed and interest.

(III) Upon a finding that the employer, with willful disregard of the law, misclassified employees, the director may:

(A) Impose a fine of up to five thousand dollars per misclassified employee for the first misclassification with willful disregard, and for a second or subsequent misclassification with willful disregard, a fine of up to twenty-five thousand dollars per misclassified employee; and

(B) Upon a second or subsequent misclassification with willful disregard, issue an order prohibiting the employer from contracting with, or receiving any funds for the performance of contracts from, the state for up to two years after the date of the director's order. Upon the issuance of such order, the director shall notify state departments and agencies as necessary to ensure enforcement of the order.

(f) The director shall provide a copy of the written order to the respondent. Those portions of the written order that are not confidential under the act shall be a public record.

(g) An employer shall have the right to appeal the director's order in accordance with section 8-76-113.

(4) (a) An employer may request a written advisory opinion from the director concerning whether the employer should classify the individual as an employee for purposes of complying with the act. The employer shall provide the director with information necessary for the director to issue an advisory opinion.

(b) Upon receipt of a request and pertinent information from an employer, the director shall issue an advisory opinion to the employer, indicating whether the employer should classify the individual as an employee in order to comply with the act. An opinion issued pursuant to this subsection (4) is only advisory, based on the information provided by the employer and the director's understanding of the circumstances at the time issued, and is not binding on the division, the employer, or any other state or local governmental entity.

(c) The director shall promulgate rules in accordance with article 4 of title 24, C.R.S., establishing the process for issuing an advisory opinion and the fees to be charged the requesting employer to cover the director's and division's costs in providing the advisory opinion. Any fees charged pursuant to this subsection (4) for the costs associated with issuing an advisory opinion shall be deposited in the employee misclassification advisory opinion fund, which fund is hereby created. Moneys in the employee misclassification advisory opinion fund shall be subject to annual appropriation by the general assembly for the purposes of this subsection (4). Interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. At the end of any fiscal year, all unexpended and unencumbered moneys in the fund shall remain in the fund and shall not be credited or transferred to the general fund or any other fund.

(5) The director, by all means reasonable and within budgetary constraints, shall publicize the complaint process established in this section and its availability to those who have discovered misclassification of employees. The director shall develop and make available free of charge to employers a notice explaining the rights of employees to be properly classified and the availability of a complaint process pursuant to this section. Employers shall post the notice conspicuously in the workplace or otherwise where it can be seen as employees come or go to their places of work.

(6) to (8) Repealed.

**Source:** L. 2009: Entire section added, (HB 09-1310), ch. 406, p. 2238, § 1, effective June 2. L. 2010: (1)(a), (1)(b), (3)(a), (3)(c), (3)(e)(I), (3)(e)(II), and (7)(c) amended, (HB 10-1422), ch. 419, p. 2065, § 13, effective August 11. L. 2012: (2)(c) amended and (2)(d) repealed, (HB 12-1120), ch. 27, p. 105, § 13, effective June 1.

**Editor's note:** (1) Subsection (8) provided for the repeal of subsections (6) to (8), effective July 1, 2012. (See L. 2009, p. 2238.)

(2) The effective date for amendments to subsection (2)(c) and the repeal of subsection (2)(d) by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

## ARTICLE 73

### Benefits - Eligibility - Disqualification

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-73-101.	Payment of benefits.	8-73-110.	Other remuneration - definitions.
8-73-102.	Weekly benefit amount for total unemployment.	8-73-111.	Compensation from other state.
8-73-103.	Benefits for partial unemployment.	8-73-112.	Benefits payable after receiving workers' compensation benefits.
8-73-104.	Duration of benefits - repeal.	8-73-113.	Benefits payable during approved training.
8-73-105.	Part-time workers.	8-73-114.	Enhanced unemployment insurance compensation benefits - eligibility - approved training programs - amount of benefits - outreach - notice of funding through gifts, grants, and donations - repeal.
8-73-105.3.	Temporary employees.		
8-73-105.5.	Employment by temporary help contracting firm.		
8-73-106.	Seasonal industry - definitions.		
8-73-107.	Eligibility conditions - penalty.		
8-73-108.	Benefit awards - repeal.		
8-73-109.	Strikes or other labor disputes - definitions.		

**8-73-101. Payment of benefits.** (1) All benefits provided in this article shall be payable from the fund. All benefits shall be paid through employment offices or such other agencies as the director of the division, by general rule, may designate. Notwithstanding any other provision of the law to the contrary, any amount of unemployment compensation



payable to any individual for any week, if not an even dollar amount, shall be rounded to the next lower full dollar amount.

(2) An individual's eligibility and benefit amounts shall be determined weekly. Unemployment insurance benefit checks shall be issued once every two weeks; except that the division, when it determines it to be necessary for proper administration of articles 70 to 82 of this title, including the effecting of administrative economies, may issue benefit checks on a weekly basis. Under no circumstance shall benefit checks be issued less frequently than once every two weeks.

**Source:** L. 36, 3rd Ex. Sess.: p. 14, § 3. L. 37: p. 1250, § 1. CSA: C. 167A, § 3. L. 39: p. 568, § 1. L. 41: p. 762, § 3. CRS 53: § 82-4-1. C.R.S. 1963: § 82-4-1. L. 83: Entire section amended, p. 435, § 2, effective October 1. L. 84: Entire section amended, p. 321, § 1, effective March 26. L. 86: (1) amended, p. 488, § 85, effective July 1. L. 93: (2) amended, p. 1771, § 23, effective June 6. L. 2006: (2) amended, p. 141, § 5, effective August 7.

#### ANNOTATION

**Annotator's note.** The case included in the annotations to this section which refers to the industrial commission was decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the director of the division.

**When two sections of this article are pertinent,** the commission has wide latitude in determining which section it will apply. Colo. State Judicial Dept. v. Indus. Comm'n, 630 P.2d 102 (Colo. App. 1981).

**8-73-102. Weekly benefit amount for total unemployment.** (1) (a) Except as otherwise provided in section 8-73-104 or subsection (2) of this section, each eligible individual who is totally unemployed in any week shall be paid, with respect to such week, benefits at the rate of sixty percent of one-twenty-sixth of the wages paid for insured work during the two consecutive quarters of the individual's base period in which such total wages were highest, computed to the next lower multiple of one dollar but not more than one-half of the average weekly earnings in all covered industries in Colorado according to the records of the division, as computed by the division in June for the ensuing twelve months beginning July 1, on the basis of the most recent available figures, and not less than twenty-five dollars.

(b) (I) If an individual does not have sufficient qualifying weeks or wages in the base period to qualify for unemployment insurance benefits, the individual shall have the option of designating that the base period shall be the alternative base period.

(II) If information regarding weeks and wages for the calendar quarter immediately preceding the first day of the benefit year is not available from the regular quarterly reports of wage information, and the division is not able to obtain the information using other means pursuant to state or federal law, the division may base the determination of eligibility for unemployment insurance benefits on the affidavit of the unemployed individual with respect to weeks and wages for that calendar quarter. The individual shall furnish payroll documentation, if available, in support of the affidavit. The division shall verify the employee's wage information. A determination of unemployment insurance benefits based on an alternative base period shall be adjusted when the quarterly report of wage information from the employer is received, if that information causes a change in the determination.

(2) An individual who is entitled to the maximum weekly benefit amount as computed in subsection (1) of this section shall receive a weekly benefit amount of fifty percent of one fifty-second of his total wages paid for insured work during his base period, computed to the next lower multiple of one dollar, but not to exceed fifty-five percent of the average weekly earnings in all covered industries in Colorado; except that the maximum weekly benefit amount in effect on July 1, 1985, as computed pursuant to this subsection (2), shall remain in effect until such maximum weekly benefit amount is equal to or less than fifty-five percent of the average weekly earnings in all covered industries in Colorado. In no case

shall an individual receive a weekly benefit amount computed in accordance with this subsection (2) unless it is greater than the weekly benefit amount yielded by computation in accordance with subsection (1) of this section.

(3) Benefit amounts determined under the provisions of this section shall apply only to those individuals whose benefit years begin subsequent to the effective date of each newly computed maximum benefit amount. No redetermination of benefit amounts already established shall be required by the computation of new maximum benefit amounts.

(4) There shall be deducted from the weekly benefit amount that part of wages payable to such individual with respect to such week that is in excess of twenty-five percent of the weekly benefit amount, and the weekly benefit amount resulting shall be computed to the next lower multiple of one dollar.

(5) (a) There shall be deducted from the weekly benefit amount child support intercept payments calculated under paragraphs (b) to (h) of this subsection (5).

(b) An individual filing a new claim for unemployment compensation shall, at the time of filing such claim, disclose whether or not the individual owes child support obligations. If any such individual discloses that he owes child support obligations and is determined to be eligible for unemployment compensation, the division shall notify the state or local child support enforcement agency enforcing such obligation that the individual has been determined to be eligible for unemployment compensation.

(c) The division shall deduct and withhold from any unemployment compensation payable to an individual that owes child support obligations:

(I) The amount specified by the individual to the division to be deducted and withheld under this subsection (5), if neither subparagraph (II) of this paragraph (c) nor subparagraph (III) of this paragraph (c) is applicable; or

(II) The amount, if any, determined pursuant to an agreement submitted to the division under section 454(20)(B)(i) of the "Social Security Act", as amended, by the state or local child support enforcement agency, unless subparagraph (III) of this paragraph (c) is applicable; or

(III) Any amount otherwise required to be so deducted and withheld from such unemployment compensation pursuant to legal process, as that term is defined in section 462(e) of the "Social Security Act", as amended, transmitted to the division.

(d) Any amount deducted and withheld under paragraph (c) of this subsection (5) shall be paid by the division to the appropriate state or local child support enforcement agency.

(e) Any amount deducted and withheld under paragraph (c) of this subsection (5) shall be treated as if it were paid to the individual as unemployment compensation and as if it were paid by such individual to the state or local child support enforcement agency in satisfaction of the individual's child support obligations.

(f) For the purposes of this subsection (5), "unemployment compensation" means any compensation payable under articles 70 to 82 of this title, including amounts payable by the division pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment.

(g) This subsection (5) applies only if appropriate arrangements have been made for reimbursement by the state or local child support enforcement agency for the administrative costs incurred by the division under this section which are attributable to child support obligations being enforced by the state or local child support enforcement agency.

(h) As used in this subsection (5), "child support obligations" includes only those obligations which are being enforced pursuant to a plan described in section 454 of the "Social Security Act", as amended, which has been approved by the secretary of health and human services under part D of Title IV of the "Social Security Act".

(i) As used in this subsection (5), "state or local child support enforcement agency" means any agency of a state or a political subdivision operating pursuant to a plan described in paragraph (h) of this subsection (5).

(6) (a) There shall be deducted from the weekly benefit amount any uncollected overissuance of food stamp coupons calculated under paragraphs (b) to (f) of this subsection (6).

(b) The division shall deduct and withhold from any unemployment compensation payable to an individual that owes an uncollected overissuance of food stamp coupons:



(I) The amount specified by the individual to the division to be deducted and withheld under this subsection (6);

(II) The amount, if any, determined pursuant to an agreement submitted to the division under section 13(c)(3)(A) of the federal "Food Stamp Act", as amended, by the state food stamp agency; or

(III) Any amount otherwise required to be deducted and withheld from such unemployment compensation pursuant to section 13(c)(3)(B) of the federal "Food Stamp Act", as amended.

(c) Any amount deducted and withheld under paragraph (b) of this subsection (6) shall be paid by the division to the appropriate state food stamp agency.

(d) Any amount deducted and withheld under paragraph (b) of this subsection (6) shall for all purposes be treated as if it were paid to the individual as unemployment compensation and then paid by such individual to the state food stamp agency to which the uncollected overissuance of food stamp coupons is owed as repayment for the overissuance.

(e) This subsection (6) applies only if appropriate arrangements have been made for reimbursement by the state food stamp agency for the administrative costs incurred by the division under this section that are attributable to repayment of uncollected overissuances of food stamp coupons owed to the state food stamp agency.

(f) For the purposes of this subsection (6):

(I) "State food stamp agency" means any agency described in section 3(n)(1) of the federal "Food Stamp Act", as amended, that administers the food stamp program established under such federal act within this state.

(II) "Uncollected overissuance" has the meaning provided for the term in section 13(c)(1) of the federal "Food Stamp Act", as amended.

(III) "Unemployment compensation" has the meaning provided for the term in paragraph (f) of subsection (5) of this section.

(7) (a) An individual filing a new claim for unemployment compensation shall, at the time of filing such claim, be advised that:

(I) Unemployment compensation is subject to federal and state income tax;

(II) Requirements exist pertaining to estimated tax payments;

(III) The individual may elect to have federal income tax deducted and withheld from the individual's payment of unemployment compensation at the rate specified in the federal internal revenue code;

(IV) The individual may elect to have Colorado state income tax deducted and withheld from the individual's payment of unemployment compensation at the rate of four percent; and

(V) The individual shall be permitted to change a previously elected withholding status no more than one time during each "benefit year" as that term is defined by section 8-70-111 (1).

(b) Amounts deducted and withheld from unemployment compensation for income tax purposes shall remain in the unemployment compensation fund, created pursuant to section 8-77-101, until transferred to the federal or state taxing authority as a payment of income tax.

(c) The director of the division shall follow all procedures specified by the United States department of labor and the federal internal revenue service pertaining to the deducting and withholding of income tax.

(d) Amounts shall be deducted and withheld under the provisions of this subsection (7) for income tax purposes only after amounts are deducted and withheld for any overpayments, child support obligations, food stamp overissuances, or any other amounts required to be deducted and withheld under articles 70 to 82 of this title.

**Source:** L. 36, 3rd Ex. Sess.: p. 14, § 3. L. 37: p. 1250, § 1. CSA: C. 167A, § 3. L. 39: p. 568, § 1. L. 41: p. 762, § 3. L. 47: p. 885, § 1. L. 49: p. 720, § 1. L. 53: p. 628, §§ 1, 2. CRS 53: § 82-4-2. L. 57: p. 516, §§ 2, 3. L. 59: pp. 560, 564, §§ 1, 6. L. 63: pp. 666, 683, §§ 1, 11. C.R.S. 1963: § 82-4-2. L. 69: pp. 669, 682, §§ 4, 1. L. 73: p. 958, § 4. L. 79: (1) amended, p. 345, § 5, effective July 1; (2) amended, p. 345, § 5, effective September 30. L. 82: (5) added, p. 235, § 1, effective July 1. L. 83: (4)

amended, p. 435, 2042, § 3, effective October 1; (1) and (2) amended, p. 2042, § 5, effective January 1, 1984. **L. 85:** (5)(c)(III) amended, p. 587, § 1, effective July 1. **L. 86:** (2) amended, p. 542, § 3, effective July 1. **L. 87:** (4) amended, p. 409, § 3, effective May 16. **L. 94:** (6) added, p. 2060, § 1, effective July 1. **L. 96:** (7) added, p. 381, § 5, effective January 1, 1997. **L. 98:** (4) amended, p. 88, § 1, effective March 23. **L. 2009:** (1) amended, (SB 09-247), ch. 405, p. 2228, § 2, effective July 1.

**Editor's note:** Section 462 of the "Social Security Act", referenced in subsection (5)(c)(III), was repealed in 1996. For the current definition of "legal process" in such act, see 42 U.S.C. § 659 (i)(5).

**Cross references:** (1) For section 454 of the "Social Security Act", see 42 U.S.C. § 654; for part D of Title IV of the act, see 42 U.S.C. § 651 et seq.

(2) For section 13 of the "Food Stamp Act", see 7 U.S.C. § 2022; for section 3 of the act, see 7 U.S.C. § 2012.

## ANNOTATION

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the director of the division.

**Commission must follow plain wording of subsection (1).** Since subsection (1) refers to "wages paid" rather than wages earned, the commission had no choice but to follow the plain wording of the statute. *Grams v. Indus. Comm'n*, 38 Colo. App. 357, 556 P.2d 1234 (1976).

**Determinations required prior to computations under § 8-73-107 (1)(e).** The dollar rounding provision is in subsection (1) and the weekly benefit must have already been determined before the computations called for in § 8-73-107 (1)(e) are made. *Grams v. Indus. Comm'n*, 38 Colo. App. 357, 556 P.2d 1234 (1976).

**8-73-103. Benefits for partial unemployment.** (1) Each eligible individual who is partially unemployed shall be paid a partial benefit. Partial benefits shall be in an amount equal to the eligible individual's weekly benefit amount for total unemployment, minus that part of wages payable to such individual with respect to such week which is in excess of twenty-five percent of his weekly benefit amount as computed in accordance with section 8-73-102, and the benefit payment resulting shall be computed to the next lower multiple of one dollar.

(2) The director of the division is authorized to prescribe regulations governing benefits for partial unemployment for other pay periods which will result in benefit amounts for such periods proportionate to the amounts prescribed in this article for weekly pay periods.

**Source:** **L. 36, 3rd Ex. Sess.:** p. 14, § 3. **L. 37:** p. 1250, § 1. **CSA: C. 167A,** § 3. **L. 39:** p. 568, § 1. **L. 41:** p. 762, § 3. **CRS 53:** § 82-4-3. **C.R.S. 1963:** § 82-4-3. **L. 73:** p. 959, § 5. **L. 81:** (1) amended, p. 484, § 6, effective July 1. **L. 83:** (1) amended, p. 435, § 4, effective October 1. **L. 86:** (2) amended, p. 488, § 86, effective July 1.

**8-73-104. Duration of benefits - repeal.** (1) The division shall compute wage credits for each individual by crediting him with the wages for insured work paid during each quarter of such individual's base period or twenty-six times the current maximum benefit amount, whichever is the lesser. Any otherwise eligible individual shall be entitled during

**Colorado department of social services is the sole vehicle** by which deductions may be secured from unemployment compensation payable to an individual who owes a child support obligation. *Colo. Division of Employment v. Wells*, 693 P.2d 1027 (Colo. App. 1984).

**Definition of "wages" to be deducted from benefits.** Monthly payments under a "consulting agreement" requiring claimant to make himself available if needed constituted "wages" regardless of whether claimant actually performed any work under the agreement. *Magin v. Division of Emp.*, 899 P.2d 369 (Colo. App. 1995).

**"Wages" and "earnings" are synonymous in this context.** *Magin v. Division of Emp.*, 899 P.2d 369 (Colo. App. 1995).

**Applied in** *Denver Post, Inc. v. Dept. of Labor & Emp.*, 41 Colo. App. 275, 586 P.2d 1342 (1978).



any benefit year to a total amount of benefits equal to twenty-six times his weekly benefit amount or one-third of his wage credits for insured work paid during his base period, whichever is the lesser; except that benefits based on seasonal wages may be paid only for unemployment during the normal seasonal period of the seasonal industry in which such wage credits were earned and only to seasonal workers who are available for work in such seasonal industry, and the total thereof shall not exceed one-third of such individual's wages paid for insured seasonal work during the corresponding normal seasonal period of his base period. For the purposes of this section, wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by whom the wages were paid has satisfied the conditions of section 8-70-113, 8-76-104, or 8-76-107, with respect to becoming an employer.

(2) (a) (I) Notwithstanding other provisions of this section or section 8-76-103 (1) (a), benefits based upon regular part-time employment may not be charged to the experience rating account of the regular part-time employer until the claimant has become separated from the regular part-time employment and then only for those weeks of unemployment that occur after said separation.

(II) This paragraph (a) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

(b) (I) Notwithstanding any other provision of this section or of section 8-76-102.5 (1) (a), benefits based upon regular part-time employment may not be charged to the experience rating account of the regular part-time employer until the claimant has become separated from the regular part-time employment, and then only for those weeks of unemployment that occur after the separation.

(II) This paragraph (b) is effective on and after the repeal of paragraph (a) of this subsection (2).

**Source:** L. 36, 3rd Ex. Sess.: p. 14, § 3. L. 37: p. 1250, § 1. CSA: C. 167A, § 3. L. 39: p. 568, § 1. L. 41: p. 762, § 3. L. 43: p. 600, § 1. L. 47: p. 885, § 1. L. 49: p. 720, § 1. L. 53: p. 629, § 3. CRS 53: § 82-4-4. L. 57: p. 517, § 4. L. 59: pp. 561, 564, §§ 2, 6. L. 63: p. 667, § 2. C.R.S. 1963: § 82-4-4. L. 65: pp. 831, 847, §§ 3, 11. L. 72: pp. 448, 609, §§ 1, 122. L. 76: (1) amended, p. 338, § 9, effective October 1. L. 77: (1) amended, p. 482, § 1, effective October 1. L. 85: (1) amended, p. 366, § 2, effective July 1. L. 90: (1) amended, p. 602, § 5, effective April 3. L. 2011: (2) amended, (HB 11-1288), ch. 212, p. 928, § 11, effective July 1. L. 2012, 1st Ex. Sess.: (2)(a)(II) amended, (HB 12S-1002), ch. 2, p. 2427, § 6, effective June 1.

**Editor's note:** As of publication date, the revisor of statutes has not received the notice specified in subsection (2)(a)(II) of this section.

**8-73-105. Part-time workers.** (1) As used in this section, "part-time worker" means an individual whose normal work is in an occupation in which his services are not required for the customary scheduled full-time hours prevailing in the establishment in which he is employed or who, owing to personal circumstances, does not customarily work the customary scheduled full-time hours prevailing in the establishment in which he is employed.

(2) The director of the division shall prescribe fair and reasonable general rules applicable to part-time workers for determining their full-time weekly wage and the total wages for employment by employers required to qualify such workers for benefits. The rules, with respect to such part-time workers, shall supersede any inconsistent provisions of articles 70 to 82 of this title but, so far as practicable, shall secure results reasonably similar to those provided in the analogous provisions of articles 70 to 82 of this title.

**Source:** L. 36, 3rd Ex. Sess.: p. 14, § 3. L. 37: p. 1250, § 1. CSA: C. 167A, § 3. L. 39: p. 568, § 1. L. 41: p. 762, § 3. CRS 53: § 82-4-5. C.R.S. 1963: § 82-4-5. L. 86: (2) amended, p. 488, § 87, effective July 1.

### ANNOTATION

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the director of the division.

**Statute defines two types of part-time workers.** Redmond v. Indus. Comm'n, 32 Colo. App. 134, 509 P.2d 1277, modified, 183 Colo. 14, 514 P.2d 623 (1973).

**Because the "or" in subsection (1) is not inclusive, but is in the alternative.** Redmond v. Indus. Comm'n, 32 Colo. App. 134, 509 P.2d 1277, modified, 183 Colo. 14, 514 P.2d 623 (1973).

**Commission is directed to comply with this statute and prescribe fair and reasonable rules** which will afford part-time workers benefits due them. Redmond v. Indus. Comm'n, 32 Colo. App. 134, 509 P.2d 1277, modified, 183 Colo. 14, 514 P.2d 623 (1973).

**Essential question in each case with regard to eligibility of a part-time worker for unemployment benefits** is whether the particular part-time worker claimant so restricted his availability for suitable work or so restricted his ability to actively seek work, that — in relation to the condition of the surrounding labor market — he cannot be deemed to have met the eligibility requirements. Indus. Comm'n v. Redmond, 183 Colo. 14, 514 P.2d 623 (1973).

**Part-time worker must comply with § 8-73-107.** A part-time worker under this section

must comply with other statutory eligibility requirements under § 8-73-107 such as he must be "available for all work deemed suitable", and he must be "actively seeking work". Indus. Comm'n v. Redmond, 183 Colo. 14, 514 P.2d 623 (1973).

**But part-time workers should be afforded benefits notwithstanding inconsistent provisions.** Provisions of § 8-73-107, that a claimant must be able to work and must be available for all work deemed suitable pursuant to § 8-73-108, should not prevent the intent of the general assembly from being carried out, and that intent, as evidenced by this section, is to the effect that part-time workers should be afforded benefits notwithstanding inconsistent provisions elsewhere in the act. Redmond v. Indus. Comm'n, 32 Colo. App. 134, 509 P.2d 1277, modified, 183 Colo. 14, 514 P.2d 623 (1973).

**Full-time college student afforded part-time worker benefits.** This section clearly expresses a legislative intent to afford benefits to certain part-time workers, and the claimant was such a worker, and had the general assembly intended not to afford part-time worker benefits to full-time college students, it could easily have so stated. Indus. Comm'n v. Redmond, 183 Colo. 14, 514 P.2d 623 (1973).

**And part-time worker who is full-time college student need not be available for full-time work in order to qualify for unemployment benefits.** Indus. Comm'n v. Redmond, 183 Colo. 14, 514 P.2d 623 (1973).

**8-73-105.3. Temporary employees.** (1) As used in this section, "temporary employee" means an individual who is employed by an employer on an irregular schedule and who has agreed to work for the employer on an as-needed or on-call basis.

(2) At the time of hire as a temporary employee, an employer must give the employee notice that the employee is required to contact or notify the employer upon completion of an assignment and to be available to work, as agreed upon at the time of hire, during a specified period of time, on specified dates, or upon call by the employer on an as-needed basis.

(3) If a temporary employee receives the notice pursuant to subsection (2) of this section and does not contact or notify the employer upon completion of an assignment in compliance with the notice and is not available to work at the agreed-upon times, the employee is deemed to have voluntarily terminated employment for the purpose of determining benefits pursuant to section 8-73-108 (5) (e).

(4) If a temporary employee who agrees to work on an as-needed basis receives the notice pursuant to subsection (2) of this section and refuses all work within three separate pay periods when contacted by the employer, the temporary employee is deemed to have voluntarily terminated employment for reasons that may or may not allow an award of benefits pursuant to section 8-73-108.

(5) Repealed.



**Source: L. 95:** Entire section added, p. 776, § 1, effective July 1. **L. 2001:** (5) repealed, p. 43, § 1, effective March 11.

**8-73-105.5. Employment by temporary help contracting firm.** (1) (a) For the purposes of this section, "temporary help contracting firm" means any person who is in the business of employing individuals and, for compensation from a third party, providing those individuals to perform work for the third party, under the supervision of the third party.

(b) Repealed.

(2) Employment with a temporary help contracting firm is characterized by a series of limited-term assignments of an employee to a third party, based on an agreement between the temporary help contracting firm and the third party. A separate employment agreement exists between the temporary help contracting firm and each individual it hires as an employee. Completion of an assignment for a third party by an employee employed by a temporary help contracting firm does not, in itself, terminate the employment agreement between the temporary help contracting firm and the employee.

(3) (Deleted by amendment, L. 94, p. 637, § 3, effective July 1, 1994.)

(4) At the time of hire a temporary help contracting firm shall provide written notice to each employee which clearly states that the employee is required to contact the firm upon completion of an assignment.

(5) If an employee of a temporary help contracting firm receives the written notice pursuant to subsection (4) of this section and does not contact the firm upon completion of an assignment in compliance with such written notice, such employee shall be held to have voluntarily terminated employment for purposes of determining benefits pursuant to section 8-73-108 (5) (e) (XXII).

(6) If an employee of a temporary help contracting firm contacts the firm upon completion of an assignment in compliance with subsection (4) of this section and does not continue employment in a new assignment, such employee shall be considered separated under the provisions of section 8-73-108 (4) (a).

**Source: L. 90:** Entire section added, p. 606, § 2, effective April 16. **L. 94:** Entire section amended, p. 637, § 3, effective July 1. **L. 95:** (1) amended, p. 776, § 2, effective July 1. **L. 2001:** (1)(b) repealed, p. 43, § 2, effective March 11.

#### ANNOTATION

**Employee-claimant of a temporary help contracting firm is entitled to a determination whether he was "at fault" for his separation** even though he was disqualified pursuant to the provisions of this section and not directly under one of the statutory disqualifying provisions of § 8-73-108. *Velo v. Employment Solutions Pers.*, 953 P.2d 1295 (Colo. App. 1998).

**No error in determination by hearing officer that disqualifying provisions of subsection (5) of this section and § 8-73-108 (5)(e)(XXII) are applicable to claimant.** On the last day of his final assignment, employer temporary help contracting firm notified claimant that his assignment was ending. Subsequently, employer offered claimant additional assignments which claimant did not accept. There is no evidence that claimant informed his employer that he was available for further assignments. Moreover, claimant did not contact employer in accordance with the written contract he had received. Accordingly, court upheld that portion of hearing officer's order stating that claimant was responsible for his separation and

should be disqualified from the receipt of his unemployment benefits pursuant to subsection (5) of this section and § 8-73-108 (5)(e)(XXII). *Velo v. Employment Solutions Pers.*, 988 P.2d 1139 (Colo. App. 1998).

**Claimant is entitled to a determination whether he was "at fault" for his separation notwithstanding the applicability of the disqualifying provisions of this section.** To determine otherwise would abrogate the overriding legislative policy that unemployment benefits are to be awarded only to those claimants who are unemployed through no fault of their own. There appears no legislative intent to treat unemployment compensation claimants who work for temporary help agencies differently from other unemployment compensation claimants with regard to the issue of fault. Accordingly, matter must be remanded to panel for it to consider "fault" issue and, based on its resolution of that issue, to enter a new order on whether claimant is entitled to benefits. *Velo v. Employment Solutions Pers.*, 988 P.2d 1139 (Colo. App. 1998).

**8-73-106. Seasonal industry - definitions.** (1) (a) As used in articles 70 to 82 of this title, "seasonal industry" means an industry or functionally distinct occupation within an industry which, because of climatic conditions or the seasonal nature of the employment, customarily employs workers only during a regularly recurring period or periods of less than twenty-six weeks in a calendar year. "Nonseasonal period or periods" means the time within a calendar year other than the seasonal period or periods. "Seasonal worker" means an individual who has been paid seasonal wages by a seasonal employer for seasonal work only during the designated seasonal period.

(b) During the nonseasonal period or periods, the seasonal employer may employ not more than twenty-five percent of the total number of workers in each functionally distinct occupation that were employed in the previous seasonal period or periods without losing the seasonal designation for that functionally distinct occupation, so long as the seasonal employer does not employ any workers in the designated seasonal occupations during a consecutive forty-five-day period at any time following the seasonal period or periods. A worker who performs services for the same seasonal employer outside the employer's designated seasonal period or periods shall not be considered a seasonal worker for any period, and all wages paid by the seasonal employer to such worker shall be considered nonseasonal wages. If a seasonal worker performs services for the same seasonal employer outside the employer's designated seasonal period or periods thereby resulting in the loss of the worker's seasonal status and if such worker is not thereafter employed by such employer between any two following designated seasonal periods, the worker may thereafter be reemployed by such seasonal employer and regain his status as a seasonal worker.

(2) The director of the division shall prescribe rules and regulations applicable to seasonal industries for determining their normal seasonal period or periods and seasonal workers, as such terms are defined in subsection (1) of this section.

(3) Upon written application filed with the division by an employer, the director of the division shall determine and may thereafter redetermine, from time to time in accordance with the rules and regulations of the division, the normal seasonal period during which workers are ordinarily employed for the purpose of carrying on seasonal operations in the seasonal industry in which such employer is engaged. Such determination shall be made by said director within ninety days after the filing of such application by an employer with the division. Until such determination by the director of the division, no occupation or industry shall be deemed seasonal. Any employing unit affected by such seasonal determination may appeal the determination in accordance with section 8-76-113. For the purpose of determining whether an individual is a seasonal worker and the duration of such individual's benefits, the determination by said director of the normal seasonal period of a seasonal industry shall be applicable to the filing of the quarterly report of wages in the calendar quarter commencing after the date of such determination.

(4) Repealed.

**Source:** L. 36, 3rd Ex. Sess.: p. 14, § 3. L. 37: p. 1250, § 1. CSA: C. 167A, § 3. L. 39: p. 568, § 1. L. 41: p. 762, § 3. CRS 53: § 82-4-6. L. 59: p. 566, § 1. L. 63: p. 668, § 3. C.R.S. 1963: § 82-4-6. L. 67: p. 282, § 1. L. 69: p. 660, § 247. L. 72: pp. 448, 609, §§ 2, 123. L. 73: p. 959, § 6. L. 76: (3) amended, p. 339, § 10, effective October 1. L. 79: (1) and (3) amended, p. 346, § 6, effective September 30. L. 85: (1) amended, p. 370, § 1, effective March 30. L. 86: (2) and (3) amended, p. 488, § 88, effective July 1. L. 90: (4) added, p. 610, § 1, effective April 3; (3) amended, p. 607, § 4, effective April 16. L. 94: (4) repealed, p. 639, § 4, effective July 1.

#### ANNOTATION

**School cook not "seasonal worker".** Where unemployment compensation benefits were sought by a cook at private school for period of unemployment following end of school term, the court of appeals held that the claimant did not come within the statutory definition of "sea-

sonal worker". In re Interrogatories by Indus. Comm'n, 30 Colo. App. 599, 496 P.2d 1064 (1972).

**Appeal of denial of classification as seasonal employer.** Before the general assembly enacted a procedure for appeal of a decision



denying classification as a seasonal employer in June 1979, the administrative procedure act was applicable, and any such appeal should have

been filed in the district court. *City of Aurora v. Indus. Comm'n*, 44 Colo. App. 132, 609 P.2d 129 (1980).

**8-73-107. Eligibility conditions - penalty.** (1) Any unemployed individual shall be eligible to receive benefits with respect to any week only if the division finds that:

(a) (I) He or she has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the director of the division may prescribe; except that the director of the division, by regulation, may waive or alter either or both of the requirements of this subparagraph (I) as to individuals attached to regular jobs and as to such other types of cases or situations with respect to which the director of the division finds that compliance with such requirements would be oppressive, or would be inconsistent with the purposes of articles 70 to 82 of this title, but that no such regulation shall conflict with section 8-73-101.

(II) Without in any way limiting the authority of the director of the division to waive or alter the requirements of subparagraph (I) of this paragraph (a), during the period of the national economic recession that began in 2008, in order to assist unemployed individuals in being available for appropriate jobs and to assist employers in having available trained employees, the director of the division shall waive or alter such requirements so that individuals attached to regular jobs do not have to comply with the requirements of subparagraph (I) of this paragraph (a) for a period of twenty-six weeks.

(b) He has made a claim for benefits in accordance with the provisions of section 8-74-101;

(c) (I) The individual is able to work and is available for all work deemed suitable pursuant to the provisions of section 8-73-108, and, with respect thereto:

(A) Decisions of the division regarding the ability of the claimant to work, the availability of the claimant for work, and the claimant's active search for work may be appealed by the claimant or by any employer whose account may be charged with any benefits paid pursuant to such decision, if the appeal is received within twenty calendar days, as defined in section 8-70-103 (5), after the date on the notice of any such decision;

(B) A potentially chargeable employer may protest on the basis of inability to work, nonavailability for work, or failure to search for work within fifteen calendar days after the date on which he discovers such a condition to exist, within thirty days after the date on which payment was made for the week during which the claimant is alleged to have been unable to work or unavailable for work, or within sixty calendar days after the mailing date of the report of quarterly benefit charges, whichever comes first;

(C) No individual shall be considered available for work during any week in which he has no reasonable expectation of securing employment in his usual occupation or in an occupation for which he is reasonably qualified as a result of his movement to an area;

(D) No individual shall be denied benefits because of nonavailability or failure to make an active search for work solely due to his compliance with a summons to report for jury duty. Remuneration received in connection with such duty shall not be considered wages, as defined in section 8-70-141 (1) (a), and the individual's weekly benefit amount shall not be reduced as prescribed in section 8-73-102 (4).

(E) If an individual left employment because of health-related reasons, the division may require a written medical statement issued by a licensed practicing physician addressing any matters related to health.

(II) Nothing in this paragraph (c) shall prevent the division from reviewing and redetermining any decision at any time if the redetermination is based upon facts not known to the division at the time of its original decision.

(d) The individual has been either totally or partially unemployed for a waiting period of one week. No benefits are payable for the waiting period. No week shall be counted as a week of unemployment for the purposes of this paragraph (d):

(I) Unless it occurs within the benefit year which includes the week with respect to which he claims payment of benefits;

(II) If benefits have been paid with respect thereto;

(III) Unless the individual was eligible for benefits with respect thereto under provisions of sections 8-73-107 to 8-73-112;

(IV) Unless total wages earned for the week are less than the weekly benefit amount;

(e) The individual has during his or her base period been paid wages for insured work equal to not less than forty times such individual's weekly benefit amount or two thousand five hundred dollars, whichever is greater. For the purposes of this paragraph (e), wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year comes subsequent to the date on which the employing unit by whom such wages were paid has satisfied the conditions of sections 8-70-113, 8-76-104, and 8-76-107 with respect to becoming an employer.

(f) His total wages earned for the week are less than his weekly benefit amount;

(g) (I) He or she is actively seeking work. In determining whether the claimant is actively seeking work, the division, taking notice of the customary methods of obtaining work in the claimant's usual occupation, or any occupation for which he or she is reasonably qualified, and the current condition of the labor market, shall consider, but shall not be limited to a consideration of, whether, during said week, the claimant followed a course of action that was reasonably designed to result in his or her prompt reemployment in suitable work.

(II) This paragraph (g) shall not apply to a person determined eligible to receive benefits pursuant to section 8-73-108 (4) (r) (I) for the first fifteen business days after a claim for benefits is filed if compliance with this paragraph (g) would:

(A) Make it more difficult for the person to escape domestic abuse; or

(B) Unfairly penalize a person who is or has been a victim of domestic abuse or is at further risk of domestic abuse.

(h) The individual has furnished the division with separation and other reports containing the information deemed necessary by the division to determine the individual's eligibility for benefits, but this provision shall not apply if the individual proves to the satisfaction of the division that he or she had good cause for failing to furnish such reports. The eligibility of any individual shall not be affected by the refusal or failure of an employer to furnish reports concerning separation and employment as required by articles 70 to 82 of this title and the rules pursuant thereto, and the division shall determine the eligibility of such individual upon the basis of such information it may obtain; and any employer who fails or refuses to furnish reports concerning separation and employment shall cease to be an interested party to the separation issue directly related to determinations made in accordance with section 8-73-108 (4) and (5) (e). For each instance of failure to furnish the division with such reports, the employer, unless good cause to the contrary is shown to the satisfaction of the division, may be assessed a penalty of twenty-five dollars, which shall be collected in the same manner as premiums due under articles 70 to 82 of this title.

(i) It is not, in whole or in part, within a period during which the worker is not working due to a disciplinary suspension as provided in the contract of employment;

(j) Such individual is not absent from work due to an authorized and approved voluntary leave of absence.

(2) An individual who has received compensation during the individual's benefit year is required to have worked for an employer as defined in section 8-70-113 since the beginning of such year and to have earned at least two thousand dollars as remuneration for such employment in order to qualify for compensation in the next benefit year.

(3) For the purpose of this subsection (3), "educational institution" includes the Colorado school for the deaf and the blind; except that such term does not include a headstart program that is not a part of a school administered by a board of education because such headstart employees are not subject to the same employment conditions as other employees of the school. Compensation is payable on the basis of services to which sections 8-70-119, 8-70-125, and 8-70-125.5 apply in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other services subject to articles 70 to 82 of this title; except that:

(a) With respect to services in an instructional, research, or principal administrative capacity for an educational institution, compensation shall not be payable based on such services for any week commencing during the period between two successive academic



years or terms (or when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms;

(b) With respect to services in any other capacity, for an educational institution compensation payable on the basis of such services shall be denied to any individual for any week which commences during a period between two successive academic years or terms or periods described in paragraph (c) of this subsection (3) if such individual performs such services in the first of such academic years, terms, or periods and there is a reasonable assurance that such individual will perform such services in the second of such academic years, terms, or periods; except that, if compensation is denied to any individual for any week under this paragraph (b) and such individual was not offered, an opportunity to perform such services for the educational institution for the second of such academic years, terms, or periods, such individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of this paragraph (b);

(c) With respect to any services described in paragraphs (a) or (b) of this subsection (3), compensation payable on the basis of such services shall be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess and if there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess;

(d) With respect to any services described in paragraph (a) or (b) of this subsection (3), compensation payable on the basis of services in any such capacity shall be denied as specified in paragraph (a), (b), or (c) of this subsection (3) to any individual who performed such services in an educational institution while in the employ of an educational service agency. For the purpose of this paragraph (d), the term "educational service agency" means a governmental agency or governmental entity, such as that created by the "Boards of Cooperative Services Act of 1965", article 5 of title 22, C.R.S., which is established and operated exclusively for the purpose of providing such services to one or more educational institutions.

(e) With respect to any services described in paragraph (a) of this subsection (3), compensation payable on the basis of such services shall be denied to any individual for any week during a period of paid or unpaid sabbatical or other voluntary leave provided for in the individual's contract if such individual performs such services in the academic year or term immediately preceding the beginning of sabbatical or other voluntary leave and if there is a contract or reasonable assurance that such individual will perform such services in the academic year or term following the end of the sabbatical or other voluntary leave;

(f) With respect to services to which section 8-70-140 applies, if such services are provided to or on behalf of an educational institution, benefits shall not be payable under the same circumstances and subject to the same terms and conditions as described in paragraphs (a) to (d) of this subsection (3).

(4) (a) Notwithstanding any other provision in this section, no otherwise eligible individual shall be denied benefits for any week because he is in training with the approval of the division, nor shall such individual be denied benefits by reason of the application of provisions in paragraph (c) of subsection (1) of this section relating to availability for work, the provisions of paragraph (g) of subsection (1) of this section relating to active search for work, or the provisions of section 8-73-108 relating to failure to apply for, or a refusal to accept, suitable work with respect to any week in which he is in training with the approval of the division.

(b) (Deleted by amendment, L. 98, p. 89, § 3, effective March 23, 1998.)

(5) Repealed.

(6) Benefits shall not be paid to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive

sport seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the latter of such seasons (or similar periods).

(7) (a) Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, or was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed. For purposes of the "Colorado Employment Security Act":

(I) An alien shall be considered to be "lawfully admitted for permanent residence" only if the alien has been granted status under section 101 of the "Immigration and Nationality Act", 8 U.S.C. 1101 (a) (20);

(II) An alien shall be considered to be "lawfully present for purposes of performing services" only if the alien is an alien who possesses work authorization or has been lawfully admitted to temporary residence under section 245 (a) or section 210 of the "Immigration and Nationality Act", 8 U.S.C. 1255(a) and 8 U.S.C. 1160, respectively;

(III) An alien shall be considered to be "permanently residing in the United States under color of law" only if the alien is:

(A) An alien admitted as a refugee under section 207 of the "Immigration and Nationality Act", 8 U.S.C. § 1157, in effect after March 31, 1980;

(B) An alien granted asylum by the attorney general of the United States under section 208 of the "Immigration and Nationality Act", 8 U.S.C. § 1158;

(C) An alien granted a parole into the United States for an indefinite period under section 212 (d) (5) (B) of the "Immigration and Nationality Act", 8 U.S.C. § 1182 (d) (5) (B);

(D) An alien granted the status as a conditional entrant refugee under section 203 (a) (7) of the "Immigration and Nationality Act", 8 U.S.C. § 1153 (a) (7), in effect prior to March 31, 1980; or

(E) An alien who has been formally granted deferred action status by the immigration and naturalization service, or any successor agency.

(b) Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits.

(c) In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to such individual are not payable because of his alien status shall be made except upon a preponderance of the evidence.

**Source:** L. 36, 3rd Ex. Sess.: p. 18, § 4. L. 37: p. 1254, § 2. CSA: C. 167A, § 4. L. 39: p. 570, § 2. L. 41: p. 765, § 4. L. 43: p. 601, § 2. L. 45: p. 712, § 1. L. 47: p. 886, § 2. L. 49: p. 722, § 2. L. 51: p. 807, § 2. L. 53: p. 623, §§ 2-4. CRS 53: § 82-4-8. L. 55: p. 533, § 1. C.R.S. 1963: § 82-4-7. L. 65: p. 832, § 4. L. 71: p. 932, § 7. L. 73: p. 959, § 7. L. 75: (3) amended, p. 322, § 3, effective June 20. L. 76: (3) amended, p. 360, § 2, effective April 20; (3) amended, p. 339, § 11, effective October 1. L. 77: (5), (6), and (7) added, p. 463, § 14, effective July 1; (3) repealed, p. 471, § 27, effective January 1, 1978. L. 79: (1)(c) and (7)(a) R&RE, (1)(d)(I) amended, (3) RC&RE, and (5) repealed, pp. 346, 347, 356, §§ 7, 8, 9, 25, effective September 30. L. 81: (1)(h) amended, p. 492, § 6, effective July 1; (3) amended, p. 511, § 1, effective July 1. L. 82: (1)(e) and (2) amended, p. 236, § 3, effective July 1. L. 83: (3)(b) amended, p. 436, § 5, effective April 12. L. 84: (2) R&RE, p. 317, § 6, effective July 1; (3)(e) amended, p. 323, § 1, effective July 1. L. 85: (3)(e) amended, p. 1358, § 4, effective June 28; (1)(h) and (7)(a) amended, p. 366, § 3, effective July 1. L. 86: (1)(a) amended, p. 489, § 89, effective July 1; (3)(f) added and IP(7)(a) amended, p. 542, §§ 4, 5, effective July 1. L. 87: (4) amended, p. 406, § 1, effective May 16. L. 89: (1)(h) and (2) amended, p. 425, § 3, effective July 1. L. 90: (1)(c)(I)(A), (1)(c)(I)(D), (1)(e), (2), IP(3) and (3)(f) amended, p. 603, § 6, effective April 3; (7)(a) amended, p. 609, § 7, effective April 16. L. 92: (1)(c)(I)(B) and (1)(h) amended, p. 1793, § 2, effective April 10. L. 98: IP(1)(d), (2), and (4)(b) amended, p. 89, § 3, effective March 23. L. 99: (1)(e) amended, p. 634, § 1, effective August 4; (1)(c)(I)(E) and (1)(j) added, p. 396, §§ 1, 2, effective August 15.



**L. 2001:** IP(3) amended, p. 1548, § 4, effective December 21, 2000. **L. 2005:** (1)(g) amended, p. 319, § 1, effective August 8. **L. 2007:** IP(1)(c)(I) and (1)(c)(I)(A) amended, p. 802, § 2, effective August 3. **L. 2009:** (1)(a) amended, (SB 09-178), ch. 268, p. 1220, § 1, effective May 18; (1)(h) amended, (HB 09-1363), ch. 363, p. 1883, § 10, effective July 1. **L. 2011:** (7)(a)(III)(E) amended, (HB 11-1303), ch. 264, p. 1149, § 5, effective August 10.

**Editor's note:** The federal "Consolidated Appropriations Act, 2001", Pub.L. 106-554, which became law on December 21, 2000, required all states to amend their laws regarding how Indian tribes are treated for unemployment insurance purposes. The 2001 act amending the introductory portion to subsection (3) provided for an effective date of December 21, 2000. (See L. 2001, p. 1550.)

## ANNOTATION

**Law reviews.** For note, "The Unemployment Compensation Recipient — Should He Accept a Job?", see 44 Den. L.J. 147 (1967). For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L.J. 82 (1970). For article, "Alcoholism and Unemployment Insurance in Colorado", see 18 Colo. Law. 1963 (1989).

**Underlying principle.** The Colorado program of unemployment insurance is based on the principle that only those persons who are willing and able to work are entitled to unemployment benefits. *Sylvara v. Indus. Comm'n*, 191 Colo. 92, 550 P.2d 868 (1976) (decided under former law).

**Preservation of state interest.** The state has a legitimate interest in providing unemployment benefits only to conscientious persons. But that interest is preserved by the statutory requirement that in order to receive benefits a claimant must be available for work and actively seeking employment. *Kistler v. Indus. Comm'n*, 192 Colo. 172, 556 P.2d 895 (1976).

**Definition of "disciplinary suspension".** A disciplinary suspension is a suspension imposed for a defined period for the purpose of penalizing an employee for a specific act, after which period the employee is scheduled to return to work. *Pueblo Sch. Dist. No. 60 v. Martinez*, 749 P.2d 1005 (Colo. App. 1987).

**Sufficient guidelines to determine eligibility.** The terms "able to work", "available for all work deemed suitable", and "actively seeking work" constitute sufficient guidelines to enable the commission to properly determine the eligibility of one seeking unemployment compensation. *Denver Post, Inc. v. Dept. of Labor & Emp.*, 199 Colo. 466, 610 P.2d 1075 (1980).

**"Availability for work" or "actively seeking work" are two eligibility conditions** which could be found to be lacking or restricted by full-time attendance at school, and such a finding would be a lawful basis for disallowing compensation. *Indus. Comm'n v. Bennett*, 166 Colo. 101, 441 P.2d 648 (1968).

**But "actively seeking work" as a concept is incapable of precise definition** and it is for the appropriate agency to make such a determination after considering all the facts and circum-

stances in each particular case. *Bayly Mfg. Co. v. Dept. of Emp.*, 155 Colo. 433, 395 P.2d 216 (1964).

**"Actively seeking work" implies seeking work from other potential employers.** Limiting the search for work to one's previous employer is a cause for disqualification. *McClaffin v. Indus. Claim Appeals Office*, 126 P.3d 288 (Colo. App. 2005).

**Availability of employment determined from factual situation presented.** A determination of the availability for employment is one for which an all-inclusive rule cannot be stated, but rather must be made within the context of the factual situation presented by each case. *Couchman v. Indus. Comm'n*, 33 Colo. App. 116, 515 P.2d 636 (1973); *Medina v. Indus. Comm'n*, 38 Colo. App. 256, 554 P.2d 1360 (1976); *Duenas-Rodriguez v. Indus. Comm'n*, 199 Colo. 95, 606 P.2d 437 (1980).

Whether a claimant is able to work and is available for all work deemed suitable, as provided in subsection (1)(c), and whether the claimant was actively seeking work, as provided in subsection (1)(g), must be determined within the context of the factual situation presented by each case. *Denver Post, Inc. v. Dept. of Labor & Emp.*, 199 Colo. 466, 610 P.2d 1075 (1980).

**Work is not "suitable" if wages offered are substantially less than prevailing wage.** *Romero v. Indus. Comm'n*, 616 P.2d 992 (Colo. App. 1980).

**The essential question in each case is whether the claimant's availability for suitable work is so restricted** — in relation to the condition of the surrounding labor market — that he cannot be deemed to have met the eligibility requirements of ability to, and availability for, work. *Medina v. Indus. Comm'n*, 38 Colo. App. 256, 554 P.2d 1360 (1976).

While claimants in their twenty-eighth or later weeks of pregnancy may have limited employment opportunities, they may still be considered to be "actively seeking work". *Frontier Airlines, Inc. v. Indus. Comm'n*, 734 P.2d 142 (Colo. App. 1986), cert. dismissed, 738 P.2d 1185 (Colo. 1987).

**Question of whether claimant is unemployed is a purely mathematical inquiry:** If he performs no services and receives no compensation, then he is totally unemployed; if he does receive compensation, but in an amount less than the amount of benefits he could recover if totally unemployed, then he is still unemployed, though only partially. It is only when a claimant receives compensation exceeding the amount of weekly total unemployment benefits that he remains "employed" under these sections. *Denver Post, Inc. v. Dept. of Labor & Emp.*, 41 Colo. App. 275, 586 P.2d 1342 (1978), modified, 199 Colo. 466, 610 P.2d 1075 (1980).

**The initial burden is on the claimant** to establish a prima facie case of eligibility for benefits. *Medina v. Indus. Comm'n*, 38 Colo. App. 256, 554 P.2d 1360 (1976); *Duenas-Rodriguez v. Indus. Comm'n*, 199 Colo. 95, 606 P.2d 437 (1980).

**Illegal alien ineligible for benefits.** An illegal alien has no constitutional right to work and, being legally unavailable for work, did not qualify for benefits under subsection (1)(c). *Duenas-Rodriguez v. Indus. Comm'n*, 199 Colo. 95, 606 P.2d 437 (1980).

**But applicants for political asylum** were permanently residing in the United States under color of law and thus eligible for unemployment benefits. *Div. of Emp. & Training v. Indus. Comm'n*, 705 P.2d 1022 (Colo. App. 1985); *Div. of Emp. & Training v. Turynski*, 735 P.2d 469 (Colo. 1987).

**Since subsection (7) is based on federal law**, federal authority in interpreting the federal enactment is highly persuasive in interpreting this state statute. *Arteaga v. Indus. Comm'n*, 703 P.2d 654 (Colo. App. 1985), *aff'd sub nom. Div. of Emp. & Training v. Yiadom*, 735 P.2d 473 (Colo. 1987).

**The provisions of subsections (7)(a)(I) to (7)(a)(VI)** are merely illustrative of the categories of persons included within the meaning of the phrase "permanently residing in the United States under color of law". An interpretation that said provisions are an exhaustive definition of persons included within the meaning of said phrase would result in the statute not being in substantial compliance with federal law. *Sandoval v. Colo. Div. of Emp.*, 757 P.2d 1105 (Colo. App. 1988).

**For purposes of subsection (7), petitioner was "permanently residing in the United States under 'color of law'"**, where he was married to a citizen of the United States, was authorized to work by the Immigration and Naturalization Service (INS), was in the process of applying for permanent residence, and because the INS made no effort to deport him during the application process. *Arteaga v. Indus. Comm'n*, 703 P.2d 654 (Colo. App. 1985), *aff'd sub nom. Div. of Emp. & Training v. Yiadom*, 735 P.2d

473 (Colo. 1987); *Zanjani v. Indus. Comm'n*, 703 P.2d 652 (Colo. App. 1985).

And petitioner became eligible for unemployment benefits when the INS demonstrated its intention to allow petitioner to remain in the country until he obtained permanent resident alien status. *Arteaga v. Indus. Comm'n*, 703 P.2d 654 (Colo. App. 1985); *Zanjani v. Indus. Comm'n*, 703 P.2d 652 (Colo. App. 1985).

Claimant had pending at all times at least one petition which would result in an adjustment of his status to lawful permanent resident which constituted the necessary status to receive unemployment benefits. The fact that claimant did not have a valid INS work authorization during his base period was merely one factor to consider in determining whether he met the requirements of "permanently residing in the United States under color of law". *Sandoval v. Colo. Div. of Emp.*, 757 P.2d 1105 (Colo. App. 1988).

**Eligibility where claimant unable to perform "normal" work for health reasons.** Where an unemployment compensation claimant is, for health reasons, unable to perform such claimant's "normal" work for a period of time, the claimant may nevertheless be eligible for benefits if the claimant is able to perform and is available for other suitable work. *Bartholomay v. Indus. Comm'n*, 642 P.2d 50 (Colo. App. 1982).

**Fact that claimant has restricted his employment to particular hours of the day or to a specific shift must be considered** within the context of the particular labor market in which he is seeking employment before a valid conclusion can be reached as to whether he has made himself unavailable for employment. *Couchman v. Indus. Comm'n*, 33 Colo. App. 116, 515 P.2d 636 (1973).

**When eligibility provisions of section come into play.** While any refusal of suitable work may well be independent grounds for a "no award" decision under § 8-73-108 (6), the "eligibility" provisions of this section, including limited availability, only come into play with respect to conditions existing after filing of the claim. *Olivas v. Indus. Comm'n*, 33 Colo. App. 273, 518 P.2d 304 (1974).

**Section would not become pertinent unless claimant applies for benefits after expiration of disqualifications.** Where "no award" decision rendered required that claimant be "disqualified" from receiving benefits for a period of 13 to 25 weeks under § 8-73-108 (2)(b)(I), and a 13-week disqualification was imposed, the provisions of this section would not become pertinent unless the claimant should apply for benefits after the period of disqualifications had expired, and the question of claimant's restrictions on availability for work at that time would then ripen. *Olivas v. Indus. Comm'n*, 33 Colo. App. 273, 518 P.2d 304 (1974).



Where the records contained no indication whatsoever that claimants failed to meet the basic eligibility requirements of subsection (1), claimants were deemed to have met the basic eligibility requirements since the industrial commission is presumed to carry out its official duties in a regular manner. *Everitt Lumber Co. v. Indus. Comm'n*, 39 Colo. App. 336, 565 P.2d 967 (1977).

**Part-time worker must comply with section.** A part-time worker under § 8-73-105 must comply with other statutory eligibility requirements under this section such as he must be "available for all work deemed suitable", and he must be "actively seeking work". *Indus. Comm'n v. Redmond*, 183 Colo. 14, 514 P.2d 623 (1973).

**But section applied considering intention to afford part-time workers' benefits.** The requirements of this section must be applied with the consideration that the claimant may be a part-time worker and that the general assembly intended to afford benefits to such workers. *Indus. Comm'n v. Redmond*, 183 Colo. 14, 514 P.2d 623 (1973).

**And such workers afforded benefits notwithstanding inconsistent provisions elsewhere.** The provisions of this section, that a claimant must be able to work and must be available for all work deemed suitable pursuant to § 8-73-108, should not prevent the intent of the general assembly from being carried out, and that intent, as evidenced by § 8-73-105, is to the effect that part-time workers should be afforded benefits notwithstanding inconsistent provisions elsewhere in the act. *Redmond v. Indus. Comm'n*, 32 Colo. App. 134, 509 P.2d 1277, modified, 183 Colo. 14, 514 P.2d 623 (1973).

**Claimant's status as student does not in itself make him unavailable for employment** within the meaning of this statute. *Couchman v. Indus. Comm'n*, 33 Colo. App. 116, 515 P.2d 636 (1973).

**Intent of subsection (3).** The exclusion from coverage stated in subsection (3) is intended to preclude school teaching and nonteaching personnel from receiving unemployment compensation during summer recess if they have the promise of work in the fall. *Bd. of County Comm'rs v. Martinez*, 43 Colo. App. 322, 602 P.2d 911 (1979), overruled on other grounds sub nom. *Indus. Comm'n v. Bd. of County Comm'rs*, 690 P.2d 839 (Colo. 1984).

**Even though a school engages in academic activity during summer break, such scheduled break is probably not an academic period.** Consequently, applicant was not entitled to receive unemployment benefits under subsection (3)(c) during summer break regardless of the academic activity taking place at the school. *Herrera v. Indus. Claim Appeals Office*, 18 P.3d 819 (Colo. App. 2000).

**Headstart program workers employed by county were eligible to receive benefits during summer recess.** *Indus. Comm'n v. Bd. of County Comm'rs*, 690 P.2d 839 (Colo. 1984).

**Distinction relating to headstart program constitutional.** Distinguishing between employees of county-administered headstart programs and employees of school-administered programs bears a rational relationship to a legitimate state objective and thus does not violate equal protection. *Indus. Comm'n v. Bd. of County Comm'rs*, 690 P.2d 839 (Colo. 1984).

**Claimant held not able and available.** Where claimant had formerly worked at a job requiring her to be on her feet eight hours a day and, after surgery needed because of an injury which was unrelated to her employment, applied for part-time work at her usual occupation with the same employer, where she was advised that they had no part-time work, nor any jobs that would meet her physical limitations, the type and hours of work sought by claimant were so limited that she was not "able and available" for all suitable work within the meaning of this section. *Medina v. Indus. Comm'n*, 38 Colo. App. 256, 554 P.2d 1360 (1976).

**Failure to answer call-in card.** Since the referee found that claimant did not realize the call-in card concerned possible employment and since claimant was not otherwise alerted to such employment, claimant's failure to report within the time limit specified, standing alone, will not support the finding that claimant was unavailable for referral and was not actively seeking work. *Lawlor v. Indus. Comm'n*, 34 Colo. App. 442, 527 P.2d 1186 (1974).

**Commission correct in considering claimants' last week as "waiting week".** Where the earnings of each claimant for the last week worked were under \$50, and the benefits to which each was entitled ranged from \$82 to \$87, the commission was correct in considering claimants' last week of work to be the "waiting week", and it was proper to pay full benefits beginning the following week. *Denver Symphony Ass'n v. Indus. Comm'n*, 34 Colo. App. 343, 526 P.2d 685 (1974).

**Determinations are required prior to computations under subsection (1)(e).** The dollar rounding provision is in § 8-73-102 (1) and the weekly benefit must have already been determined before the computations called for in subsection (1)(e) are made. *Grams v. Indus. Comm'n*, 38 Colo. App. 357, 556 P.2d 1234 (1976).

**Determination of monetary eligibility for unemployment benefits.** Since the payments to the claimant pursuant to the charter provision were made under a plan established by the employer which compensates police officers on account of "accident disability", the amount of these payments cannot be counted as "wages" for determining monetary eligibility for unem-

ployment benefits. *City & County of Denver v. Indus. Comm'n*, 707 P.2d 1008 (Colo. App. 1985), cert. denied, 733 P.2d 680 (Colo. 1987).

**Hearsay evidence alone cannot support commission's order.** Hearsay evidence, though admissible in administrative hearings, cannot alone support an order of the industrial commission. *Romero v. Indus. Comm'n*, 616 P.2d 992 (Colo. App. 1980).

**This section concerns eligibility, not entitlement.** Its applicability must be determined in eligibility proceedings that may not be intermingled with entitlement issues. *Denver v. Indus. Claim Appeals Office*, 833 P.2d 881 (Colo. App. 1992).

**Under the Colorado Employment Security Act, eligibility for unemployment benefits and entitlement to those benefits are distinct and separate matters** that relate to whether a claimant may receive unemployment compensa-

tion. In *re Adamic*, 291 B.R. 175 (Bankr. D. Colo. 2003).

"Eligibility" for unemployment compensation relates to the monetary provisions of the statute, while "entitlement" concerns the non-monetary provisions. Each is an equal element of a claim for unemployment compensation benefits. In *re Adamic*, 291 B.R. 175 (Bankr. D. Colo. 2003).

**Applied** in *Dailey, Goodwin & O'Leary v. Division of Emp., Indus. Comm'n*, 40 Colo. App. 256, 572 P.2d 853 (1977); *Martinez v. Indus. Comm'n*, 618 P.2d 738 (Colo. App. 1980); *Bd. of County Comm'rs v. Indus. Comm'n*, 650 P.2d 1297 (Colo. App. 1982); *Nazzaro v. Indus. Comm'n*, 671 P.2d 983 (Colo. App. 1983); *Bushehri v. Indus. Claim Appeals Office*, 749 P.2d 439 (Colo. App. 1987); *Denver v. Indus. Claim Appeals Office*, 833 P.2d 881 (Colo. App. 1992).

**8-73-108. Benefit awards - repeal.** (1) (a) In the granting of benefit awards, it is the intent of the general assembly that the division at all times be guided by the principle that unemployment insurance is for the benefit of persons unemployed through no fault of their own; and that each eligible individual who is unemployed through no fault of his own shall be entitled to receive a full award of benefits; and that every person has the right to leave any job for any reason, but that the circumstances of his separation shall be considered in determining the amount of benefits he may receive, and that certain acts of individuals are the direct and proximate cause of their unemployment, and such acts may result in such individuals receiving a disqualification.

(b) A full award of benefits shall be the total amount of benefits computed under sections 8-73-102 and 8-73-104. Benefits payable under the provisions of this section shall be awarded, subject to other applicable provisions of articles 70 to 82 of this title.

(2) Repealed.

(3) (a) (I) The most recent separation and all separations from base period employers, excluding those defined in subparagraph (II) of paragraph (e) of this subsection (3), shall be considered. In the event a claimant has more than one separation from the same adjudicable employer, the most recent separation shall be controlling as to the determination of eligibility for benefits attributable to that employer.

(II) Benefits remaining from a previous full award shall be reduced if a disqualification is granted on the most recent separation from that employer.

(III) Benefits previously reduced due to a disqualification shall become available if a full award is granted on the most recent separation. If a disqualification was previously imposed, then the employee must work ten consecutive work days for the same employer before a full award may be granted on the most recent separation.

(b) An additional claim filed during an existing benefit year because of a recurrence of unemployment shall require the claimant to report all job separations subsequent to the effective date of the initial claim which may be considered by the division. Those job separations that are considered shall result in a full award or a disqualification. If a disqualification is imposed on the most recent separation, a ten-week deferral of benefits shall be imposed.

(c) The gross misconduct of an individual causing his discharge from employment shall result in a disqualification of twenty-six weeks. "Gross misconduct" means conduct evincing such willful or wanton disregard of an employer's interests or negligence or harm of such a degree or recurrence as to manifest culpability or wrongful intent, or assault or threatened assault upon supervisors, coworkers, or others at the work site.

(d) Benefits shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for gross



misconduct connected with his work, fraud in connection with a claim for benefits, or receipt of disqualifying income.

(e) (I) Benefit payments will be charged against the experience rating accounts of the base period employers in inverse chronological order.

(II) When the total amount of base period wages, as defined in section 8-70-141 (1) (a), paid by a base period employer is less than one thousand dollars:

(A) Such wages shall be included in the computation of wage credits under the provisions of section 8-73-104; and

(B) Benefits paid with respect to such wages shall not be charged against the experience rating account of an employer but will be charged against the fund; and

(C) Separations from such employers, other than the last employer, shall not be adjudicated.

(III) Repealed.

(f) Benefit payments shall not be charged against the experience rating account of an employer and shall be charged against the fund when:

(I) The benefits are paid for unemployment directly caused by a major natural disaster;

(II) The president has declared the event a disaster pursuant to section 102 (2) of the federal "Robert T. Stafford Disaster Relief and Emergency Assistance Act", as amended, 42 U.S.C. sec. 5122(2); and

(III) The benefits are paid to an individual who would have otherwise been eligible for disaster unemployment assistance with respect to that unemployment but for the individual's receipt of unemployment compensation benefits.

(4) **Full award.** An individual separated from a job shall be given a full award of benefits if any of the following reasons and pertinent conditions related thereto are determined by the division to have existed. The determination of whether or not the separation from employment shall result in a full award of benefits shall be the responsibility of the division. The following reasons shall be considered, along with any other factors that may be pertinent to such determination:

(a) Laid off for lack of work;

(b) (I) The health of the worker is such that the worker is separated from his or her employment and must refrain from working for a period of time that exceeds the greater of the employer's medical leave of absence policy or the provisions of the federal "Family and Medical Leave Act of 1993", if applicable, or the worker's health is such that the worker must seek a new occupation, or the health of the worker or the worker's spouse or dependent child is such that the worker must leave the vicinity of the worker's employment; except that, if the health of the worker or the worker's spouse or dependent child has caused the separation from work, the worker, in order to be entitled to a full award, must have complied with the following requirements: Informed the worker's employer in writing, if the employer has posted or given actual advance notice of this writing requirement, of the condition of the worker's health or the health of the worker's spouse or dependent child prior to separation from employment and allowed the employer the opportunity to make reasonable accommodations for the worker's condition; substantiated the cause by a competent written medical statement issued by a licensed practicing physician prior to the date of separation from employment when so requested by the employer prior to the date of separation from employment or within a reasonable period thereafter; submitted himself or herself or the worker's spouse or dependent child to an examination by a licensed practicing physician selected and paid by the interested employer when so requested by the employer prior to the date of separation from employment or within a reasonable period thereafter; or provided the division, when so requested, with a written medical statement issued by a licensed practicing physician. For purposes of providing the medical statement or submitting to an examination for an employer, "a reasonable period thereafter" shall include the time before adjudication by either a deputy or referee of the division. An award of benefits pursuant to this subparagraph (I) shall include benefits to a worker who, either voluntarily or involuntarily, is separated from employment because of pregnancy and who otherwise satisfies the requirements of this subparagraph (I).

(II) In the event of an injury or sudden illness of the worker which would preclude verbal or written notification of the employer prior to such occurrence, the failure of the

worker to notify the employer prior to such occurrence will not in itself constitute a reason for the denial of benefits if the worker has notified the employer at the earliest practicable time after such occurrence. Such notice shall be given no later than two working days following such occurrence unless the worker's physician provides a written statement to the employer within one week of the employer's request that the worker's condition made giving such notice impracticable and substantiating the illness or injury.

(III) Any physician who makes or is present at any examination required under these provisions shall testify as to the results of his examination; except that no such physician shall be required to disclose any confidential communication imparted to him for the purpose of treatment which is not necessary to a proper understanding of the case.

(IV) The off-the-job or on-the-job use of not medically prescribed intoxicating beverages or controlled substances, as defined in section 18-18-102 (5), C.R.S., may be reason for a determination for a full award pursuant to this paragraph (b), but only if:

(A) The worker has declared to the division that he or she is addicted to intoxicating beverages or controlled substances;

(B) The worker has substantiated the addiction by a competent written medical statement issued by a physician licensed to practice medicine pursuant to article 36 of title 12, C.R.S., or has substantiated the successful completion of, or ongoing participation in, a treatment program as described in sub-subparagraph (C) of this subparagraph (IV) within four weeks of the claimant's admission. Such substantiation shall be in writing to the division and signed by an authorized representative of the approved treatment program.

(C) A worker who is not affiliated with an approved treatment program must present to the division within four weeks after the date of the medical statement referred to in sub-subparagraph (B) of this subparagraph (IV), substantiation of registration in a program of corrective action that will commence within four weeks after the date of the medical statement and that is provided by an approved private treatment facility or an approved public treatment facility as defined in section 27-81-102 (2) or (3), C.R.S., or by an alcoholics anonymous program. The substantiation shall be in writing to the division and signed by an authorized representative of the approved treatment program.

(D) (Deleted by amendment, L. 2006, p. 653, § 1, effective April 24, 2006.)

(IV.5) Any benefits awarded to the claimant under the provisions of subparagraph (IV) of this paragraph (b) and normally chargeable to the employer will be charged to the fund.

(V) A potentially chargeable employer may notify the division concerning the failure of the worker to participate in or complete an approved program of corrective action to deal with the addiction within fifteen calendar days after the date on which he discovers such a condition to exist. The worker shall be given an opportunity to respond to the employer's allegations. The division, upon review of additional information, may modify a prior decision pursuant to subparagraph (XXIV) of paragraph (e) of subsection (5) of this section.

(c) Unsatisfactory or hazardous working conditions when so determined by the division. In determining whether or not working conditions are unsatisfactory for an individual, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, the distance of the work from his residence, and the working conditions of workers engaged in the same or similar work for the same and other employers in the locality shall be considered. For the purpose of this paragraph (c), "hazardous working conditions" means such conditions, as are determined by the division to exist, that could result in a danger to the physical or mental well-being of the worker. In any such determination the division shall consider, but shall not be limited to a consideration of, the following: The safety measures used or the lack thereof and the condition of equipment or lack of proper equipment. No work shall be considered hazardous if the working conditions surrounding a worker's employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employers engaged in the same or similar type of activity.

(d) A substantial change in the worker's working conditions, said change in working conditions being substantially less favorable to the worker; but requiring a worker to work a different shift shall not be considered a substantial change in working conditions unless such requirement would be a violation of seniority rights which entitle the worker to shift preferential, but in any such case the burden of proving such seniority rights shall rest upon



the worker. No change in working conditions shall be considered substantial if it is determined by the division that the conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work.

(e) Unreasonable reduction in the worker's rate of pay as determined by the division. In determining whether or not there has been an unreasonable reduction in the worker's rate of pay, the division shall consider, but shall not be limited to a consideration of, whether or not the reduction in pay was applied by the employer to all workers in the same or similar class or merely to this individual, the general economic conditions prevailing in the state, the financial condition of the employer involved, and whether or not the reduction in wage was agreed to by other workers employed in the same or similar work. The worker's loss of a shift differential or overtime pay shall not be considered an unreasonable reduction in the worker's rate of pay under this paragraph (e), unless such shift differential or overtime pay was guaranteed by the employer.

(f) (I) Due to the particular nature of the building and construction industry, construction workers who quit a construction job to accept a different construction job in any of the following circumstances:

(A) Quitting within thirty days immediately prior to the established termination date of the job quit; and at the time of quitting, the construction worker had been offered and had accepted another construction job and the specific starting date of the new job was within thirty days from the date of quitting the prior job; and the new job offered employment for a longer period of time than remained available on the job quit unless the new job was terminated by a contract cancellation; or

(B) Unsatisfactory working conditions with respect to the distance of his work from his residence when so determined by the division; or

(C) Quitting a construction job that is outside the state of Colorado in order to accept a construction job within the state of Colorado, if such construction worker has maintained a residence in this state; or

(D) Leaving a job to comply with a condition of an apprenticeship assignment of an employer, which condition was imposed to meet the conditions of a joint apprenticeship or other apprenticeship program which is in accordance with requirements for programs registered with the federal government; or

(E) Quitting a job outside the worker's regular apprenticeable trade to return to work in his or her regular apprenticeable trade. For purposes of this paragraph (f), a "regular apprenticeable trade" is a skilled trade or occupation in the construction industry in which, by longstanding and recognized practice of a significant segment of the industry, a worker generally must complete a period of apprenticeship or training pursuant to a joint apprenticeship or other apprenticeship program which is in accordance with requirements for programs registered with the federal government. A worker may have more than one regular apprenticeable trade.

(II) If the provisions of either sub-subparagraph (A), (B), (C), (D), or (E) of subparagraph (I) of this paragraph (f) are met, any benefits normally chargeable to the employer for whom the employee worked immediately prior to accepting the new job will be charged to the fund. Benefits shall not be awarded pursuant to this paragraph (f) unless the worker has subsequently separated from the new job under conditions which would result in a full award under this subsection (4).

(g) After being given the choice by his employer between being terminated, furloughed, or laid off and replacing another worker, the worker has elected to accept a termination, furlough, or layoff;

(h) Quitting employment because of a violation of the written employment contract by the employer; except that before such quitting the worker must have exhausted all remedies provided in such written contract for the settlement of disputes before quitting his job;

(i) Being discharged from employment without the employer informing either the worker or the division, after a request from the division as to the reason for the discharge;

(j) Being physically or mentally unable to perform the work or unqualified to perform the work as a result of insufficient educational attainment or inadequate occupational or professional skills. In cases where an individual quits because of physical or mental

inability to perform the work because of domestic abuse, any award of benefits will be made in accordance with paragraph (r) of this subsection (4).

(k) Refusing with good cause to work overtime without reasonable advance notice. Good cause as used in this paragraph (k) shall be restricted to reasonable, compelling personal reasons as determined by the division affecting either the worker or the worker's immediate family.

(l) Being instructed or requested to perform a service or commit an act which is in violation of an ordinance or statute;

(m) Involuntary retirement in accordance with company policy or at the volition of the employer;

(n) Quitting employment under conditions which would not have resulted in a denial of benefits under the provisions of paragraph (b) of subsection (5) of this section;

(o) Quitting employment because of personal harassment by the employer not related to the performance of the job;

(p) (I) Business closure because the employer is, or was, a member of the military reserves or National Guard and was called to active military duty.

(II) Any benefits awarded to the claimant under the provisions of subparagraph (I) of this paragraph (p) and normally chargeable to the employer will be charged to the fund.

(q) Repealed.

(r) (I) Separating from a job because of domestic violence may be reason for a determination for a full award if:

(A) The worker reasonably believes that his or her continued employment would jeopardize the safety of the worker or any member of the worker's immediate family and provides the division with substantiating documentation as described in sub-subparagraph (B) or (C) of this subparagraph (I); or

(B) The worker provides the division with an active or recently issued protective order or other order documenting the domestic violence or a police record documenting recent domestic violence; or

(C) The worker provides the division with a statement substantiating recent domestic violence from a qualified professional from whom the worker has sought assistance for the domestic violence, such as a counselor, shelter worker, member of the clergy, attorney, or health worker.

(II) If the worker does not meet the provisions of subparagraph (I) of this paragraph (r), the worker shall be held to have voluntarily terminated employment for the purposes of determining benefits pursuant to subparagraph (XXII) of paragraph (e) of subsection (5) of this section.

(III) Any benefits awarded to the claimant under the provisions of this paragraph (r) normally chargeable to the employer shall be charged to the fund.

(IV) The director of the division shall adopt rules as necessary to implement and administer this paragraph (r).

(V) As used in this paragraph (r), "immediate family" means the worker's spouse, parent, or minor child under eighteen years of age.

(s) (I) Quitting a job to relocate as a result of the transfer of the individual's spouse to a new place of residence, either within or outside Colorado, from which it is impractical to commute to the place of employment, and upon arrival at the new place of residence, the individual is in all respects available for suitable work. The spouse shall be a member of the United States armed forces who is on active duty as defined in 10 U.S.C. sec. 101 (d) (1), active guard and reserve duty as defined in 10 U.S.C. sec. 101 (d) (6), or active duty pursuant to title 10 or 32 of the United States Code.

(II) Any benefits awarded to the claimant under this paragraph (s) normally chargeable to the employer shall be charged to the fund, and any such benefits shall not affect an employer's premium.

(III) The division shall maintain records regarding the number of individuals claiming and awarded benefits, and the amount of benefits awarded to individuals, pursuant to this paragraph (s). By January 31, 2009, and by each January 31 thereafter, the division shall submit a report to the business affairs and labor committee of the house of representatives and the business, labor, and technology committee of the senate, or their successor



committees, detailing the number of claimants and amounts awarded pursuant to this paragraph (s).

(IV) This paragraph (s) is repealed, effective July 1, 2018.

(t) (I) Quitting a job to relocate to a new place of residence, either within or outside Colorado, from which it is impractical to commute to the place of employment because the individual's spouse, who was stationed in Colorado, is killed in combat. Upon arrival at the new place of residence, the individual shall be available, in all respects, for suitable work. The individual's spouse shall have been a member of the United States armed forces who was on active duty as defined in 10 U.S.C. sec. 101 (d) (1), active guard and reserve duty as defined in 10 U.S.C. sec. 101 (d) (6), or active duty pursuant to title 10 or 32 of the United States Code.

(II) The director shall promulgate rules allowing for the waiver of the requirement to actively seek work, pursuant to section 8-73-107 (1) (g), for an individual who is eligible for benefits pursuant to this paragraph (t).

(III) Any benefits awarded to the claimant under this paragraph (t) normally chargeable to the employer shall be charged to the fund, and any such benefits shall not affect an employer's premium.

(IV) The division shall maintain records regarding the number of individuals claiming and awarded benefits, and the amount of benefits awarded to individuals, pursuant to this paragraph (t). By January 31, 2010, and by each January 31 thereafter, the division shall submit a report to the business affairs and labor committee of the house of representatives and the business, labor, and technology committee of the senate, or their successor committees, detailing the number of claimants and amounts awarded pursuant to this paragraph (t).

(V) This paragraph (t) is repealed, effective July 1, 2019.

(u) (I) Separating from a job due to a change in location of the employment of the worker's spouse that necessitates a new place of residence for the worker, either within or outside Colorado, from which it is impractical to commute to the worker's place of employment, and upon arrival at the new place of residence, the individual is in all respects available for suitable work. The director of the division shall adopt rules as necessary to implement and administer this paragraph (u).

(II) Any benefits awarded to the claimant under this paragraph (u) normally chargeable to the employer shall be charged to the fund.

(v) (I) Separating from a job because a member of the worker's immediate family is suffering from an illness that requires the worker to care for the immediate family member for a period that exceeds the greater of the employer's medical leave of absence policy or the provisions of the federal "Family and Medical Leave Act of 1993" if the worker meets the following requirements:

(A) The worker informed his or her employer, if the employer has posted or given actual advance notice of the requirement to so inform the employer, of the condition of the worker's immediate family member; and

(B) The worker provides the division, when requested, a competent statement verifying the condition of the worker's immediate family member.

(II) Separating from a job because a member of the worker's immediate family is suffering from a disability that requires the worker to care for the immediate family member for a period that exceeds the greater of the employer's medical leave of absence policy or the provisions of the federal "Family and Medical Leave Act of 1993" if the worker meets the following requirements:

(A) The worker informed his or her employer, if the employer has posted or given actual advance notice of the requirement to so inform the employer, of the condition of the worker's immediate family member; and

(B) The worker provides the division, when requested, a competent statement verifying the condition of the worker's immediate family member.

(III) The director of the division shall adopt rules as necessary to implement and administer this paragraph (v).

(IV) Any benefits awarded to the claimant under this paragraph (v) normally chargeable to the employer shall be charged to the fund, and any such benefits shall not affect an employer's premium.

(V) As used in this paragraph (v):

(A) "Disability" means all types of verified disability, including, without limitation, mental and physical disabilities; permanent and temporary disabilities; and partial and total disabilities.

(B) "Illness" means verified poor health or sickness.

(C) "Immediate family member" means the worker's spouse, parent, or minor child under eighteen years of age.

(5) **Disqualification.** (a) An individual who refuses to accept suitable work or refuses a referral to suitable work shall be disqualified from receiving benefits for a period of twenty weeks beginning with the week in which the refusal occurred, and his total benefits shall be reduced by an amount equal to the number of weeks of disqualification multiplied by his weekly benefit amount. The determination of whether or not an individual has refused to accept suitable work or refused to accept a referral to suitable work shall be the responsibility of the division.

(b) The refusal of suitable work or refusal of referral to suitable work at any time after the last separation from employment that occurred prior to the time of filing the initial claim shall be considered in determining the direct and proximate cause of the separation. In determining whether or not any work is suitable for an individual, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing work in his customary occupation, and the distance of the available local work from his residence shall be considered. Notwithstanding any other provisions of articles 70 to 82 of this title, no work shall be deemed suitable and benefits shall not be denied under articles 70 to 82 of this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(I) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(II) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(III) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(c) An award shall not be denied to an individual more than once for failure to apply for or to accept the same or a similar position with the same employer.

(d) Repealed.

(e) Subject to the maximum reduction consistent with federal law, and insofar as consistent with interstate agreements, if a separation from employment occurs for any of the following reasons, the employer from whom such separation occurred shall not be charged for benefits which are attributable to such employment and, because any payment of benefits which are attributable to such employment out of the fund as defined in section 8-70-103 (13) shall be deemed to have an adverse effect on such employer's account in such fund, no payment of such benefits shall be made from such fund:

(I) Quitting employment because of dissatisfaction with prevailing rates of pay in that industry, standard hours of work, standard working conditions, or working conditions which generally prevail for other workers performing the same or similar work, regularly assigned duties, or opportunities for advancement;

(II) Quitting employment because of dissatisfaction with a supervisor with no evidence to indicate that the supervision is other than that reasonably to be expected in the proper performance of work;

(III) Quitting to marry, irrespective of whether or not such marriage occurs subsequent to the separation from employment;

(IV) Quitting to move to another area as a matter of personal preference, unless such move was pursuant to other provisions of subsection (4) of this section;



(V) Quitting to seek other work; or quitting to accept other employment if such employment does not meet the requirements of paragraph (f) of subsection (4) of this section;

(VI) Insubordination such as: Deliberate disobedience of a reasonable instruction of an employer or an employer's duly authorized representative, refusal or failure to obtain, maintain, or renew licenses, certifications, credentials, conditions, or other professional designations which are necessary to permit the claimant to perform a job, failure to keep in good standing with the union because of nonpayment of dues, or repeated acts of agitation against employer working conditions, pay scale, policies, or procedures; except that orderly action on the part of an employee or through union negotiation shall not be so considered if such action does not interfere with work performance;

(VII) Violation of a statute or of a company rule which resulted or could have resulted in serious damage to the employer's property or interests or could have endangered the life of the worker or other persons, such as: Mistreatment of patients in a hospital or nursing home; serving liquor to minors; selling prescription items without prescriptions from licensed doctors; immoral conduct which has an effect on worker's job status; divulging of confidential information which resulted or could have resulted in damage to the employer's interests; failure to observe conspicuously posted safety rules; intentional falsification of expense accounts, inventories, or other records or reports whether or not substantial harm or injury was incurred; or removal or attempted removal of employer's property from the premises of the employer without proper authority;

(VIII) Off-the-job use of not medically prescribed intoxicating beverages or controlled substances, as defined in section 18-18-102 (5), C.R.S., to a degree resulting in interference with job performance;

(IX) On-the-job use of or distribution of not medically prescribed intoxicating beverages or controlled substances, as defined in section 18-18-102 (5), C.R.S.;

(IX.5) The presence in an individual's system, during working hours, of not medically prescribed controlled substances, as defined in section 18-18-102 (5), C.R.S., or of a blood alcohol level at or above 0.04 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a drug or alcohol test administered pursuant to a statutory or regulatory requirement or a previously established, written drug or alcohol policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests;

(X) Incarceration after conviction of a violation of any law, or loss of license, certification, credential, condition, or other professional designation that is essential to job performance;

(XI) Theft;

(XII) Assaulting or threatening to assault under circumstances such as to cause a reasonably emotionally stable person to become concerned as to his physical safety;

(XIII) Willful neglect or damage to an employer's property or interests;

(XIV) Rudeness, insolence, or offensive behavior of the worker not reasonably to be countenanced by a customer, supervisor, or fellow worker;

(XV) Careless or shoddy work. In determining whether or not work has been performed in a careless or shoddy manner, the division shall consider the length of time the worker has been performing the work satisfactorily and industry standards for such work. No work shall be considered careless or shoddy that comes within the area of reasonable mistakes and errors normally made by workers engaging in the same or similar work.

(XVI) Failure to properly safeguard, maintain, or account for the employer's property when this obligation is an essential part of the job;

(XVII) Taking unauthorized vacations or failing to return to work as scheduled after an authorized vacation or other leave of absence unless such failure to return to work was caused by circumstances which would result in a full award under the provisions of this section;

(XVIII) Refusal without good cause to work a different shift when no violation of seniority rights, as provided in paragraph (d) of subsection (4) of this section, is involved;

(XIX) Refusal without good cause to accept transfer to another department which does not involve a substantial change in working conditions or a substantial loss in wages;

(XX) For other reasons including, but not limited to, excessive tardiness or absenteeism, sleeping or loafing on the job, or failure to meet established job performance or other defined standards, unless such failure is attributable to factors listed in paragraph (b) of subsection (4) of this section;

(XXI) Lack of transportation. Transportation shall be the responsibility of the worker; if, however, in the opinion of the division, it would have been unreasonable to require the worker to continue in employment with his same employer at a new jobsite substantially less accessible or substantially more distant from the worker's residence than the site at which he had worked, benefits shall not be denied because of his refusal to continue in employment at the new site.

(XXII) Quitting under conditions involving personal reasons, unless the personal reasons were compelling pursuant to other provisions of subsection (4) of this section;

(XXIII) Voluntary retirement;

(XXIV) Failure to participate in or failure to complete an approved program of corrective action to deal with an addiction pursuant to subparagraph (IV) of paragraph (b) of subsection (4) of this section. The determination of whether or not an individual has failed to participate in or complete an approved program of corrective action to deal with an addiction shall be the responsibility of the division. In making such a decision, the division may consider extenuating circumstances for the individual's failure to participate in or complete the approved program of corrective action which would justify a decision not to disqualify the individual from receiving benefits, but only if the individual presents a program of corrective action in accordance with sub-subparagraph (C) of subparagraph (IV) of paragraph (b) of subsection (4) of this section. The only extenuating circumstances which may be considered by the division shall be whether the individual suffered an illness not related to the addiction or received incapacitating injuries in an accident or whether the death of an immediate family member of the individual occurred which contributed to the failure of the individual to participate in or complete the program of corrective action. The burden of proof that an extenuating circumstance existed lies with the claimant.

(f) Repealed.

(g) If a separation from employment subject to adjudication under this subsection (5) occurs for any of the reasons enumerated in paragraph (e) of this subsection (5) and such separation is the most recent separation from employment, any benefits to which the claimant is entitled shall be deferred for ten weeks. In the event that the last separation does not include wages in the base period and the job separation results in a disqualification, the receipt of any benefits from qualifying employment in the base period shall be deferred for a period of ten weeks from the effective date of the claim. A subsequent initial claim in which such wages are within the base period shall result in the maximum reduction of benefits attributable to such employment consistent with federal law and interstate agreements. Such deferral shall begin with the effective date of the valid initial or additional claim. As used in this paragraph (g), "most recent separation from employment" means the claimant's last employment prior to filing a valid initial or additional claim.

(h) Repealed.

(6) to (9) Repealed.

**Source:** L. 36, 3rd Ex. Sess.: p. 19, § 5. CSA: C. 167A, § 5. L. 41: p. 766, § 5. L. 49: p. 722, § 3. L. 53: p. 624, § 5. CRS. 53: § 82-4-9. L. 57: p. 517, § 5. L. 59: pp. 562, 564, §§ 3, 6. L. 63: p. 668, § 4. C.R.S. 1963: § 82-4-8. L. 65: p. 833, § 5. L. 69: p. § 5. L. 71: pp. 933-935, 946, 947, §§ 8-11, 19, 2. L. 76: (2)(b)(I) amended, p. 299, § 20, May 20; entire section R&RE, p. 339, § 12, effective October 1; (6)(a) amended, p. 358, § 2, effective October 1. L. 77: (4)(f)(I) amended, p. 292, § 3, effective May 26; (4)(b)(I) amended and (7)(b) repealed, pp. 480, 481, §§ 1, 2, effective July 1; (2)(b)(I), (2)(b)(II), (2)(b)(III), (2)(b)(IV), (2)(c)(I), and (4)(f)(I) amended, (4)(f)(V) and (4)(f)(VI) added, and (7) repealed, pp. 464, 465, 471, §§ 15, 16, 27, effective July 7; (1), (2)(b)(I), (2)(b)(II), (2)(b)(III), (2)(b)(IV), (2)(c)(I), (3), IP(4), and IP(5) amended and (2)(b)(V), (2)(d)(III), (2)(f), (6), and (7) repealed, pp. 483, 485, §§ 2, 5, effective October 1; (2)(f) repealed, p. 471, § 27, effective January 1, 1978. L. 79: (2)(b) amended, p. 1665, § 135, effective July 19; (1), (2), and (3) R&RE, (4)(f)(VI), IP(5), and (5)(d) amended, and (4)(o)



and (8) added, pp. 348, 350, 351, §§ 10, 11, 12, effective September 30. **L. 81:** (3)(e)(II)(B) amended, p. 510, § 4, effective July 1; (5) R&RE and (9) added, p. 515, 516, §§ 1, 2, effective July 1. **L. 83:** (3)(e)(II)(B) amended, (3)(e)(II)(C) added, and (3)(e)(III) repealed, pp. 429, 433, §§ 3, 14, effective June 3; (4)(f)(VII) added, p. 2043, § 6, effective October 1. **L. 84:** (1)(a), (3)(b), and IP(4) amended, (5) R&RE, and (2), (8), and (9) repealed, pp. 325, 326, 330, §§ 1, 2, 6, effective July 1; (9)(a)(XXI) added, p. 323, § 2, effective July 1. **L. 85:** (3)(d) amended, p. 361, § 6, effective April 4; (3)(a), (3)(b), IP(3)(e)(II), (3)(e)(II)(C), (4)(n), and (5)(g) amended and (5)(f) and (5)(h) repealed, pp. 367, 369, §§ 4, 7, effective July 1. **L. 86:** (4)(h) amended, p. 543, § 6, effective July 1. **L. 88:** (4)(f)(IV) amended, p. 1429, § 4, effective June 11; (4)(b)(IV) and (4)(b)(V) added, p. 393, § 1, effective July 1; IP(4)(f) amended, p. 394, § 2, effective July 1; (5)(e)(XXIV) added, p. 394, § 3, effective July 1. **L. 89:** (3)(a) and (4)(b)(I) amended, p. 425, § 4, effective July 1; (4)(f) R&RE, p. 427, § 1, effective July 1; (5)(d) repealed, p. 426, § 5, effective July 1; (5)(e)(IV) and (5)(e)(V) amended, p. 428, § 2, effective July 1. **L. 90:** IP(3)(e)(II) amended, p. 603, § 7, effective April 3; (3)(a) R&RE, p. 608, § 5, effective April 16. **L. 91:** (4)(f) amended, p. 1287, § 1, effective May 16; (4)(p) added, p. 1289, § 2, effective May 16. **L. 92:** (4)(b)(I) amended, p. 1794, § 3, effective April 10; (4)(q) added, p. 1822, § 1, effective April 10. **L. 94:** (5)(e)(IX.5) added, p. 1998, § 1, effective July 1. **L. 95:** (4)(b)(I), (4)(b)(II), (4)(b)(IV), (4)(e), (4)(k), (5)(e)(VI), (5)(e)(VII), (5)(e)(IX), and (5)(e)(X) amended, p. 273, § 1, effective July 1. **L. 96:** IP(3)(e)(II) and (3)(e)(II)(B) amended and (3)(f) added, p. 382, § 6, effective April 17. **L. 97:** (4)(b)(IV.5) added, p. 479, § 1, effective April 24. **L. 98:** (4)(q) repealed, p. 91, § 4, effective March 23; IP(4) and (4)(b)(IV) amended, p. 375, § 1, effective April 21. **L. 99:** (4)(j) and (5)(e)(XXII) amended and (4)(r) added, p. 397, § 3, effective August 15. **L. 2003:** (4)(r)(I)(A) amended, p. 1009, § 10, effective July 1. **L. 2005:** (4)(s) added, p. 972, § 1, effective June 2; (4)(r)(I) amended, p. 320, § 2, effective August 8. **L. 2006:** (4)(b)(IV)(D), IP(4)(r)(I), and (4)(s)(I) amended, p. 653, § 1, effective April 24; (3)(f)(II) amended, p. 1489, § 7, effective June 1. **L. 2008:** (4)(s) amended, p. 1721, § 1, effective June 2. **L. 2009:** (4)(t) added, (HB 09-1054), ch. 65, p. 230, § 1, effective March 25; (4)(r)(I), (5)(e)(IV), and (5)(e)(XXII) amended and (4)(r)(IV), (4)(r)(V), (4)(u), and (4)(v) added, (SB 09-247), ch. 405, pp. 2229, 2231, 2230, §§ 3, 5, 4, effective July 1. **L. 2010:** (4)(b)(IV)(C) amended, (SB 10-175), ch. 188, p. 777, § 5, effective April 29. **L. 2012:** IP(4)(b)(IV), (5)(e)(VIII), (5)(e)(IX), and (5)(e)(IX.5) amended, (HB 12-1311), ch. 281, p. 1609, § 8, effective July 1.

## ANNOTATION

- I. General Consideration.
- II. Disqualification for Benefits.
- III. Full Award.
  - A. In General.
  - B. Unsatisfactory or Hazardous Working Conditions.
  - C. Substantial Change in Working Conditions.
  - D. Accepting a Better Job.
  - E. Employer's Violation of Employment Contract.
  - F. Unable or Unqualified to Perform Work.
  - G. Health of Worker.
  - H. Refusing with Good Cause to Work Overtime.
  - I. False Reports.
- IV. Reduced Awards.
  - V. No Award.
- VI. Evidence.

## I. GENERAL CONSIDERATION.

**Law reviews.** For article, "Unemployment Insurance in Colorado - Eligibility and Disqualification", see 25 Rocky Mt. L. Rev. 180 (1953). For article, "The Conflict Between Collective Bargaining and Unemployment Insurance", see 28 Rocky Mt. L. Rev. 185 (1956). For article, "One Year Review of Constitutional Law", see 40 Den. L. Ctr. J. 134 (1963). For note, "The Unemployment Compensation Recipient - Should He Accept a Job?", see 44 Den. L.J. 147 (1967). For article, "Sex Discrimination and State Protective Laws", see 44 Den. L.J. 147 (1967). For article, "Sex Discrimination and State Protective Laws", see 44 Den. L.J. 344 (1967). For article, "Defending an Unemployment Compensation Claim", see 13 Colo. Law. 69 (1984). For article, "Drug Testing in Colorado: Problems And Advice for Private Employers", see 19 Colo. Law. 413 (1990). For article,

"Alcoholism and Unemployment Insurance in Colorado", see 18 Colo. Law. 1963 (1989).

**Annotator's notes.** (1) In light of the repeal and reenactment of this section in 1976, annotations from cases pertaining to this section as it read prior to 1976 have been treated as decided under former law. Moreover, the annotations to this section have been modified and updated to reflect various amendments and repeals, especially the repeal in 1977 of former subsections (7) and (8), relating to optional and special awards; the transfer in 1977 of the provisions of former subsection (6), relating to making of no awards, to subsection (5), relating to reduced awards, and amendment in 1984 of that subsection (5) to make it pertain to disqualification from benefits; the repeal in 1984 of former subsection (8) (added in 1979), relating to denial of benefits; and the repeal of former subsection (9), relating to employer's release from charge for benefits being paid following certain types of employee separation.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under this section to the director of the division.

**Constitutionally impermissible application.** While the employment security act is neutral on its face, application of the act to defendant had the effect of forcing him to choose between fidelity to his religious beliefs and the forfeiture of benefits on the one hand and abandonment of said beliefs to accept suitable work on the other. Therefore, in its application, the act offended the constitutional requirement for governmental neutrality because it unduly burdened defendant's free exercise of religion. *Engraff v. Indus. Comm'n*, 678 P.2d 564 (Colo. App. 1983).

**Constitutionality of classifications within this section.** In view of the general policy and intent of this section as spelled out by the general assembly, there is no unconstitutional denial of equal protection of the law by reason of the classifications adopted by the general assembly; they are reasonable and based on proper justifiable distinctions. *Cottrell Clothing Co. v. Teets*, 139 Colo. 558, 342 P.2d 1016 (1959); *Miller v. Indus. Comm'n*, 173 Colo. 476, 480 P.2d 565 (1971).

**Underlying principle.** The Colorado program of unemployment insurance is based on the principle that only those persons who are willing and able to work are entitled to unemployment benefits. *Sylvara v. Indus. Comm'n*, 191 Colo. 92, 550 P.2d 868 (1976) (decided under former law).

**State interest preserved.** The state has a legitimate interest in providing unemployment benefits only to conscientious persons. But that

interest is preserved by the statutory requirement that in order to receive benefits a claimant must be available for work and actively seeking employment. *Kistler v. Indus. Comm'n*, 192 Colo. 172, 556 P.2d 895 (1976) (decided under former law).

**Unemployment compensation acts are to be liberally construed** to further their remedial and beneficent purposes. *Andersen v. Indus. Comm'n*, 167 Colo. 281, 447 P.2d 221 (1968); *Montano v. Indus. Comm'n*, 171 Colo. 92, 464 P.2d 518 (1970); *Tague v. Coors Porcelain Co.*, 30 Colo. App. 158, 490 P.2d 96 (1971); *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973); *Anyon v. Indus. Comm'n*, 42 Colo. App. 88, 589 P.2d 1390 (1979); *Colo. Div. of Emp. & Train. v. Hewlett*, 777 P.2d 704 (Colo., 1989).

**But it is not the function of "liberal" construction to twist the facts** in order to reach a result favorable to an employee. *Montano v. Indus. Comm'n*, 171 Colo. 92, 464 P.2d 518 (1970); *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973); *Pierce v. Indus. Comm'n*, 195 Colo. 10, 576 P.2d 1012 (1978).

**Entitlement should not be confused with eligibility.** Where claimant did not fulfill eligibility requirements of § 8-73-107, claimant was disqualified from receiving benefits. *McClafflin v. Indus. Claim Appeals Office*, 126 P.3d 288 (Colo. App. 2005).

**The intent of the general assembly is to provide unemployment benefits for those who are "unemployed through no fault of their own".** *Donnell v. Indus. Comm'n*, 149 Colo. 228, 368 P.2d 777 (1962); *Andersen v. Indus. Comm'n*, 167 Colo. 281, 447 P.2d 221 (1968); *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 40 Colo. App. 381, 579 P.2d 651 (1978), rev'd on other grounds, 197 Colo. 335, 592 P.2d 808 (1979); *Int'l. Typographical Union v. Indus. Comm'n*, 44 Colo. App. 29, 609 P.2d 634 (Colo. App. 1980); *Parker v. Daniels Motors, Inc.*, 738 P.2d 68 (Colo. App. 1987); *Nielson v. AMI Indus., Inc.*, 759 P.2d 834 (Colo. App. 1988); *Colo. Div. of Emp. & Train. v. Hewlett*, 777 P.2d 704 (Colo. 1989).

It is the expressed intent of the general assembly that unemployment insurance is for the benefit of persons who become unemployed through no fault of their own. *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973) (decided under former law).

The intent of the general assembly is that each eligible individual is entitled to a full award of benefits if he is unemployed through no fault of his own. *Zelingers v. Indus. Comm'n*, 679 P.2d 608 (Colo. App. 1984).

However, there is a specific exception to this with regard to pregnancy if the other requirements of subsection (4)(b)(I) of this section are met. *Frontier Airlines, Inc. v. Indus. Comm'n*, 734 P.2d 142 (Colo. App. 1986), cert. dismissed, 738 P.2d 1185 (Colo. 1987).



**Claimant is entitled to a determination whether he was "at fault" for his separation notwithstanding the applicability of the disqualifying provisions of § 8-73-105.5.** To determine otherwise would abrogate the overriding legislative policy that unemployment benefits are to be awarded only to those claimants who are unemployed through no fault of their own. No legislative intent to treat unemployment compensation claimants who work for temporary help agencies differently from other unemployment compensation claimants with regard to the issue of fault. Accordingly, matter must be remanded to panel for it to consider "fault" issue and, based on its resolution of that issue, to enter a new order on whether claimant is entitled to benefits. *Velo v. Employment Solutions Pers.*, 988 P.2d 1139 (Colo. App. 1998).

**The unemployment law is intended to provide a speedy determination of eligibility through a simplified administrative procedure.** Colo. Div. of Emp. & Train. v. Hewlett, 777 P.2d 704 (Colo. 1989).

**Unless reason for discharge comes within one of grounds provided in this section.** One who is discharged from his employment is entitled to unemployment compensation unless the reason for his discharge comes within one of the grounds provided for the act. *Sayers v. Am. Janitorial Serv., Inc.*, 162 Colo. 292, 425 P.2d 693 (1967); *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d 1160 (Colo. 1987); Colo. Div. of Emp. & Train. v. Hewlett, 777 P.2d 704 (Colo. 1989).

**Matters within discretion of general assembly.** The establishment of reasonable classifications of workers, the grounds upon which compensation may be awarded, the standards of eligibility and disqualification, and the formula by which distributions are to be made are all matters within the sound discretion of the general assembly. *Miller v. Indus. Comm'n*, 173 Colo. 476, 480 P.2d 565 (1971).

**Using standards adopted by the general assembly, the office is delegated the responsibility of determining whether, under all circumstances from a case, benefits are to be awarded for a particular separation from employment.** Sch. Dist. No. 1 v. Fredrickson, 812 P.2d 723 (Colo. App. 1991).

If decision of office as to which section of Employment Security Act applies is supported by substantial evidence and inferences drawn therefrom, decision will not be disturbed on appeal. Sch. Dist. No. 1 v. Fredrickson, 812 P.2d 723 (Colo. App. 1991).

**Commission has wide latitude to determine which provisions apply.** Some unemployment benefit cases fall within two or more provisions of this statute, and in such instances, the commission has wide latitude in determining which section will be applied. *Mattison v. Indus. Comm'n*, 33 Colo. App. 203, 516 P.2d 1143

(1973) (decided under former law); *Mountain States Tel. & Tel. Co. v. Indus. Comm'n*, 697 P.2d 418 (Colo. App. 1985); *Southwest Forest Indus. v. Indus. Comm'n*, 719 P.2d 1098 (Colo. App. 1986).

**And must exercise discretion in executing legislative intent.** In order for the commission to carry out the legislative intent as expressed in subsections (1) and (5) it must at times exercise discretion in determining whether to grant a claimant a reduced award. The intent of the general assembly to confer such discretion on the commission is reflected by the 1979 amendment adding subsection (5)(s) to this section. *Sims v. Indus. Comm'n*, 627 P.2d 1107 (Colo. 1981); *Dunn v. Indus. Comm'n*, 640 P.2d 1146 (Colo. 1982).

**Commission is not at liberty to apply the converse of a section of this statute in making a determination of benefits.** *Mattison v. Indus. Comm'n*, 33 Colo. App. 203, 516 P.2d 1143 (1973) (decided under former law).

**It is the reason for separation that determines which subsection applies.** *Kortz v. Indus. Comm'n*, 38 Colo. App. 411, 557 P.2d 842 (1976) (decided under former law).

The reason for separation from employment determines the amount of benefits to which a claimant is entitled. *Stavros v. Indus. Comm'n*, 631 P.2d 1192 (Colo. App. 1981).

**If claimant meets initial burden of establishing eligibility** by filing a claim reflecting a discharge from covered employment, then employer has burden to rebut claimant's prima facie case by proving disqualification. *Yellow Front Stores v. Indus. Comm'n*, 694 P.2d 882 (Colo. App. 1985).

The claimant has the initial burden of proof to establish a prima facie case of eligibility for benefits. If the initial burden is met, the burden shifts to the employer to establish the statutory disqualification of benefits. Colo. Div. of Emp. & Train. v. Hewlett, 777 P.2d 704 (Colo. 1989); *Ward v. Indus. Claim Appeals Office*, 916 P.2d 605 (Colo. App. 1995).

Procedures for a claimant to establish a prima facie case of eligibility at a hearing vary depending on whether the claimant was awarded or disqualified from receipt of benefits by the deputy. If the deputy found that the claimant's claim documentation established a prima facie case, the claimant may simply rely upon the documentation at the hearing. If not, the claimant must make out a prima facie case at the hearing. *Ward v. Indus. Claim Appeals Office*, 916 P.2d 605 (Colo. App. 1995).

**Hearing officer has discretion** to determine the order and manner of presentation of witnesses and evidence. *Ward v. Indus. Claim Appeals Office*, 916 P.2d 605 (Colo. App. 1995).

**Responsibility for separation from employment is determination of fact.** *Sims v. Indus. Comm'n*, 627 P.2d 1107 (Colo. 1981).

The reason for separation from employment is a question of fact, and the commission's determination in this regard may not be altered on review, if it is supported by the evidence. *Mohawk Data Sciences Corp. v. Indus. Comm'n*, 660 P.2d 922 (Colo. App. 1983); *Jones v. Indus. Comm'n*, 705 P.2d 530 (Colo. App. 1985); *Frontier Airlines, Inc. v. Indus. Comm'n*, 719 P.2d 739 (Colo. App. 1986).

The word "fault" is not limited to something worthy of censure but must be construed as meaning failure or volition. *Denver Post Corp. v. Indus. Comm'n*, 677 P.2d 436 (Colo. App. 1984).

**The qualifying and disqualifying sections are not couched in terms of fault.** Even if one of the disqualifying sections applies, a claimant may still be entitled to benefits if the totality of the circumstances show the claimant was not at fault in his separation. *Collins v. Indus. Claim Appeals Office*, 813 P.2d 804 (Colo. App. 1991).

**"Fault" under the statute is not necessarily related to culpability,** but must be construed as requiring a volitional act. *Zelingers v. Indus. Comm'n*, 679 P.2d 608 (Colo. App. 1984); *Pepsi-Cola Bottling v. Colo. Div. of Emp.*, 754 P.2d 1382 (Colo. App. 1988).

And in the absence of a volitional act, there can be no "fault" on claimant's part within the meaning of the unemployment statute. *Frontier Airlines, Inc. v. Indus. Comm'n*, 719 P.2d 739 (Colo. App. 1986).

"Fault" means that the claimant, at a minimum, must have performed some volitional act resulting in the discharge from employment. *Nielson v. AMI Indus., Inc.*, 759 P.2d 834 (Colo. App. 1988).

**A claimant may still be entitled to benefits if the totality of the circumstances establishes that the claimant's separation occurred through "no fault" of his own,** even if the findings of the hearing officer support the application of one of the disqualifying sections of the statute. *Velo v. Employment Solutions Pers.*, 953 P.2d 1295 (Colo. App. 1998).

**Claimant is entitled to a determination whether he was "at fault"** for his separation even though he was disqualified pursuant to the provisions of § 8-73-105.5 and not directly under one of the statutory disqualifying subsections of this section. *Velo v. Employment Solutions Pers.*, 953 P.2d 1295 (Colo. App. 1998).

**A finding of "willful intent" is not necessary** before a claimant may be determined to be "at fault" for his own job termination. "Fault" is not necessarily related to culpability, but only requires a volitional act. *Richards v. Winter Park Recreational Ass'n*, 919 P.2d 933 (Colo. App. 1996).

**The determination of fault in a job separation is a question of fact to be determined by the commission,** and it will not be set aside if it is supported by substantial evidence. *Wilson v.*

*Indus. Comm'n*, 730 P.2d 911 (Colo. App. 1986).

**Function of hearsay.** Though hearsay evidence may be received in an unemployment benefits proceeding, it alone cannot be the basis of the commission's order. *Allen v. Indus. Comm'n*, 36 Colo. App. 330, 540 P.2d 358 (1975) (decided under former law).

Hearsay evidence, though admissible in administrative hearings, cannot alone support an order of the industrial commission. *Romero v. Indus. Comm'n*, 616 P.2d 992 (Colo. App. 1980).

**Hearsay may have probative value and should be considered as corroborative evidence.** *Yellow Front Stores v. Indus. Comm'n*, 694 P.2d 882 (Colo. App. 1985).

Hearsay evidence alone may be basis of determination in an unemployment compensation proceeding but only if such evidence is reliable and trustworthy and possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. *Flower Stop Mktg. Corp. v. Kilgore*, 762 P.2d 747 (Colo. App. 1988), *aff'd in part and rev'd in part* on other grounds, 782 P.2d 13 (Colo. 1989) (applying *Kirke v. State Dept. of Rev.*, 724 P.2d 77 (Colo. 1986) and overruling the "residuum rule" holding in *Sims v. Indus. Comm'n*, 627 P.2d 1107 (Colo. 1981) and subsequent cases which applied such rule).

**Factors useful in determining whether hearsay evidence is reliable, trustworthy, and of some probative value** are set forth in *Indus. Claim Appeals Office v. Flower Stop Mktg. Corp.*, 782 P.2d 13 (Colo. 1989).

**Evidence of specific illness inadmissible in unemployment compensation hearing where claimant did not provide employer with prior notice** that a specific illness was the reason for claimant's failure to report to work. *Sands v. Indus. Claim Appeals Office*, 801 P.2d 12 (Colo. App. 1990).

**Factual defense to application of subsection (5)(e)(XVII) may not be raised if not stated in claimant's notice of appeal.** *Sands v. Indus. Claim Appeals Office*, 801 P.2d 12 (Colo. App. 1990).

**There must be disclosure prior to the hearing** of one party's intent to dispute the other party's specific factual allegations. *Monarrez v. Indus. Claim Appeals Office*, 835 P.2d 607 (Colo. App. 1992).

**Resolution of conflicting evidence** is a matter properly left to the commission in its fact-finding role. *Mohawk Data Sciences Corp. v. Indus. Comm'n*, 660 P.2d 922 (Colo. App. 1983).

**The commission is not held to a crystalline standard when it articulates its findings of fact.** *Allmendinger v. Indus. Comm'n*, 40 Colo. App. 210, 571 P.2d 741 (1977) (decided under



former law); Muhlenkamp v. Indus. Claim Appeals Office, 802 P.2d 1127 (Colo. App. 1990).

**And lack of clarity in the factual findings of an order does not require a remand.** Jones v. Indus. Comm'n, 705 P.2d 530 (Colo. App. 1985).

**Where the decision is justified, it may not be set aside "on the technicality of unclarity of expression on the part of the commission".** Allmendinger v. Indus. Comm'n, 40 Colo. App. 210, 571 P.2d 741 (1977) (decided under former law); Muhlenkamp v. Indus. Claim Appeals Office, 802 P.2d 1127 (Colo. App. 1990).

**Conclusion permitted by substantial evidence not disturbed on review.** Where substantial evidence permits the conclusion drawn by the commission, it will not be disturbed on review. Allmendinger v. Indus. Comm'n, 40 Colo. App. 210, 571 P.2d 741 (1977) (decided under former law); Sims v. Indus. Comm'n, 627 P.2d 1107 (Colo. 1981).

**Where evidence is conflicting or susceptible to conflicting inferences,** decisions based on a choice between plausible inferences from such evidence are to be affirmed. McGinn v. Indus. Comm'n, 31 Colo. App. 6, 496 P.2d 1080 (1972); Jones v. Indus. Comm'n, 705 P.2d 530 (Colo. App. 1985).

**Employer's remedies for defalcation by claimant.** Where it is admitted that claimant voluntarily left employment with petitioner for a better job and so that award of benefits based on the better job section was appropriate, the employer must rely on other available remedies to obtain redress from any defalcation by claimant. Kortz v. Indus. Comm'n, 38 Colo. App. 411, 557 P.2d 842 (1976) (decided under former law).

**Claimant's failure to pursue employer's grievance procedures should not be dispositive of her eligibility for benefits.** The pursuit of such a course of action is not required by statute as a prerequisite to an award of benefits. Larsen-Oldaker v. Indus. Comm'n, 735 P.2d 209 (Colo. App. 1987).

**Determination of monetary eligibility is not a final disposition of entitlement.** Although a finding that a claimant is not monetarily eligible to receive benefits is a final disposition, a finding of monetary eligibility does not mean that a claimant is eligible to receive benefits. Arteaga v. Indus. Claim Appeals Office, 781 P.2d 98 (Colo. App. 1989).

**Once claimant's eligibility is decided, a determination that claimant was not entitled to benefits is not barred by the doctrine of res judicata.** Res judicata is only applicable when a determination of a course of action in one legal proceeding is being used to foreclose a different determination of the same cause of action in a second subsequent different legal proceeding. Arteaga v. Indus. Claim Appeals Office, 781 P.2d 98 (Colo. App. 1989).

**Error not to be inferred from failure to enter written findings on every factor raised** in deciding whether claimant had shown good cause for raising new issue at hearing, where findings indicated that the relevant issues had been considered. Sands v. Indus. Claim Appeals Office, 801 P.2d 12 (Colo. App. 1990).

**Equal protection challenge to subsection (4)(f) which singles out construction workers for special consideration must fail.** As a statutory classification, the provision is valid unless there is no rational basis for the distinction or it is not rationally related to a legitimate state interest. Because the legislature declared that the statute was enacted because construction workers are subjected to working conditions not generally encountered by other employees, the legislature has determined that there is a rational basis for treating construction workers differently for unemployment compensation purposes. The statutory exception is therefore rationally related to the legitimate state interest of addressing the problems associated with the construction industry and does not violate equal protection. Getts v. Indus. Claim Appeals Office, 804 P.2d 282 (Colo. App. 1990).

**Police report which averred that claimant had made nuisance telephone calls to the home of one of the employer's supervisors was valid basis for discharge and disqualification for benefits.** Lucero v. Indus. Claim Appeals Office, 812 P.2d 1191 (Colo. App. 1991).

**Subsection (4)(f) on its face does not operate to deny equal protection to nonconstruction workers.** The difference in treatment of construction and nonconstruction workers is rationally related to differences arising from the nature of the construction industry. Baldwin v. Indus. Claim Appeals Office, 813 P.2d 807 (Colo. App. 1991) (distinguishing Higgs v. Western Landscaping & Sprinkler Sys., Inc., 804 P.2d 161 (Colo. 1991)).

**For decisions under former subsection (5), relating to 50% awards,** see Mattison v. Indus. Comm'n, 33 Colo. App. 203, 516 P.2d 1143 (1973); Olivas v. Indus. Comm'n, 33 Colo. App. 273, 518 P.2d 304 (1974).

**For decisions under former subsection (6), relating to no award of benefits,** see Olivas v. Indus. Comm'n, 33 Colo. App. 273, 518 P.2d 304 (1974); Allen v. Indus. Comm'n, 36 Colo. App. 330, 540 P.2d 358 (1975); Pierce v. Indus. Comm'n, 38 Colo. App. 85, 553 P.2d 402 (1976); Everitt Lumber Co. v. Indus. Comm'n, 39 Colo. App. 336, 565 P.2d 967 (1977); Ross v. Indus. Comm'n, 39 Colo. App. 204, 566 P.2d 367 (1977); Michals v. Indus. Comm'n, 40 Colo. App. 5, 568 P.2d 108 (1977); Pierce v. Indus. Comm'n, 195 Colo. 10, 576 P.2d 1012 (1978).

**For decision under former subsection (7), relating to optional awards,** see Mattison v.

Indus. Comm'n, 33 Colo. App. 203, 516 P.2d 1143 (1973).

**For decisions under former subsection (8), relating to special awards,** see *Briggs v. Indus. Comm'n*, 36 Colo. App. 292, 539 P.2d 1303 (1975); *Sylvara v. Indus. Comm'n*, 191 Colo. 92, 550 P.2d 868 (1976); *Kistler v. Indus. Comm'n*, 192 Colo. 172, 556 P.2d 895 (1976); *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 38 Colo. App. 298, 559 P.2d 252 (1976).

**Applied in** *Olsgard v. Indus. Comm'n*, 190 Colo. 472, 548 P.2d 910 (1976) (decided under former law); *Yanish v. Indus. Comm'n*, 38 Colo. App. 492, 558 P.2d 1007 (1976) (decided under former law); *Nesbit v. Indus. Comm'n*, 43 Colo. App. 398, 607 P.2d 1024 (1979); *Armijo v. Indus. Comm'n*, 44 Colo. App. 171, 610 P.2d 107 (1980); *Martinez v. Indus. Comm'n*, 618 P.2d 738 (Colo. App. 1980); *Stern v. Indus. Comm'n*, 653 P.2d 742 (Colo. 1982); *Asche v. Indus. Comm'n*, 654 P.2d 813 (Colo. 1982); *Trujillo v. Indus. Comm'n*, 648 P.2d 1094 (Colo. App. 1982); *Johnson v. Indus. Comm'n*, 652 P.2d 1109 (Colo. App. 1982); *Seethaler v. Indus. Comm'n*, 660 P.2d 11 (Colo. App. 1982); *Stern v. Indus. Comm'n*, 667 P.2d 244 (Colo. App. 1983); *FlaHavhan v. Hewlett Packard Co.*, 675 P.2d 19 (Colo. App. 1983); *City of Arvada v. Indus. Comm'n*, 701 P.2d 623 (Colo. App. 1985); *Colo. Springs v. Indus. Comm'n*, 749 P.2d 412 (Colo. 1988); *Marquez v. Indus. Claim Appeals Office*, 868 P.2d 1175 (Colo. App. 1994); *Boenheim v. Indus. Claim Appeals Office*, 23 P.3d 1247 (Colo. App. 2001).

## II. DISQUALIFICATION FOR BENEFITS.

**Commission error.** Commission erred in entering order of disqualification for benefits after July 1, 1981, based on repealed subsection (5)(x). *Nazzaro v. Indus. Comm'n*, 671 P.2d 983 (Colo. App. 1983).

**An objective standard must be applied in analyzing a disqualification under subsection (5)(e)(VI) for insubordination.** Under that standard, the panel must use its independent judgment to determine whether, under the particular facts and circumstances of each case, the request that claimant refused was one that a reasonable person would have refused. *Bell v. Indus. Claim Appeals Office*, 93 P.3d 584 (Colo. App. 2004).

**Presence of medical marijuana in an individual's system during working hours is a ground for disqualification from unemployment benefits under this section.** Medical use of marijuana by an employee holding a registry card under § 14 of article XVIII of the state constitution does not constitute the use of "medically prescribed controlled substances" within the meaning of subsection (5)(e)(IX.5). *Beinor*

*v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011).

Although medical certification permitting the possession and use of marijuana may insulate claimant from state criminal prosecution, it does not preclude claimant from being denied unemployment benefits based on a separation from employment for testing positive for marijuana in violation of an employer's express zero-tolerance drug policy. *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011).

**Disqualification was established pursuant to subsection (5)(e)(XX) when an employer established that the claimant did not do the job for which he was hired and which he knew was expected of him.** *Pabst v. Indus. Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992); *Richards v. Winter Park Recreational Ass'n*, 919 P.2d 933 (Colo. App. 1996).

**Disqualification pursuant to subsection (5)(e)(XX) is warranted** for claimant who was aware of employer's drug testing requirement and who tested positive for use of cocaine. *Bd. of Water Comm'rs v. Indus. Claim Appeals Office*, 881 P.2d 476 (Colo. App. 1994).

**Unemployment insurance claimant was properly disqualified** from receiving benefits where he was discharged for unsatisfactory performance and where it was established that he did not do the job for which he was hired and which he knew was expected of him, despite the fact that he was not explicitly warned that his job was in jeopardy. *Pabst v. Indus. Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992).

**Disqualification was established pursuant to subsection (5)(e)(VI) where** claimant directly disobeyed an order of his employer, notwithstanding that the employer did not follow all progressive disciplinary procedures before discharging claimant, because claimant received adequate notice that his conduct had placed him at risk of losing his job and he nonetheless persisted. *Keil v. Indus. Claim Appeals Office*, 847 P.2d 235 (Colo. App. 1993).

**"Fellow workers" who fall within the ambit of the statute** are not limited to those who are employed by the same employer as the claimant. *Tilley v. Indus. Claim Appeals Office*, 924 P.2d 1173 (Colo. App. 1996).

**A finding that a claimant quit because of dissatisfaction with standard working conditions is proper** only when there has been no substantial change in claimant's work environment, duties, and conditions. *Wagon v. Indus. Claim Appeals Office*, 787 P.2d 668 (Colo. App. 1990).

**Employer may not rely on information it received subsequent to termination of employee to justify termination** and render the employee ineligible for unemployment compensation benefits. *Pepsi-Cola Bottling v. Colo. Div. of Emp.*, 754 P.2d 1382 (Colo. App. 1988).



**Payment of unemployment compensation subject to disqualification.** This section authorizes payment of unemployment compensation to employee who left employment voluntarily without good cause or extenuating circumstances, subject to disqualification of benefits for not less than 13 nor more than 25 weeks. *Morrison Rd. Bar, Inc. v. Indus. Comm'n*, 138 Colo. 16, 328 P.2d 1076 (1958); *Donnell v. Indus. Comm'n*, 149 Colo. 228, 368 P.2d 777 (1962).

**And disqualification does not violate state or federal constitution.** This section which purports to give to the commission the power to disqualify "for not less than ten weeks nor more than thirty-two and one-half weeks" is not repugnant to and does not violate art. V, § 1, Colo. Const., and the fourteenth amendment to the constitution of the United States in that the provisions of said statute constitute an unlawful delegation of legislative power and fail to set forth adequate standards. *Donnell v. Indus. Comm'n*, 149 Colo. 228, 368 P.2d 777 (1962).

**Disqualifying provisions are not mandatory** if the totality of the circumstances establishes that a claimant was unemployed through no fault of his own. *Zelingers v. Indus. Comm'n*, 679 P.2d 608 (Colo. App. 1984); *Frontier Airlines, Inc. v. Indus. Comm'n*, 719 P.2d 739 (Colo. App. 1986); *Cole v. Indus. Claim Appeals Office*, 964 P.2d 617 (Colo. App. 1998).

**When an employee's job performance gives rise to a "last chance" settlement agreement,** and the employee refuses to sign the agreement, the employee may be disqualified from receiving unemployment benefits. Such disqualification may be premised on the actions and omissions that gave rise to the employer's original dissatisfaction with the employee's performance not on the refusal to sign the agreement. *Bell v. Indus. Claim Appeals Office*, 93 P.3d 584 (Colo. App. 2004).

**Where claimant refused to provide written verification explaining her unexcused absence,** her unemployment benefits were properly denied pursuant to subsection (5)(e)(VI). *Stevenson v. Indus. Comm'n*, 705 P.2d 1020 (Colo. App. 1985).

**Limiting period of disqualification does not deprive employer of due process.** Limiting the disqualification of benefits of disqualified persons to a maximum of 16 weeks does not deprive an employer of his property without due process of law. *Cottrell Clothing Co. v. Teets*, 139 Colo. 558, 342 P.2d 1016 (1959).

The concept of fault means a volitional act, and is not necessarily related to culpability. Thus, in the absence of a volitional act by the employee, there can be no fault on the employee's part within the meaning of the unemployment statute. *Rulon v. Indus. Comm'n*, 728 P.2d 739 (Colo. App. 1986).

**Disqualification under subsection (5)(e)(XI) for theft** is allowed whether or not the theft occurs in the course of employment. *Jefferson County v. Kiser*, 876 P.2d 122 (Colo. App. 1994).

**Disqualification under subsection (5)(e)(IX.5) for marijuana use requires employer to show that testing laboratory was licensed or certified.** Absent some form of waiver or stipulation by claimant, this requirement may not be deemed inapplicable or satisfied without evidentiary proof. *Sosa v. Indus. Claim Appeals Office*, 259 P.3d 558 (Colo. App. 2011).

**Absence of specific finding regarding value of item allegedly taken by employee does not preclude disqualification for theft under subsection (5)(e)(XI),** however, to disqualify employee for theft, employer must establish by a preponderance of the evidence the mens rea required in theft or larceny cases. *Start v. Indus. Claim Appeals Office*, 224 P.3d 1056 (Colo. App. 2009).

**A claimant is not disqualified for benefits under subsection (5)(e)(XXII) (quitting for personal reasons)** if she is otherwise eligible for benefits under one of the other provisions of this section. *Colo. Div. of Emp. & Train. v. Hewlett*, 777 P.2d 704 (Colo. 1989).

**No error in determination by hearing officer that disqualifying provisions of subsection (5)(e)(XXII) of this section and § 8-73-105.5 (5) are applicable to claimant.** On the last day of his final assignment, employer temporary help contracting firm notified claimant that his assignment was ending. Subsequently, employer offered claimant additional assignments which claimant did not accept. There is no evidence that claimant informed his employer that he was available for further assignments. Moreover, claimant did not contact employer in accordance with the written contract he had received. Accordingly, court upheld that portion of hearing officer's order stating that claimant was responsible for his separation and should be disqualified from the receipt of his unemployment benefits pursuant to subsection (5)(e)(XXII) of this section and § 8-73-105.5 (5). *Velo v. Employment Solutions Pers.*, 988 P.2d 1139 (Colo. App. 1998).

**An employee may not be denied benefits under subsection (1)(a) absent some "fault" on the employee's behalf,** i.e., that it was a "volitional" act on the employee's part that caused the employment termination and the circumstances surrounding the termination must be one of those that is specifically described in the statute as being disqualifying. *Goddard v. E G & G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994).

**Referee's conclusion that claimant's termination was "under conditions involving per-**

sonal reasons," was unsupported by record showing that claimant's employment termination had been determined by the employer to be necessary and imminent, that claimant had been given choice between being involuntarily laid off or accepting a voluntary layoff, and that claimant was told his chances were good that he would receive unemployment compensation. *Goddard v. E G & G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994).

**As a matter of law, if an employee is given notification of a pending layoff,** but is offered severance pay in return for a waiver of reemployment rights, which the employee accepts, the resulting employment termination cannot be considered to be the "fault" of the employee. The employment separation in such case must be viewed as no more the voluntary act of the employee than if the employee had refused the offer and the employer had laid him or her off. *Goddard v. E G & G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994).

**Claimant who used employer's equipment for private benefit was properly denied full unemployment benefits** because his discharge was based on violation of company rule which could have resulted in serious damage to employer's interest, even if exact value of such damage could not be estimated. *Madrid v. Mountain States Tel. and Tel. Co.*, 728 P.2d 1299 (Colo. App. 1986).

**Disqualification from unemployment compensation was proper** when evidence showed that the claimant struck a coemployee, the claimant was the aggressor, the attack resulted in a sizeable bruise on the coemployee's arm, and the employer had a policy requiring summary dismissal of an employee for fighting or hitting another employee. *Baca v. Marriott Hotels, Inc.*, 732 P.2d 1252 (Colo. App. 1986).

**The term "assaulting,"** as used in this section to disqualify a person from receiving unemployment compensation for assaulting or threatening to assault, means an actual harmful or offensive contact similar to the common law tort of battery. *Baca v. Marriott Hotels, Inc.*, 732 P.2d 1252 (Colo. App. 1986).

**The phrase "threatening to assault,"** as used in this section to disqualify a person from receiving unemployment compensation for assaulting or threatening to assault, means the apprehension of harmful or offensive contact similar to the common law tort of assault. *Baca v. Marriott Hotels, Inc.*, 732 P.2d 1252 (Colo. App. 1986).

**Mental state of coemployee irrelevant** in determining whether to deny unemployment benefits to claimant when claimant was found to have assaulted coemployee. *Baca v. Marriott Hotels, Inc.*, 732 P.2d 1252 (Colo. App. 1986).

**Employee discharged pursuant to employer-generated disciplinary guidelines not automatically ineligible.** While employer's dis-

ciplinary policy may form an appropriate basis for discharge, it cannot serve as a rule of law automatically disqualifying the employee from statutory benefits. *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Sch. Dist. No. 1 v. Fredrickson*, 812 P.2d 723 (Colo. App. 1991).

**Employee discharged other than in accordance with employer-generated disciplinary guidelines not automatically eligible.** Volitional act of employee may result in disqualification under this section notwithstanding employer's failure to follow progressive disciplinary procedures before discharging employee. Principles concerning wrongful discharge set forth in *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987), and related cases are not engrafted onto unemployment compensation statutes. *Keil v. Indus. Claim Appeals Office*, 847 P.2d 235 (Colo. App. 1993).

**Claimant who quit job to accept better position and was subsequently terminated from better job for a disqualifying reason** was disqualified from receiving all unemployment benefits. *Carleno v. Littleton Sch. Dist. No. 6*, 750 P.2d 926 (Colo. App. 1988).

**Claimant who requested transfer from Montana to Colorado was not disqualified under subsection (5)(e)(IV) from benefits relating to employment in Montana.** Claimant's interstate transfer within the same company does not constitute a separation from employment, and her tenure with employer is not separate periods of employment with different employers. *Dewhurst v. Indus. Claim Appeals Office*, 148 P.3d 378 (Colo. App. 2006).

**Statutory presumptions concerning blood alcohol content in traffic cases not applicable to unemployment cases.** Blood alcohol content is only one evidentiary factor to be weighed along with all the other evidence presented at the hearing. *Safeway Stores v. Indus. Claim Appeals Office*, 754 P.2d 773 (Colo. App. 1988).

**An objective standard is the proper standard for reviewing the reasonableness of an employer's request pursuant to subsection (5)(e)(VI) and,** in assessing the reasonableness of such a request, the Indus. claim appeals panel must consider the facts and circumstances of each case, using its independent judgment to determine whether the request the claimant refused was one which a reasonable person would have refused. *Rose Med. Ctr. Hosp. v. Indus. Claim Appeals Office*, 757 P.2d 1173 (Colo. App. 1988).

**An objective standard is the proper standard for determining whether a claimant has engaged in disqualifying behavior under subsection (5)(c).** *Davis v. Indus. Claim Appeals Office*, 903 P.2d 1243 (Colo. App. 1995).

**Case remanded where referee's finding of fault** was claimant unreasonably agreed to perform a job duty which he was not required to perform but did not include finding of whether



claimant was aware of unwritten policy that he would not be dismissed if he refused to perform job duty. *Nielson v. AMI Indus., Inc.*, 759 P.2d 834 (Colo. App. 1988).

**Evidence and findings support conclusion claimant should be disqualified because of incarceration after conviction of violation of law.** *Smith v. Indus. Claim Appeals Office*, 817 P.2d 635 (Colo. App. 1991).

**Where company policy provided for immediate termination for possession of drugs and possession was clearly shown, hearing officer erred in addressing the issue of ownership of such drugs** and in determining that subsection (5)(e)(VII) was inapplicable. *Phelps Tointon v. Div. of Emp. & Train.*, 824 P.2d 827 (Colo. App. 1991).

**City employee who was discharged from employment for violation of residency requirement not disqualified** from receipt of unemployment benefits pursuant to subsection (5)(e)(VII) where there was no finding that serious harm to city's interests would result by virtue of the violation. *Morris v. City & County of Denver*, 843 P.2d 76 (Colo. App. 1992).

**The determination as to whether a claimant is at fault for a separation from employment because of a violation of the residency requirement must be determined on a case-by-case basis**, with due consideration given to the totality of the circumstances in each particular situation. *Morris v. City & County of Denver*, 843 P.2d 76 (Colo. App. 1992).

**The determination as to whether a claimant was responsible or "at fault" for the separation from employment is not a question of evidentiary fact, but rather is an ultimate legal conclusion to be based on the established findings of evidentiary fact.** *Bd. of Water Comm'rs v. Indus. Claim Appeals Office*, 881 P.2d 476 (Colo. App. 1994); *Cole v. Indus. Claim Appeals Office*, 964 P.2d 617 (Colo. App. 1998).

**Claimant was at fault for his termination** and he should be disqualified from receiving benefits since claimant knew he was required to perform an anti-collision test as part of his job, had forgotten to perform the test, and represented to his supervisor that he had done so. Claimant's supervisor's failure to check claimant's work did not absolve claimant of his own responsibility. *Richards v. Winter Park Recreational Ass'n*, 919 P.2d 933 (Colo. App. 1996).

**Based on established findings of evidentiary fact, panel properly ruled that claimant was responsible or "at fault" for her separation by her volitional choice to quit under the circumstances shown, notwithstanding her health problems.** Factual findings and the record support the conclusion that claimant quit this employment for subjective, personal reasons that do not provide an objective basis for an

award of benefits. *Cole v. Indus. Claim Appeals Office*, 964 P.2d 617 (Colo. App. 1998).

**Applied in** *Short v. Steves Holiday Liquors, Inc.*, 727 P.2d 415 (Colo. App. 1986).

### III. FULL AWARD.

#### A. In General.

##### **Commission discretion to grant full award.**

The commission has discretion to grant a full award even though none of the paragraphs of subsection (4) is cited or applicable. Such discretion is necessary to effect the legislative mandate that each individual who is unemployed through no fault of his own shall receive a full award of benefits. *Sante Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983).

**In determining direct and proximate cause of claimant's separation** and whether that claimant is entitled either to a full or a reduced award of benefits (now disqualification), the division and the commission shall consider the "reasons" specifically enumerated in the statute and "any other factors which may be pertinent to such determination". *Albaitis v. Indus. Comm'n*, 44 Colo. App. 55, 609 P.2d 1118 (1980), *aff'd*, 627 P.2d 1107 (Colo. 1981).

**Conditions for full award.** Where claimant would not have left her job and job would not have been filled by another person had she not become pregnant and requested maternity leave, she was not laid off for lack of work, nor for any condition of health, injury or illness, nor for any of the other conditions specified therein for which a full award could be made. *Miller v. Indus. Comm'n*, 173 Colo. 476, 480 P.2d 565 (1971).

**When employee is fired in violation of employer's stated policy**, claimant is entitled to a full award of benefits because of discharge through no fault of her own even though found to be sleeping on the job. *Hosp. Shared Serv. of Colo. v. Indus. Comm'n*, 677 P.2d 447 (Colo. App. 1984).

**Full unemployment compensation benefits were available to flight attendants on mandatory maternity leave** commencing in twenty-eighth week of pregnancy. Such claimants were separated from employment even though they were receiving employment benefits and had the right to resume employment. *Frontier Airlines, Inc. v. Indus. Comm'n*, 734 P.2d 142 (Colo. App. 1986), *cert. dismissed*, 738 P.2d 1185 (Colo. 1987).

**Subsection (4)(I) is applied** in *Eckart v. Indus. Claim Appeals Office*, 775 P.2d 97 (Colo. App. 1989).

**Claimant who was unable to work at a particular job due to health reasons was not eligible for unemployment benefits** since he was able to perform the same work under different employment conditions and was not,

therefore, required to seek a new occupation. Pub. Serv. Co. of Colo. v. Ingle, 794 P.2d 1374 (Colo. App. 1990).

**Where employer failed to request written substantiation of claimant's health condition,** claimant is not precluded from eligibility for unemployment benefits. Pub. Serv. Co. of Colo. v. Ingle, 794 P.2d 1374 (Colo. App. 1990).

**Applied** in Patterson v. Indus. Comm'n, 39 Colo. App. 255, 567 P.2d 385 (1977).

#### B. Unsatisfactory or Hazardous Working Conditions.

**Evidence of unsatisfactory conditions.** The hearing officer must consider evidence presented of the factors listed in subsection (4)(a), but a claimant's failure to submit proof of working conditions of workers engaged in the same or similar work for the same or other employers in the locality does not prevent an award of benefits. Campbell v. Indus. Claim Appeals Office, 97 P.3d 204 (Colo. App. 2003).

**The standard for determining whether a claimant is entitled to benefits under the hazardous working conditions provisions of subsection (4)(c)** is whether a reasonable person in the claimant's position would have found the actual working conditions, as determined by the hearing officer to have existed, detrimental to that worker's physical or mental well-being so as to warrant resignation from employment. Rodco Sys., Inc. v. Indus. Claim Appeals Office, 981 P.2d 699 (Colo. App. 1999).

A hazardous condition may be created when, by an objective standard, the situation was hazardous to the employee's health or morals and was not normal. Rodco Sys., Inc. v. Indus. Claim Appeals Office, 981 P.2d 699 (Colo. App. 1999).

**Evidence insufficient to prove "unsatisfactory or hazardous working conditions".** Rotenberg v. Indus. Comm'n, 42 Colo. App. 161, 590 P.2d 521 (1979); Southwest Forest Indus. v. Indus. Comm'n, 719 P.2d 1098 (Colo. App. 1986).

**Evidence of significant unilateral increase in working hours sufficient to prove unsatisfactory working conditions.** Thus, claimant was entitled to receive a full award of benefits, pursuant to subsection (4)(c). Campbell v. Indus. Claim Appeals Office, 97 P.3d 204 (Colo. App. 2003).

#### C. Substantial Change in Working Conditions.

**Change in working conditions.** Where claimant was fully satisfied with her position but was then transferred without notice, and the conditions under which she then worked were not the same conditions prevailing for other workers performing the same or similar work, it

was error to deny benefits. Indus. Comm'n v. McIntyre, 162 Colo. 277, 425 P.2d 279 (1967).

**Division not required to investigate "conditions ... generally prevailing"**. In determining eligibility for unemployment benefits, the division is an adjudicatory, not investigatory, body. Therefore, its function and responsibility are to conduct a neutral adjudication of unemployment claims not to investigate the factual basis for such claims. Chris the Crazy Trader, Inc. v. Indus. Claim Appeals Office, 81 P.3d 1148 (Colo. App. 2003).

**Whether a change in working conditions constitutes a substantial change** and, if so, whether the substantial change is substantially less favorable to the worker must be judged by an objective standard rather than by claimant's subjective outlook. Consequently, in assessing the evidence, the issue is whether a reasonable employee in claimant's position would find the change in working conditions to be not only substantial but also substantially less favorable. Wargon v. Indus. Claim Appeals Office, 787 P.2d 668 (Colo. App. 1990); Arias v. Indus. Claim Appeals Office, 850 P.2d 161 (Colo. App. 1993).

**Finding of dissatisfaction with working conditions proper only where no change in conditions.** A finding that the petitioner quit his job because he was dissatisfied with standard working conditions or regularly assigned duties is proper only when there has been no change in working conditions or duties. Martinez v. Indus. Comm'n, 657 P.2d 457 (Colo. App. 1982).

Where an employee's termination followed a change in his work environment or in his duties, the statutory provision concerning dissatisfaction with standard working conditions (former subsection (9)(a)(I)) was inapplicable. Martinez v. Indus. Comm'n, 657 P.2d 457 (Colo. App. 1982); Musgrave v. Eben Ezer Lutheran Inst., 731 P.2d 142 (Colo. App. 1986); Wargon v. Indus. Claim Appeals Office, 787 P.2d 668 (Colo. App. 1990).

**It is not required that working conditions become impossible,** only that there be a substantial change. Gray Moving & Storage, Inc. v. Indus. Comm'n, 38 Colo. App. 419, 560 P.2d 482 (1976); Gray Moving & Storage, Inc. v. Indus. Comm'n, 38 Colo. App. 422, 560 P.2d 484 (1976).

**Denial of benefits for termination due to changes in working conditions affirmed where claimant acquiesced in those changes.** Jennings v. Indus. Comm'n, 682 P.2d 518 (Colo. App. 1984).

**Denial of benefits upheld** where evidence showed that the changes in working conditions experienced by claimant were substantially the same as changes experienced by other employees and claimant acquiesced in the changes. Collins v. Indus. Claim Appeals Office, 813 P.2d 804 (Colo. App. 1991).



**Acquiescence is matter of intent** and does not necessarily depend upon the lapse of time. *Musgrave v. Indus. Claim Appeals Office*, 762 P.2d 686 (Colo. 1988).

**Acquiescence to change in conditions not established** based on fact that employee continued to work for employer where evidence showed claimant filed a grievance and a civil action protesting the change. *Nimmo v. Town of Monument*, 736 P.2d 435 (Colo. App. 1987).

**Change of attitude and treatment by supervisor.** Where claimant quit his job because of a change in his working conditions which became intolerable because of a change of attitude and treatment by his supervisor and the assignment of the least desirable jobs when the employer learned that claimant, who is black, was dating a female coemployee who is Caucasian, there was sufficient evidence to support a full award. *Gray Moving & Storage, Inc. v. Indus. Comm'n*, 38 Colo. App. 419, 560 P.2d 482 (1976).

Where claimant, a Caucasian, had had a good personal and working relationship within the company up to the time she began dating a coemployee who was black, and after that personal relationship became known, she was subjected to harassment from fellow employees and supervisors, so that she felt she had to quit as working conditions became impossible, there was sufficient evidence to support the conclusion that "claimant quit her job because of a change in her working conditions which became intolerable because of the ostracism she was receiving from fellow employees and supervisors of the company" and claimant was entitled to a full award. *Gray Moving & Storage, Inc. v. Indus. Comm'n*, 38 Colo. App. 422, 560 P.2d 484 (1976).

**Claimant's working conditions constituted a demotion**, despite the fact that her job title and salary were to remain the same, and she was therefore entitled to a full award of unemployment benefits. *Warburton v. Indus. Comm'n*, 678 P.2d 1076 (Colo. App. 1984).

**A substantial change occurs if a claimant is relieved of supervisory and administrative responsibilities**, even if the claimant's salary remains the same. *Warburton v. Indus. Comm'n*, 678 P.2d 1076 (Colo. App. 1984).

**Employee whose salary was cut, job responsibilities divided, and title diminished suffered a substantial change in working conditions.** *Musgrave v. Eben Ezer Lutheran Inst.*, 731 P.2d 142 (Colo. App. 1986).

**Change in job title and removal of supervisory duties constituted a substantial change in working conditions.** *Nimmo v. Town of Monument*, 736 P.2d 435 (Colo. App. 1987).

**A change in duties or a demotion may be a change in working conditions that is substantially less favorable**, as may be a situation in which a claimant has been relieved of administrative or supervisory responsibilities or re-

ceived a salary reduction. *Wargon v. Indus. Claim Appeals Office*, 787 P.2d 668 (Colo. App. 1990).

**Demotion with a decrease in pay and job responsibilities** constituted a substantial change in working conditions. *Larsen-Oldaker v. Indus. Comm'n*, 735 P.2d 209 (Colo. App. 1987).

**As a matter of law, to a reasonable person in claimant's position, the change in compensation method from salary to commission constituted a substantially less favorable change in working conditions**, where the claimant left a commissioned job to work for the employer because she wanted the security and stability of a salary due to her dissatisfaction with a commission and the resultant fluctuation and unpredictability of monthly income, increased competition among the sales force, and increased job pressure. *Wargon v. Indus. Claim Appeals Office*, 787 P.2d 668 (Colo. App. 1990).

**Statute does not condition the receipt of benefits on disparate treatment by supervisor.** Receipt of unemployment compensation by one who has quit because of treatment by supervisor does not require a showing of disparate treatment by supervisor as it does not matter that it was uniformly applied to all employees as long as the supervision was unreasonable. *Heller v. Indus. Comm'n*, 738 P.2d 64 (Colo. App. 1987).

#### D. Accepting a Better Job.

**"Accepting a better job" and the 90-day period.** A claimant does not actually have to have been on the job performing services in the new employment for at least three months before it can be adjudged that he has terminated old employment by "accepting a better job". *Lidke v. Indus. Comm'n*, 159 Colo. 580, 413 P.2d 200 (1966).

**Clarification of the 90-day limitation.** This section is only a clarification of the previous statute and only indicates that the completion of the 90-day limitation shall be computed from the date of actual performance of services on the new job and was not meant to preclude claims arising out of events which occurred between the date of accepting the better job and actually commencing work. *Adams v. Indus. Comm'n*, 31 Colo. App. 340, 501 P.2d 1334 (1972).

**The fact that claimant agreed and understood that his employment would end at the expiration of a fixed term** is not a basis for denying him benefits under the Colorado employment security act. *Intermountain Jewish News, Inc. v. Indus. Comm'n*, 39 Colo. App. 258, 564 P.2d 132 (1977).

**Subsection (4)(f) not violative of equal protection clause.** Provision of subsection (4)(f), that in order to qualify as a better job the new job must last at least 90 days from the first date of employment, did not violate the equal pro-

tection clause of the United States Constitution. *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973).

**However former provision of subsection (4)(f)(I) violated fourteenth amendment.** The purpose of the employment security act, as stated in § 8-70-102, is subverted by the former provision of subsection (4)(f)(I) which read "but a job shall not be considered better if it lasts less than 90 days due to lack of work, the absence of said knowledge and control notwithstanding", because this provision made an invidious distinction between (1) those who obtain a better job which terminates prior to 90 days because of lack of work with no fault of their own and (2) those who obtain a better job which terminates prior to 90 days because of some other factor other than lack of work with no fault of their own, and such a distinction involved an unconstitutional overclassification forbidden by the fourteenth amendment of the United States Constitution. *Spann v. Indus. Comm'n*, 181 Colo. 153, 508 P.2d 385 (1973).

**A worker who quits his employment to take a better job must work at the new job at least 90 days** in order to be eligible for unemployment compensation. If the worker fails to work this minimum period, it is not considered a "better job" and the commission is required to deny all unemployment benefits. *Gatewood v. Russell*, 29 Colo. App. 11, 478 P.2d 679 (1970).

Under the plain language of this statute a job must, in order to qualify as a better job, last at least 90 days from the commencement of work unless the employee is unable to complete the 90 days of employment through no fault of his own. *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973).

**But a worker may cease employment within the 90-day period and still be eligible for benefits, if the reasons** for termination of this employment were conditions over which the worker had no knowledge at the time he accepted employment, and over which he had no control after commencing work. Whether or not the worker lacked this knowledge and control is a question of fact to be determined by the commission. *Gatewood v. Russell*, 29 Colo. App. 11, 478 P.2d 679 (1970).

**Ninety-day provision applies to occupancy not duration of job.** The 90-day provision of subsection (4)(f) is not interpreted as applying to the duration of the job but rather the employee's occupancy of the job. *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973).

**Ninety-day provision designed to prevent job hopping.** Concerning the 90-day employment requirement of the better job provision, there is justification for compulsory compliance with this requirement, as it is obviously designed to prevent job hopping and to secure continuity of employment. *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973).

**And prevents depletion of insurance fund account of past employer.** The 90-day requirement of the better-job provision, together with other prescribed better-job conditions, prevents the depletion of the insurance fund account of the past employer who in no way contributed to the job separation of the worker who voluntarily separates under conditions of disqualification. *Harding v. Indus. Comm'n*, 183 Colo. 52, 515 P.2d 95 (1973).

**Failure to meet the requirements of making a new job a better job.** Petitioner left his job of his own accord to take a different job which he deemed a better job. However, it is not petitioner's qualitative judgment which determines whether the new job was a better job. The statute sets forth various requirements which must be met. Petitioner stated he was hired for a specific period of two months, hence, the one year requirement was not met. Furthermore, the job in fact lasted only two months, therefore, the three months requirement was also not met. The undisputed evidence conclusively established that petitioner was not entitled to unemployment compensation under the statute. *Anderson v. Indus. Comm'n*, 29 Colo. App. 263, 482 P.2d 403 (1971).

**Subsection (4)(f)(III) does not mean that because new job did not materialize, an award of compensation is necessarily barred.** *Spann v. Indus. Comm'n*, 181 Colo. 153, 508 P.2d 385 (1973).

**Evidence failed to sustain denial of unemployment benefits** to claimant who alleged he was offered and accepted a better job, but who employer claimed was fired prior to accepting a new job. *Olivas v. Indus. Comm'n*, 33 Colo. App. 78, 515 P.2d 110 (1973).

**Award held improper.** Where claimant's sole proof as to any other job offer consisted of her recitation of alleged interviews and telephone calls between herself and third persons, and no evidence corroborative of the hearsay was offered, the Indus. commission's award could not stand. *Rocky Mt. Radiologists Prof'l Corp. v. Dept. of Labor & Emp.*, 39 Colo. App. 183, 562 P.2d 1123 (1977).

#### E. Employer's Violation of Employment Contract.

**Violation of contract by changing days of work.** Where there is a contract between the parties specifying a five-day work week and where, thereafter, the employer causes the employee to resign by unilaterally changing the number of days in the work week, the employee is entitled to a full award of benefits. *Wade v. Hurley*, 33 Colo. App. 30, 515 P.2d 491 (1973).

**Subsection (4)(o) harassment need not be continuous.** There is nothing in subsection (4)(o) stating that harassment must be continu-



ous and substantial. *Marlin Oil Co. v. Indus. Comm'n*, 641 P.2d 312 (Colo. App. 1982).

**Failure to pay benefits under collective bargaining agreement** resulted in full award to claimants who terminated their employment. *Centennial Drywall Co., Inc. v. Indus. Comm'n*, 724 P.2d 685 (Colo. App. 1986).

**Gender-based harassment is encompassed within the more general term "personal harassment"**, and a claimant who carries burden of proving that she quit her job because of personal harassment will receive employment benefits. *Colo. Div. of Emp. & Train. v. Hewlett*, 777 P.2d 704 (Colo. 1989).

**Improper conduct need not take the stereotypical form of sexual conduct** to, at least arguably, contravene public policy. *Hewlett v. Div. of Emp. & Train.*, 753 P.2d 791 (Colo. App. 1987), rev'd on other grounds, 777 P.2d 704 (Colo. 1989).

**Where claimant contends that her separation from government employment resulted from assertion of a constitutionally protected right**, the three factor test described in *Ward v. Indus. Commission* (699 P.2d 960) is used to determine whether the claimant is entitled to unemployment benefits. *Colo. Div. of Emp. & Train. v. Hewlett*, 777 P.2d 704 (Colo. 1989).

**Where such a question is presented**, plaintiff must prove by a preponderance of the evidence that her conduct which led to her discharge was constitutionally protected and that the conduct was a "substantial" or "motivating" factor in the decision to terminate her employment. If plaintiff carries that burden of proof, the employer must show that it would have reached the same decision in the absence of the protected conduct. *Colo. Div. of Emp. & Train. v. Hewlett*, 777 P.2d 704 (Colo. 1989).

**Denial of benefits disallowed.** Employee who notified employer of his intent to resign as of future date but who was terminated earlier could not be denied unemployment benefits for period between his termination and effective date of his resignation. *Diringer v. Indus. Comm'n*, 712 P.2d 1091 (Colo. App. 1985).

#### F. Unable or Unqualified to Perform Work.

**The mental inability referred to by subsection (4)(j) is not a narrow definition pertaining solely to intellectual or educational attainment.** The statute merely provides that if an employee is unable to perform because of mental incapacity, then he is entitled to benefits. It does not state that the mental incapacity or inability must result solely from educational or intellectual deficiencies, rather than illness. *Tague v. Coors Porcelain Co.*, 30 Colo. App. 158, 490 P.2d 96 (1971).

**Physical inability to work**, as used in subsection (4)(j), has been defined as the inability to

perform the labor, or equally remunerative work, that an injured person was engaged in at the time of his injury. *Colo. State Judicial Dept. v. Indus. Comm'n*, 630 P.2d 102 (Colo. App. 1981).

**Need not be disabling.** The language of subsection (4)(j) is sufficiently broad that illness which is not necessarily disabling can constitute a physical inability to perform the work. *Mountain States Tel. & Tel. Co. v. Indus. Comm'n*, 637 P.2d 401 (Colo. App. 1981).

**Excessive absenteeism due to incidental illness.** The general assembly did not intend to deny compensation to an employee who, although excessively absent, is so because of incidental illness. *Mountain States Tel. & Tel. Co. v. Indus. Comm'n*, 637 P.2d 401 (Colo. App. 1981).

A full award of benefits is justified under subsection (4)(j) where an employee, discharged for excessive absenteeism, suffered a disabling injury which rendered him unable to get out of bed or unable to remain in a standing or sitting position for sustained periods. *Mountain States Tel. & Tel. Co. v. Indus. Comm'n*, 637 P.2d 401 (Colo. App. 1981).

**Alcoholism.** Whether worker is disqualified from receipt of benefits is based on the volitional or nonvolitional nature of worker's alcoholism and must be determined under particular facts of each case. *City & County of Denver v. Indus. Comm'n*, 756 P.2d 373 (Colo. 1988) (decided under law in effect prior to 1988 amendment adding subsection (4)(b)(IV) and (V)).

**Claimant's consumption of alcohol** warranted the denial of unemployment compensation benefits for resulting discharge where consumption of alcohol occurred during a rest break on employer's property and the claimant was paid for the time he was on the break. *Longmont Turkey Proc. v. Indus. Claim Appeals Office*, 765 P.2d 1073 (Colo. App. 1988).

**An individual who is physically or mentally unable to perform work may be awarded unemployment benefits** and such inability need not be the result of insufficient educational or occupational skills. *Electronic Fab Tech. Corp. v. Wood*, 749 P.2d 470 (Colo. App. 1987).

**No implied requirement of notice that employee's "job is in jeopardy"**. Where hearing officer found that claimant knew what was expected of him and failed to perform satisfactorily, findings were sufficient to support disqualification under subsection (5)(e)(XX). *Pabst v. Indus. Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992).

#### G. Health of Worker.

**Medical statement required only when employer makes timely request.** There is no requirement in subsection (4)(b)(I) that, before he can be entitled to benefits, the claimant must be

advised by a physician to terminate his employment. A medical statement to substantiate the claimant's assertion that he was required to leave his employment because of health reasons is required only if the employer requests it prior to the date of quitting or within a reasonable period thereafter. *Andersen v. Indus. Comm'n*, 167 Colo. 281, 447 P.2d 221 (1968).

**Denial of benefits is error as matter of law.** When under the circumstances the statute does not require proof of a doctor's advice to actually quit, the denial of benefits on the ground that the claimant did not have such specific advice is error as a matter of law. *Andersen v. Indus. Comm'n*, 167 Colo. 281, 447 P.2d 221 (1968).

**Prior notification is not required in the case of a sudden injury or illness** under subsection (4)(b)(II) as long as the employer is notified "at the earliest practicable time after such occurrence". *Montano v. Indus. Comm'n*, 171 Colo. 92, 464 P.2d 518 (1970).

**Sudden illness.** Where an employee was discovered lying down before his scheduled break and told his superiors when questioned that he had felt dizzy and had to lie down, and that he suspected that his medication had made him drowsy, the Indus. commission was justified in finding that the employee had complied with the statutory notice requirement, and was further justified in awarding him full benefits under subsection (4)(b)(II). *Samsonite Corp. v. Indus. Comm'n*, 665 P.2d 1037 (Colo. App. 1983).

**Eligibility where claimant unable to perform "normal" work for health reasons.** Where an unemployment compensation claimant is, for health reasons, unable to perform such claimant's "normal" work for a period of time, the claimant may nevertheless be eligible for benefits if the claimant is able to perform and is available for other suitable work. *Bartholomay v. Indus. Comm'n*, 642 P.2d 50 (Colo. App. 1982).

**Employee must inform employer he is leaving for health reasons.** In order to be entitled to a full award of benefits under subsection (4)(b)(I), an employee must inform his employer upon or prior to leaving that he is quitting (now separating) because of the condition of his health. *Slazas v. Indus. Comm'n*, 660 P.2d 513 (Colo. App. 1983).

**Employee need not specifically inform employer at or prior to termination that employee is leaving because of the condition of the employee's health.** *Hodges v. Canon Lodge Med. Investors, Ltd.*, 879 P.2d 476 (Colo. App. 1994) (disagreeing with *Slazas v. Indus. Comm'n*, 660 P.2d 513 (Colo. App. 1983)).

#### H. Refusing With Good Cause to Work Overtime.

**Compelling personal reasons under subsection (4)(k) are circumstances so significant that**

they would deprive a reasonable person of the ability to make a truly volitional choice about whether to work overtime. *Action Key Punch Serv. v. Indus. Comm'n*, 709 P.2d 970 (Colo. App. 1985).

**Desire to give birthday party for husband is not compelling personal reason under subsection (4)(k).** *Action Key Punch Serv. v. Indus. Comm'n*, 709 P.2d 970 (Colo. App. 1985).

**Objective standard applies.** Facts giving rise to a claim of compelling personal reason under subsection (4)(k) are to be judged by an objective standard rather than by the claimant's subjective outlook. *Action Key Punch Serv. v. Indus. Comm'n*, 709 P.2d 970 (Colo. App. 1985).

**Violation of company rule and 50% award.** The commission "cleared" the employee of stealing from his employer; the discharge was found to have been caused, not by any act of thievery, but only because of a violation of a company rule. He is entitled to a 50 percent award where the violation "did not or could not" result in serious damage to the employer's property or interests. *Ruby v. Yellow Cab, Inc.*, 163 Colo. 297, 430 P.2d 463 (1967).

**Discharge for violation of company rule.** When an employee is discharged for violating a company rule, benefits may not be reduced unless the violation could have resulted in "serious damage" to the employer's interests or endangered the "life of the worker or other employee". *Damon v. Indus. Comm'n*, 677 P.2d 431 (Colo. App. 1983).

**Violation of company rules under subsection (5)(e)(VII).** Whether employee's conduct violated company rules is applied in *Richardson v. Indus. Comm'n*, 701 P.2d 164 (Colo. App. 1985).

**Quitting for personal reasons known to the division.** Court harmonizes subsection (5)(c) and former subsection (8) which prescribe different results for quitting for personal reasons known to the division by holding that when a person quits for personal reasons which are known to the division and which are not covered under other provisions, then subsection (5)(c), which was enacted later in time, prevails. *Ortega v. Indus. Comm'n*, 682 P.2d 511 (Colo. App. 1984) (decided prior to 1984 repeal of subsection (8)).

**Eligibility provisions of § 8-73-107 came into play only after claim filed.** While any refusal of suitable work may well be independent grounds for a reduced benefits decision under former subsection (5), the "eligibility" provisions of § 8-73-107 including limited availability only come into play with respect to conditions existing after filing of the claim. *Olivas v. Indus. Comm'n*, 33 Colo. App. 273, 518 P.2d 304 (1974).

**Marital obligation not ground for full compensation.** Where a wife quits employment in



order to move her residence with her husband, a claim for full compensation cannot be supported on a marital obligation ground. *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 197 Colo. 335, 592 P.2d 808 (1979).

**Reduced benefits after violation of union contract.** The commission may reduce a claimant's benefits where he violated a specific provision of his union contract and the contract gave him notice that, by such violation, he was jeopardizing his employment status. *Anyon v. Indus. Comm'n*, 42 Colo. App. 88, 589 P.2d 1390 (1979).

**Where reduced award justified.** Where Indus. commission, in affirming the referee's determination on the basis of evidence it considered competent, in effect adopted the referee's finding on such "pertinent factors" as the claimant's absenteeism, tardiness, and poor attitude, and the employer's dissatisfaction with her work, a reduced award was justified under former subsection (5)(x) despite the fact that the statutory subsection was not expressly cited. *Kiesling v. Indus. Comm'n*, 616 P.2d 1002 (Colo. App. 1980).

**Reason for absenteeism is finding of fact.** The determination of whether absence resulting from a minor illness is more for the employee's comfort rather than a physical inability to perform the work, in which case an employee discharged for absenteeism due to illness is entitled only to a reduced award, is a factual question for the commission. *Mountain States Tel. & Tel. Co. v. Indus. Comm'n*, 637 P.2d 401 (Colo. App. 1981).

**For reduced award due to "careless or shoddy work"**, pursuant to former subsection (9)(a)(XV), see *Anders v. Indus. Comm'n*, 649 P.2d 732 (Colo. App. 1982).

**Constitutionally protected activity as basis for reduced award.** When the claimant asserts that his exercise of the right to free speech has been used by a state employer to justify a reduction of benefits, the commission's decision must reflect application of the three-part test announced in *Mt. Healthy City Sch. District Bd. of Education v. Doyle* (429 U.S. 274 (1977)). Claimant's activities cannot be relied upon to reduce benefits if he can establish that such activities are constitutionally protected and that they were a substantial or motivating factor in the decision to reduce benefits. The employer has the burden of establishing that the same result would have been reduced even in the absence of constitutionally protected conduct. *Ward v. Indus. Comm'n*, 699 P.2d 960 (Colo. 1985).

#### I. False Reports.

The phrase "other records or reports" only applies to those documents that relate di-

rectly to an employer's assets and liabilities. According to the doctrine of *eiusdem generis* and the manifest intent of the general assembly, the records and reports in subsection (5)(e)(VII) are concerned with the types of documents that give an employee the ability to misappropriate property. *Mounkes v. Indus. Claim Appeals Office*, 251 P.3d 485 (Colo. App. 2010).

### IV. REDUCED AWARDS.

**Annotator's note.** Subsection (5), which formerly dealt with reduced awards, was amended in 1984 to relate to disqualification from benefits. Annotations appearing under this heading were decided under the former subsection (5), relating to reduced awards.

**Grant of reduced award for non-enumerated reason.** The commission is empowered to grant a reduced award in a case even though the precise reason for the claimant's termination is not enumerated in former subsections (5)(a) to (5)(w) in effect at that time. *Dunn v. Indus. Comm'n*, 640 P.2d 1146 (Colo. 1982).

**Computation of eligibility.** Wages earned by a claimant not used in determining monetary eligibility on a combined-wage claim are properly available for transfer to another state to be used in computing monetary eligibility. *Denver v. Indus. Comm'n*, 712 P.2d 1110 (Colo. App. 1985).

**For purposes of collateral estoppel, board of education's decision to dismiss the teacher is "final judgment"**, not the hearing officer's recommendation to retain her. *Moffat County Sch. Dist. RE-No. 1 v. Indus. Comm'n*, 717 P.2d 995 (Colo. App. 1985), *aff'd*, 732 P.2d 616 (Colo. 1987).

**Even though a teacher is dismissed because she has inadequate professional skills, she may nonetheless be entitled to unemployment benefits.** *Indus. Comm'n v. Moffat County Sch. Dist. RE-No. 1*, 732 P.2d 616 (Colo. 1987).

### V. NO AWARD.

**Subsection (5)(g) refers to the deferral of any benefits attributable to other employments to which claimant may be entitled, and does not negate the plain disqualification provisions of subsection (5)(e).** *Parker v. Daniels Motors, Inc.*, 738 P.2d 68 (Colo. App. 1987).

**If the division determines an employee is separated from employment for just reasons, then the employee shall be given no award of benefits.** *McGinn v. Indus. Comm'n*, 31 Colo. 6, 496 P.2d 1080 (1972).

**The determination of whether an employer's actions constitute "personal harassment" under subsection (4)(o) is governed by an objective standard.** The standard is whether a reasonable person in the claimant's position would have found the employer's conduct to be

so, troubling, and annoying as to warrant resignation from employment. *Survey Solutions, Inc. v. Indus. Claim Appeals Office*, 956 P.2d 1275 (Colo. App. 1998).

**An employer's comment relating to claimant's daughter was not conduct that a reasonable person would find to be so vexing, troubling, and annoying as to warrant quitting a job,** and thus falls short of the required standard for "personal harassment". *Survey Solutions, Inc. v. Indus. Claim Appeals Office*, 956 P.2d 1275 (Colo. App. 1998).

**Where the record shows that employer criticized claimant's husband, but does not indicate what the actual comments were nor that the comments had been directed to the claimant, the record does not support a finding of "personal harassment".** *Survey Solutions, Inc. v. Indus. Claim Appeals Office*, 956 P.2d 1275 (Colo. App. 1998).

**Unemployment found voluntary.** Where a claimant voluntarily retires from his full-time position and continues as a union auditor during 12 weeks per year, his unemployment during the remainder of the year is not involuntary and he is not entitled to unemployment compensation. *Int'l Typographical Union v. Indus. Comm'n*, 44 Colo. App. 29, 609 P.2d 634 (Colo. App. 1980).

**No award when claimant leaves job only because dissatisfied.** It is apparent that the statutory scheme intended by the general assembly was to provide certain benefits during unemployment if a claimant did not quit because of dissatisfaction with standard working conditions, and that former § 82-4-8 (5)(a)(i) therefore applies to a claimant who leaves his job where there has been no change in his working conditions, but where, nevertheless, he is dissatisfied with them. *Indus. Comm'n v. McIntyre*, 162 Colo. 227, 425 P.2d 279 (1967).

**No award will be made where an employee voluntarily quits work to get married,** and a judgment imposing the maximum disqualification under the unemployment compensation act is not error. *Cottrell Clothing Co. v. Teets*, 139 Colo. 567, 342 P.2d 1021 (1959).

**An award shall not be granted to an employee who quits to seek other work, not having first accepted an offer of other employment.** The testimony of the petitioner establishes that at the time he terminated his employment there had not been a definite offer of employment made to him which he had accepted. The new employer represented to him some possibility and hope of future employment but it had not ripened into a contract of hire. *Anderson v. Valspar Corp.*, 29 Colo. App. 294, 482 P.2d 992 (1971).

**Insubordination connotes a willful, deliberate, or purposeful refusal to follow the reasonable directions or instructions of the employer.** *Beatty v. Automatic Catering, Inc.*, 165 Colo. 219, 438 P.2d 234 (1968).

**What is "willful" depends on facts.** It is difficult to mark the precise connotative boundaries of the terms "deliberate" or "willful", as employed by the law, since the word carries various shades of meaning; it takes on the color of its context, and therefore, what is "willful" depends primarily upon a determination of factual matters. *Sayers v. Am. Janitorial Serv., Inc.*, 162 Colo. 292, 425 P.2d 693 (1967).

**Willful misconduct does not necessarily require actual intent to wrong the employer.** It is enough if there is a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer. *Sayers v. Am. Janitorial Serv., Inc.*, 162 Colo. 292, 425 P.2d 693 (1967).

**Violation of a company rule.** The employee conceded that he broke a company rule, though he offered several excuses for his conduct. These excuses were in no sense "binding" on the commission. Nor do they in any manner alter the fact that there has been a violation of a company rule. *Ruby v. Yellow Cab Inc.*, 163 Colo. 297, 430 P.2d 463 (1967).

**Such as when an employee refused to leave employer's nightclub in violation of policy** whereby employer permitted employees to be in nightclub when club was not crowded. Where refusal caused employer to terminate employee's employment, such conduct prevented claimant from receiving unemployment benefits. *Radis v. Indus. Comm'n*, 31 Colo. App. 389, 502 P.2d 977 (1972).

**Deliberate disobedience of reasonable instruction.** Claimant, who refused to provide his employer with medical report, report of motor vehicle accident in which claimant was charged with driving while under influence of intoxicating liquor, and current copy of claimant's driving record, deliberately disobeyed reasonable instruction of employer and, thus, was at fault in causing his separation from employment and was ineligible for unemployment benefits. *Wilson v. Indus. Comm'n*, 730 P.2d 911 (Colo. App. 1986).

**No award because of careless work.** Where the industrial commission concluded that a claimant's employment had been terminated because his work was unsatisfactory and not up to the standard required by the company and that he was not entitled to compensation pursuant to subsection (6)(q), which provides for no award of benefits where the employment is terminated due to careless or negligent work, and the division specifically found that, although claimant, who had suffered two nervous breakdowns, might not have been restored to complete mental health, he had been certified as fit to return to work by the treating physician, and, absent other evidence, the division determined that petitioner had failed to prove he was mentally unable to perform his work, which would qualify him for



a full award. *Tague v. Coors Porcelain Co.*, 30 Colo. App. 158, 490 P.2d 96 (1971).

**"Failure to meet established job performance standards"** means that claimant did not do the job for which he was hired and which he knew was expected of him. *Parker v. Daniels Motors, Inc.*, 738 P.2d 68 (Colo. App. 1987).

**Thus, where the right to unemployment benefits did not accrue until after the amendment to subsection (4)(f) became effective**, denying benefits under the amended terms of the section was not a retroactive application of the section, even though the claimant would have been entitled to benefits under the unamended terms of the section. *Collins v. Indus. Claim Appeals Office*, 813 P.2d 804 (Colo. App. 1991).

**Subsection (9)(a)(XX) is not void for vagueness.** "Failure to meet established job performance or other defined standards" means that claimant did not do the job for which she was hired and in which she knew what was expected of her. *Dawson v. Indus. Comm'n*, 660 P.2d 924 (Colo. App. 1983).

**Collateral estoppel precludes relitigation of the grounds for terminating a tenured teacher under subsection (9)(a)(XX)** in a hearing for unemployment compensation benefits where a board of education votes to terminate a teacher after a full administrative hearing and finding of facts, even through the board's action is still subject to review. *Jefferson County Sch. Dist. v. Indus. Comm'n*, 698 P.2d 1350 (Colo. App. 1984).

**"Fault" under the statute is not necessarily related to culpability**, but must be construed as requiring a volitional act. *Zelingers v. Indus. Comm'n*, 679 P.2d 608 (Colo. App. 1984).

**Voluntary violation of residence requirement.** A police officer who married and moved outside the city voluntarily violates a charter requirement and police department regulation that is a condition of employment. This constitutes fault on the part of the police officer, and precludes an award of full unemployment benefits, pursuant to subsection (8). *City & County of Denver v. Indus. Comm'n*, 666 P.2d 160 (Colo. App. 1983).

**No award where claimant's misrepresentations about his academic credentials were material.** *Denberg v. Loretto Heights Coll.*, 694 P.2d 375 (Colo. App. 1984).

**In determining the suitability of the offered employment, this section offers the following considerations:** The degree of risk involved to claimant's health, safety, and morals; his physical fitness and prior training, his experience and prior earnings; his length of unemployment and prospects for securing work in his customary occupation; and the distance of the available local work from his residence. *Toston v. Indus. Comm'n*, 160 Colo. 281, 417 P.2d 1 (1966).

**Denial of compensation to claimants who were offered similar work 175 miles away on**

the other side of the continental divide, but who insisted that the work was not suitable and declined to accept, was held improper under this section. *Indus. Comm'n v. Lazar*, 111 Colo. 69, 137 P.2d 405 (1943).

**The beneficent purposes of the act do not include a guaranty that a job offer must be for wages equal to that of the old job** in order to be deemed as suitable work. *Bayly Mfg. Co. v. Dept. of Emp.*, 155 Colo. 433, 395 P.2d 216 (1964).

**A refusal to accept an offer of temporary employment does not, in and of itself, constitute a refusal to accept suitable work.** *Toston v. Indus. Comm'n*, 160 Colo. 281, 417 P.2d 1 (1966).

**A claimant is entitled to a reasonable time in which to compete in the labor market for available jobs of a permanent nature** for which he has the skill, and at a rate of pay commensurate with his prior earnings. *Bayly Mfg. Co. v. Dept. of Emp.*, 155 Colo. 433, 395 P.2d 216 (1964); *Toston v. Indus. Comm'n*, 160 Colo. 281, 417 P.2d 1 (1966).

**Thus, work at a substantially lower wage should not be deemed "suitable" unless a claimant has been given a reasonable period to compete in the labor market for available jobs** for which he has the skill at a rate of pay commensurate with his prior earnings. *Bayly Mfg. Co. v. Dept. of Emp.*, 155 Colo. 433, 395 P.2d 216 (1964); *Indus. Comm'n v. Zavatta*, 166 Colo. 365, 443 P.2d 982 (1968).

**And a reasonable time is a question of fact.** What constitutes a reasonable time in these cases is not a matter to be answered by rigid formulas. Rather, it must initially be determined as a question of fact under the circumstances of each individual case by the appropriate agency. *Bayly Mfg. Co. v. Dept. of Emp.*, 155 Colo. 433, 395 P.2d 216 (1964); *Toston v. Indus. Comm'n*, 160 Colo. 281, 417 P.2d 1 (1966).

**Nevertheless, "unsuitable" work may become "suitable".** Work which may be deemed "unsuitable" at the inception of the claimant's unemployment, and for a reasonable time thereafter, because it pays less, may thereafter become "suitable" work when consideration is given to the length of unemployment and the prospects for obtaining customary work at his prior earning capacity. *Bayly Mfg. Co. v. Dept. of Emp.*, 155 Colo. 433, 395 P.2d 216 (1964); *Toston v. Indus. Comm'n*, 160 Colo. 281, 417 P.2d 1 (1966).

**And a claimant may not justify his refusal of a job offer on sole grounds that it is non-union;** and if in fact the job offered is not "suitable", then the reason for the claimant's refusal is immaterial. *Indus. Comm'n v. Zavatta*, 166 Colo. 365, 443 P.2d 982 (1968).

**If wages offered are substantially less than prevailing wage, work is not "suitable".** *Romero v. Indus. Comm'n*, 616 P.2d 992 (Colo. App. 1980).

**Claimant entitled to benefits where he defended himself against unprovoked assault.** Where the evidence was uncontradicted that claimant acted only to defend himself against an unprovoked assault by a coemployee, he could not be denied unemployment benefits. *Escamilla v. Indus. Comm'n*, 670 P.2d 815 (Colo. App. 1983).

**Industrial commission was without authority to award unemployment benefits** to hospital employees who accepted and continued to receive employee benefits, i.e. they were nurses who were part of the nursing pool and were employed, albeit intermittently. *Saint Anthony Hosp. Sys. v. Indus. Comm'n*, 709 P.2d 967 (Colo. App. 1985).

**Denial of compensation improper when employment offered was at substantially less favorable wage.** *Indus. Comm'n v. Brady*, 128 Colo. 490, 263 P.2d 578 (1953).

**No substantial unfavorable change in working conditions occurred** justifying an award of benefits, where claimant's termination was precipitated by a reduction in his income but no change in the method of his compensation. Claimant was hired to serve both as a warehouse worker and a relief driver under terms by which he was paid more for working as a warehouse worker than he was paid for working as a relief driver. When the claimant's relief driver duties increased, he refused to perform them unless he was paid more and, consequently, was discharged. *Muhlenkamp v. Indus. Claim Appeals Office*, 802 P.2d 1127 (Colo. App. 1990).

**In determining a claimant's entitlement to benefits, the law in effect on the date the**

**claimant's right to benefits accrues is the law which governs.** *Baldwin v. Indus. Claim Appeals Office*, 813 P.2d 807 (Colo. App. 1991).

**When an employee voluntarily resigns and the employer refuses to accept an attempted retraction of the resignation prior to the effective date,** the employee's resignation is considered to have been voluntary for the purposes of determining unemployment compensation benefits. *Cunliffe v. Indus. Claim Appeals Office*, 51 P.3d 1088 (Colo. App. 2002).

**Applied** in *Stensvad v. Indus. Comm'n*, 167 Colo. 140, 445 P.2d 898 (1968); *Debalco v. Indus. Claim Appeals Office*, 32 P.3d 621 (Colo. App. 2001).

## VI. EVIDENCE.

**Appeals court would not take judicial notice of facts not in evidence in disqualification case.** Where the evidentiary record before the hearing officer contained nothing to indicate the testing laboratory that allegedly found marijuana in claimant's system was licensed or certified as required by statute, a reference to the lab's web site in connection with the appeal was not an acceptable substitute. Similarly, the claimant's admission that he had ingested marijuana two days prior to the test would not permit the inference that he was under the influence of marijuana at the time of the test, absent medical evidence of the length of time marijuana remains detectable in the human system. *Sosa v. Indus. Claim Appeals Office*, 259 P.3d 558 (Colo. App. 2011).

**8-73-109. Strikes or other labor disputes - definitions.** (1) (a) For purposes of this section:

(I) "Coordinated bargaining" means two or more employers bargaining with a union where there is communication and accommodation among the employers but where each is free to make independent decisions on some or all of the issues being negotiated with the union, either written notification of the intent to engage in coordinated bargaining has been provided to the union or the union has rejected an offer to engage in multiemployer bargaining, and one or more representatives of each employer participating in the coordinated bargaining is present at one or more bargaining sessions.

(II) "Defensive lockout" means a lockout:

(A) Reasonably imposed by an employer to protect materials, property, or operations; or

(B) Where a union or two or more employees that are represented by the union take economic action against an employer and that action causes the employer to lock out; or

(C) By any member of a multiemployer bargaining unit or an employer engaged in coordinated bargaining with one or more other employers if such lockout is initiated because of a strike or labor dispute involving any member of such multiemployer bargaining unit or coordinated bargaining group.

(III) "Lockout" means a refusal by an employer engaged in a dispute with a union to permit its employees to perform employment services.

(IV) "Multiemployer bargaining unit" means any group of two or more employers bargaining with a union as a single unit with the consent of each employer and the union.

(V) "Offensive lockout" means any lockout by an employer that does not satisfy the definition of a defensive lockout.



(VI) "Strike or labor dispute" means the withholding of employment services or other economic action by two or more employees that are represented by the union directed at an employer's business.

(b) An individual is ineligible for unemployment compensation benefits for any week with respect to which the division finds that his or her total or partial unemployment is due to a strike or labor dispute in the factory, establishment, or other premises in which he or she was employed and thereafter for such reasonable period of time, if any, as may be necessary for such factory, establishment, or other premises to resume normal operations.

(c) For the purposes of this section, a lockout by any member of a multiemployer bargaining unit or an employer engaged in coordinated bargaining with another employer shall constitute a labor dispute if such lockout was a defensive lockout. In accordance with paragraph (b) of this subsection (1), the employees laid off in such a defensive lockout are ineligible for unemployment compensation benefits.

(d) However, notwithstanding paragraph (b) of this subsection (1), if his or her unemployment is due to an offensive lockout initiated by the employer, the individual will be determined eligible for unemployment compensation benefits.

(2) This section shall not apply if he is not participating in or financing or directly interested in the strike as an individual or as a member of the grade or class of workers conducting the strike. Participating in a strike shall include refusal to cross the picket line.

(3) If in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department, for the purposes of this section, shall be deemed to be a separate factory, establishment, or other premises.

**Source:** L. 36, 3rd Ex. Sess.: p. 19, § 5. CSA: C. 167A, § 5. L. 41: p. 766, § 5. L. 49: p. 722, § 3. L. 53: p. 624, § 5. CRS 53: § 82-4-11. L. 63: p. 678, § 5. C.R.S. 1963: § 82-4-9. L. 75: (2) R&RE, p. 323, § 1, effective June 29. L. 99: (1) amended, p. 682, § 1, effective May 19.

#### ANNOTATION

**Law reviews.** For article, "The Conflict Between Collective Bargaining and Unemployment Insurance", see 28 Rocky Mt. L. Rev. 185 (1956). For article, "Defending an Unemployment Compensation Claim", see 13 Colo. Law. 69 (1984).

**Annotator's note.** Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12 which abolished said commission and transferred its powers, duties, and functions under the act to the director of division.

**Provisions disqualifying claimants from receiving benefits strictly construed.** The provisions of the Colorado employment security act which disqualify claimants from receiving benefits must be strictly construed to accomplish their purpose without excluding legitimate claims for benefits. F.R. Orr Constr. Co. v. Indus. Comm'n, 33 Colo. App. 326, 522 P.2d 117 (1974), aff'd, 188 Colo. 173, 534 P.2d 785 (1975).

**This section makes unemployment due to a strike noncompensable.** Sandoval v. Indus. Comm'n, 110 Colo. 108, 130 P.2d 930 (1942); Kania v. Schaffer, 31 Colo. App. 538, 506 P.2d 384 (1972).

**Coverage excluded.** This section excludes coverage for any week of unemployment caused by a strike or labor dispute. Pierce v. Indus. Comm'n, 38 Colo. App. 85, 553 P.2d 402 (1976).

**When the employer-employee relationship has been terminated, this section no longer applies.** Pierce v. Indus. Comm'n, 38 Colo. App. 85, 553 P.2d 402 (1976); Brannan Sand & Gravel v. Indus. Claim Appeals Off., 762 P.2d 771 (Colo. App. 1988), aff'd sub nom. Federico v. Brannan Sand & Gravel Co., 788 P.2d 1268 (Colo. 1990).

A referee's finding that the labor dispute with respondent employer still existed on the date claimants filed for benefits and claimants' objection to that finding were irrelevant where the claimants had quit their jobs with that employer. Pierce v. Indus. Comm'n, 38 Colo. App. 85, 553 P.2d 402 (1976).

**A striking employee does not have to unilaterally abandon the strike or dispute and offer to return to work and be refused employment, regardless of whether the employee had been permanently replaced, in order to become eligible for benefits.** Brannan Sand & Gravel v. Indus. Claim Appeals Office, 762 P.2d 771 (Colo. App. 1988), aff'd sub nom. Federico v.

Brannan Sand & Gravel Co., 788 P.2d 1268 (Colo. 1990).

**Benefits where employee permanently re-placed.** A strike or labor dispute suspends the employer-employee relationship, and this section excludes coverage for periods of unemployment attributable to the dispute. However, the relationship may be terminated and the employee may become eligible for benefits if the employer permanently replaces the striking employee. The rationale for this rule is that hiring permanent replacements ends the voluntary nature of the unemployment and breaks the chain of causation between the labor dispute and the unemployment. In re Krantz v. Kelran Constructors, Inc., 669 P.2d 1049 (Colo. App. 1983); Brannan Sand & Gravel v. Indus. Claim Appeals Office, 762 P.2d 771 (Colo. App. 1988), aff'd sub nom. Federico v. Brannan Sand & Gravel Co., 788 P.2d 1268 (Colo. 1990).

**"Strike" defined.** "A strike", in so far as the application of this act is concerned, is a concerted refusal to work for pay and under conditions that are presently available in order to procure more advantageous conditions or greater pay. Sandoval v. Indus. Comm'n, 110 Colo. 108, 130 P.2d 930 (1942).

**And a labor dispute may exist without a strike, but a labor dispute, accompanied by a concerted refusal to work for the employer until the dispute is resolved in favor of the employees' contentions, furnishes all the elements of a strike.** Sandoval v. Indus. Comm'n, 110 Colo. 108, 130 P.2d 930 (1942).

**Cause of lockout must be determined** when resolving eligibility for benefits where lockout resulted from strike against another member of multiemployer bargaining unit. If lockout resulted from employer's efforts to deprive employees of some advantage they already possessed, they are eligible for benefits. Safeway Stores 44 Inc. v. Indus. Claim Appeals Office, 973 P.2d 677 (Colo. App. 1998).

**The refusal of employees to work after expiration of their working contract** unless guaranteed contingent benefit of future action on new contracts, then unascertained and unascertainable, constituted a demand for a modification of working conditions and rates of pay, and their refusal to return to work until there was a compliance with such demand, was in effect a strike, in which situation they were not entitled to unemployment benefits. Sandoval v. Indus. Comm'n, 110 Colo. 108, 130 P.2d 930 (1942).

**Offers or concessions made subsequent to commencement of labor dispute** which are not acceptable to other party are merely negotiations and do not terminate dispute. Kania v. Shaffer, 31 Colo. App. 538, 506 P.2d 384 (1972).

**And an employee is directly interested in a dispute** when his wages, hours, or conditions of work will be affected favorably or adversely by

the outcome of a strike. It is of no consequence that such employee is not a member of the union conducting the strike or that he may not be in sympathy with its purposes. Burak v. Am. Smelting & Ref. Co., 134 Colo. 225, 302 P.2d 182 (1956).

**The burden rests upon a claimant to prove that he comes within the exceptions of this section** which entitle him to unemployment compensation in the event of a strike. Burak v. Am. Smelting & Ref. Co., 134 Colo. 255, 302 P.2d 182 (1956).

**Purpose of the "grade or class" provision in this section** is to preclude the possibility of unemployment compensation funds being used to finance, at least in part, certain types of labor disputes such as "key man" strikes in which a very small proportion of an employer's labor force can cause a shutdown of an entire operation by withdrawing their services. F.R. Orr Constr. Co. v. Indus. Comm'n, 33 Colo. App. 326, 522 P.2d 117 (1974), aff'd, 188 Colo. 173, 534 P.2d 785 (1975).

**There are two essential guidelines for the application of a "grade or class" provision:** (1) The degree of integration of the work performed by the various groups of employees, and (2) the presence of a community of interest between the striking and nonstriking employees. However, integration of work, alone, is not sufficient to preclude a claimant from establishing his eligibility. There must also be a "community of interest" between the claimants, as a class, and the striking employees. Such a "community of interest" would be evident if the claimants' wages, working conditions, fringe benefits, etc., would be affected by the outcome of the labor dispute. F.R. Orr Constr. Co. v. Indus. Comm'n, 33 Colo. App. 326, 522 P.2d 117 (1974), aff'd, 188 Colo. 173, 534 P.2d 785 (1975).

**Sympathy with strike insufficient to establish community of interest.** Where the only relationship between the striking and nonstriking employees revealed by the record is general sympathy with the strike activities of the striking union, such a relationship is inherent in all labor relations and is insufficient to establish the requisite community of interest. F.R. Orr Constr. Co. v. Indus. Comm'n, 33 Colo. App. 326, 522 P.2d 117 (1974), aff'd, 188 Colo. 173, 534 P.2d 785 (1975).

**Commission's determination as to crossing picket line is one of fact.** The question of whether claimants refused to cross picket lines, or whether no work was available and any attempt to cross picket lines would have been superfluous, is one of fact, and the determination of the commission in this regard may not be disturbed on review if supported by substantial evidence. Lamb v. Indus. Comm'n, 662 P.2d 191 (Colo. App. 1983).

**Labor dispute could not be considered direct cause of termination.** Pierce v. Indus.



Comm'n, 38 Colo. App. 85, 553 P.2d 402 (1976).

**Employer has no duty to adhere to the terms of an expired labor contract for a reasonable time to avoid creating a "construc-**

**tive lockout" situation** which would permit strikers to receive unemployment compensation under subsection (1). *Abbott v. Indus. Claim Appeals Office*, 796 P.2d 60 (Colo. App. 1990).

**8-73-110. Other remuneration - definitions.** (1) (a) An individual who is separated from employment and, because of the separation, receives additional remuneration not otherwise referred to in this section and the remuneration is not wages shall have his or her benefits postponed for a number of calendar weeks after separation from employment that is equal to the total amount of the additional remuneration, divided by the individual's usual weekly wage. The postponement required by this subsection (1) shall begin with the calendar week in which the payment was received. If the number of weeks does not equal a whole number, the remainder shall be disregarded. Notwithstanding section 8-73-107 (1) (f), any wages earned by an individual in a calendar week during postponement shall be disregarded.

(b) For purposes of this subsection (1), "individual's weekly wage" means an individual's usual or average wage earned in a representative number of calendar weeks.

(1.2) (Deleted by amendment, L. 2009, (HB 09-1076), ch. 408, p. 2248, § 1, effective June 2, 2009.)

(1.5) Repealed.

(1.6) (Deleted by amendment, L. 2009, (HB 09-1076), ch. 408, p. 2248, § 1, effective June 2, 2009.)

(2) An individual who has an award for any week and for which week he, at a subsequent date, received a pay award by reason of a decision of the national labor relations board or other source, as a result of the action taken by the national labor relations board or other source, shall immediately repay to the division such amounts as will reimburse the division for all benefit payments made for the period during which he drew benefits and for which the national labor relations board or other source has caused a payment to be made in the form of back pay award to the claimant; and the employer's account charged for such benefits shall be credited accordingly.

(3) (a) (I) Except as provided in subparagraph (II) of this paragraph (a), an individual's weekly benefit amount shall be reduced (but not below zero) by:

(A) (Deleted by amendment, L. 2009, (HB 09-1076), ch. 408, p. 2248, § 1, effective June 2, 2009.)

(B) The prorated weekly amount of a pension, retirement or retired pay, or annuity that has been contributed to by a base period employer; or

(C) The prorated weekly amount of any other similar periodic or lump-sum retirement payment from a plan, fund, or trust which has been contributed to by a base period employer.

(II) An individual's weekly benefit amount shall not be reduced when an individual receives a lump-sum retirement payment from a plan, fund, or trust that has been contributed to by a base period employer when all of the following conditions are met:

(A) The individual's separation from the employer awarding the payment is not due to a retirement pursuant to section 8-73-108 (4) (m) or (5) (e) (XXIII);

(B) The individual presents proof to the division within fourteen calendar days from date of claim or sixty calendar days of receipt of such lump-sum payment, whichever is later, that this total payment has been reinvested into an individual retirement account or KEOGH plan, as defined in 26 U.S.C. 408 or 26 U.S.C. 401, and such proof establishes that the investment is for a duration of at least one year; except that such lump-sum retirement payment shall not be considered to be received by the individual until the entire balance has been so received. Should a portion of the payment be ineligible for reinvestment and the claimant presents proof that the total eligible portion has been reinvested, only the remaining uninvested portion will be prorated in accordance with subparagraph (III) of this paragraph (a).

(III) When an individual receives a lump-sum retirement payment from a plan, fund, or trust that has been contributed to by a base period employer and such payment does not

meet all of the criteria established in subparagraph (II) of this paragraph (a), then such individual shall be determined to have received, from the date the payment was received by the individual, the individual's full-time weekly wage for a number of consecutive weeks equal to the total amount of the lump-sum retirement payment, divided by the full-time weekly wage.

(IV) An individual's weekly benefit amount shall not be reduced by any amount of a primary insurance benefit under Title II of the federal "Social Security Act" that has been contributed to by a base period employer if the employee has made contributions to federal social security.

(b) (I) An individual who has applied for a retirement payment shall be entitled to receive, if otherwise eligible, the weekly benefit amount reduced by the prorated weekly amount of the estimated or reported amount of such retirement payment. When notice of the actual or confirmed amount of the retirement payment is received by the individual, he shall advise the division and the deduction will be adjusted accordingly.

(II) If the estimated amount of the retirement payment exceeds the amount of unemployment compensation to which the individual is entitled, he shall receive one payment equal to the minimum weekly benefit amount, as prescribed by section 8-73-102 (1), other provisions of articles 70 to 82 of this title notwithstanding.

(c) For purposes of this subsection (3), "lump-sum retirement payment" means the entire balance due the individual from the plan, fund, or trust that has been contributed to by a base period employer.

(4) An individual's weekly benefit amount shall not be reduced because of the receipt of military service-connected disability compensation payable under 38 U.S.C., chapter 11, by the federal veterans administration. An individual's weekly benefit amount shall be reduced because of the receipt of a military disability retirement pension based on previous work performed by the individual, the relationship to the level of prior remuneration, or the length of service.

(5) Individuals who receive compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States shall be entitled to receive benefits for a corresponding week, if otherwise eligible, reduced by the amount of the temporary disability compensation unless the temporary disability amount has already been reduced by the unemployment insurance benefit amount.

(6) Individuals who receive sick pay benefits or other similar periodic cash payments paid to the worker by a base period employer or from any trust or fund contributed to by a base period employer shall be entitled to receive benefits for a corresponding week, if otherwise eligible, reduced by the amount of such sick pay benefits or other similar periodic cash payments.

(7) Repealed.

(8) (Deleted by amendment, L. 2009, (HB 09-1076), ch. 408, p. 2248, § 1, effective June 2, 2009.)

**Source:** L. 36, 3rd Ex. Sess.: p. 19, § 5. L. 37: p. 1255, § 3. CSA: C. 167A, § 5. L. 41: p. 766, § 5. L. 49: p. 722, § 3. L. 53: p. 624, § 5. CRS 53: § 82-4-12. L. 55: p. 533, § 2. L. 57: p. 518, § 6. L. 59: p. 564, § 6. L. 63: p. 679, § 6. C.R.S. 1963: § 82-4-10. L. 65: p. 843, § 6. L. 69: p. 671, § 6. L. 72: p. 450, § 1. L. 76: (4) and (5) amended, p. 348, § 13, effective October 1. L. 79: (3)(a)(I) amended, p. 351, § 13, effective September 30. L. 81: (3), (4), and (5) R&RE and (6) added, pp. 511, 512, §§ 2, 3, effective July 1. L. 83: (7) added, p. 430, § 4, effective June 3. L. 84: (1)(c) amended, p. 323, § 3, effective July 1. L. 85: (3)(a) amended, p. 368, § 5, effective July 1. L. 86: (1)(c) repealed, p. 547, § 12, effective May 28; IP(1), (3)(a), and (6) amended and (1.5) and (8) added, p. 543, § 7, effective July 1. L. 86, 2nd Ex. Sess.: IP(1) and (1.5) amended, (1)(c) RC&RE, and (1.2) and (1.6) added, p. 55, §§ 2, 1, effective August 15; (1.5) repealed, p. 55, § 2, effective September 1, 1986. L. 87: (3)(a) amended, p. 410, § 1, effective April 16. L. 88: (5) amended, p. 389, § 2, effective June 11. L. 90: (3)(a)(II)(B) amended and (3)(c) added, p. 613, § 1, effective March 16; (5) amended, p. 557, § 10, effective July 1. L. 92: (3)(a)(II)(B) and (3)(b)(I) amended, p. 1795, § 4, effective April 10. L. 96: (1) and (1.6) amended, p. 27, § 1, effective March 13. L. 2000: (3)(a)(I) amended,



p. 1393, § 1, effective October 1. **L. 2009:** (1), (1.2), (1.6), (3)(a)(I)(A), and (8) amended and (3)(a)(IV) added, (HB 09-1076), ch. 408, p. 2248, § 1, effective June 2.

**Editor's note:** Subsection (7)(b) provided for the repeal of subsection (7) effective July 1, 1984. (See L. 83, p. 430.)

**Cross references:** For Title II of the "Social Security Act", see 42 U.S.C. § 401 et seq.

## ANNOTATION

**Law reviews.** For article, "Administrative Law", which discusses recent Tenth Circuit decisions dealing with the offset of unemployment compensation by social security benefits, see 64 Den U. L. Rev. 122 (1987).

**"Wages in lieu of notice" disqualify employee for benefits.** This section disqualifies an employee for benefits for any week with respect to which he is receiving or has received remuneration in the form of wages in lieu of notice. *Indus. Comm'n v. Sirokman*, 134 Colo. 481, 306 P.2d 669 (1957).

**But separation allowance for periods of employment prior to separation are not "wages in lieu of notice".** Where "wages received as separation allowance" were received with respect to periods of employment which were prior to the separation, and not with respect to periods of time or weeks subsequent thereto, the allowance cannot be considered to be "wages in lieu of notice". *Indus. Comm'n v. Sirokman*, 134 Colo. 481, 306 P.2d 669 (1957).

**Payments from the public employees' retirement association fund** are payments from a fund contributed to by an employer under subsection (3)(a), which deals with unemployment benefits. *Johnson v. Div. of Emp.*, 191 Colo. 38, 550 P.2d 334 (1976).

On appeal from a decision denying the application of claimant for unemployment compensation benefits by reason of leaving state employment, supreme court held that the interpretation of payments from the public employees' retirement association fund as payments from a fund contributed to by an employer did not deny equal protection although claimant could have taken a lump sum refund of her public employees' retirement association contributions and thus would not be receiving retirement "pay" or "payments" within the meaning of this section and would have been entitled to unemployment compensation, since neither suspect classifications nor the infringement of fundamental rights were involved and the statutory discrimination had some reasonable basis. *Johnson v. Div. of Emp.*, 191 Colo. 38, 550 P.2d 334 (1976).

Where claimant for unemployment compensation benefits was employed in state service for 28 years, she was compelled to retire at the age of 57 because her husband's health required a move to a warmer climate, she elected to receive

retirement benefits on a reduced annuity basis, and the benefits were paid to her in monthly installments of \$460, the claimant's claim was correctly denied on the basis of subsection (3)(a). *Johnson v. Div. of Emp.*, 191 Colo. 38, 550 P.2d 334 (1976).

**Legislative intent in enacting subsection (3)** was to match Colorado pension-offset provisions exactly to the federal model. *Edwards v. Valdez*, 602 F. Supp. 361 (D. Colo. 1985); *Redin v. Empire Oldsmobile, Inc.*, 746 P.2d 52 (Colo. App. 1987); *Cericalo v. Indus. Claim Appeals Office*, 114 P.3d 100 (Colo. App. 2005).

**Where claimant receives social security disability insurance (SSDI) benefits, subsection (3)(a)(I)(A) requires a claimant's unemployment benefits to be reduced or offset by half the amount of the SSDI benefits.** *Cericalo v. Indus. Claim Appeals Office*, 114 P.3d 100 (Colo. App. 2005).

**Because subsection (3)(a)(I)(A) applies the offset both to individuals receiving SSDI benefits and to individuals receiving retirement benefits, it does not discriminate on the basis of disability.** *Cericalo v. Indus. Claim Appeals Office*, 114 P.3d 100 (Colo. App. 2005).

**Offset in subsection (3) should be applied only** when a claimant is retired or is retiring at the termination of his employment, and the retirement benefits contributed to by the employer are in fact immediately available for utilization by the employee. *Redin v. Empire Oldsmobile, Inc.*, 746 P.2d 52 (Colo. App. 1987) (decided prior to 1987 amendments).

**In subsection (3)(a)(I)(B), "base period" means the time before the filing of a claim for unemployment benefits that an employee must be paid wages to be eligible for unemployment benefits.** The reference in subsection (3)(a)(I)(B) to a pension that has been contributed to by a base period employer means a pension that the employer has contributed to during the employee's base period. Therefore, a pension that arises from previous employment with the same employer does not reduce the unemployment benefit amount. *Hopkins v. Indus. Claim Appeals Office*, \_\_\_ P.3d \_\_\_ (Colo. App. 2011).

**The state of Colorado and the state unemployment commission** are not liable if the unemployment insurance fund runs dry. *Edwards v. Valdez*, 602 F. Supp. 361 (D. Colo. 1985).

**Policy of this section** is to prevent "double dipping" by persons who are retired or are retiring at the termination of their employment. *Redin v. Empire Oldsmobile, Inc.*, 746 P.2d 52 (Colo. App. 1987).

**Severance allowance interpreted.** Payments received by employee which were based upon length of services and current salary constituted a severance allowance. *Bockmon v. Mountain States Tel. & Tel.*, 739 P.2d 887 (Colo. App. 1987).

But a lump sum payment made to the employee in consideration of the employee's release of all common law and statutory claims against the employer does not constitute a severance allowance and does not reduce the em-

ployee's right to unemployment compensation. *Moore v. Digital Equip. Corp.*, 868 P.2d 1170 (Colo. App. 1994).

A lump-sum payment the primary purpose of which was not to obtain a release of claims but to provide additional compensation after separation constituted a severance allowance. *Pero v. Indus. Claim Appeals Office*, 46 P.3d 484 (Colo. App. 2002).

**Applied in** *Hartman v. Freedman*, 197 Colo. 275, 591 P.2d 1318 (1979); *Schmidt v. Indus. Comm'n*, 42 Colo. App. 253, 600 P.2d 76 (1979); *Green v. Indus. Claim Appeals Office*, 765 P.2d 1064 (Colo. App. 1988); *Laszar v. Indus. Claim Appeals Office*, 230 P.3d 1263 (Colo. App. 2009).

**8-73-111. Compensation from other state.** An individual shall not receive an award for any week with respect to which or a part of which he has received or is seeking unemployment benefits under an unemployment compensation law of another state, the federal government, or a foreign country. If the appropriate agency of such other state, the federal government, or a foreign country finally determines that he is not entitled to such unemployment benefits, this lack of award shall not apply. For the purposes of this section, a law of the federal government providing payments of any type and for any amount for periods of unemployment due to lack of work shall be considered an unemployment compensation law of the federal government.

**Source:** L. 36, 3rd Ex. Sess.: p. 19, § 5. CSA: C. 167A, § 5. L. 39: p. 571, § 3. L. 41: p. 766, § 5. L. 45: p. 712, § 2. L. 49: p. 722, § 3. L. 53: p. 624, § 5. CRS 53: § 82-4-13. L. 63: p. 680, § 7. C.R.S. 1963: § 82-4-11.

**8-73-112. Benefits payable after receiving workers' compensation benefits.** Any provision of the law to the contrary notwithstanding, a person who is separated from employment due to an accident or injury resulting in a temporary total disability for which he has been compensated under section 8-42-105, if otherwise eligible, shall be entitled to receive, after the termination of the continuous period of disability, benefits under this article which were available and in effect at the time of separation from employment. Payment of benefits for a week under this section shall be made only if a claim therefor is filed within the four weeks immediately following the termination of the continuous period of total disability and the week for which benefits are claimed occurs within three years after the date of separation from employment. Only one benefit year may be established under the provisions of this section.

**Source:** L. 69: p. 684, § 1. C.R.S. 1963: § 82-4-12. L. 91: Entire section amended, p. 1908, § 9, effective June 1.

## ANNOTATION

**Termination of the continuous period of total disability occurs upon administrative order regarding vocational rehabilitation.** If an injured employee has been ordered to undergo a vocational rehabilitation evaluation, the period of continuous disability terminates on the date of the administrative determination regarding vocational rehabilitation. *Fluke v. Indus. Claim Appeals Office*, 799 P.2d 468 (Colo. App. 1990).

**The three-year requirement of this section is not similar to a statute of limitations.** Rather, it is a substantive limitation upon the total amount of unemployment benefits to which an injured employee who has been receiving temporary workers' compensation is entitled. In no event is such an employee entitled to unemployment benefits for any week commencing at a date more than three years from the date of employment separation, irrespective of the date



when the claim is filed. *Lewis v. Colo. Dept. of Labor*, 924 P.2d 1183 (Colo. App. 1996).

The substantive limitation in this section is expressed in temporal terms, thus its effect is similar to a statute of repose, in the sense that because an unemployment claimant can seek benefits only for those weeks after the filing of the claim, an injured employee may never become entitled to receive unemployment benefits if that employee receives temporary total dis-

ability benefits for three years or more. *Lewis v. Colo. Dept. of Labor*, 924 P.2d 1183 (Colo. App. 1996).

**The fact that an employee does not discover that a claim** for benefits may have arisen before the temporal limitation has completely expired does not result in any due process violations. *Lewis v. Colo. Dept. of Labor*, 924 P.2d 1183 (Colo. App. 1996).

**8-73-113. Benefits payable during approved training.** (1) Notwithstanding any other provisions of articles 70 to 82 of this title, the division shall not deny benefits for any week to an otherwise eligible individual because:

(a) The individual is in training approved under section 236 (a) (1) of the federal "Trade Act of 1974", Pub.L. 93-618, codified at 19 U.S.C. sec. 2296 (a) (1), as amended;

(b) The individual left work to enroll in the training, as long as the work left is not suitable employment;

(c) Of the application of provisions of articles 70 to 82 of this title relating to availability for work, active search for work, or refusal to accept work to any week in which the individual is enrolled in the training;

(d) The individual left work that he or she engaged in on a temporary basis during a break in the training or a delay in the commencement of the training; or

(e) The individual left on-the-job training not later than thirty days after commencing the training because the training did not meet the requirements of 19 U.S.C. sec. 2296 (c) (1) (B) of the federal "Trade Act of 1974", as amended.

(2) As used in this section, "suitable employment" means, with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment, as defined for purposes of the federal "Trade Act of 1974", as amended, and wages for such work at not less than eighty percent of the individual's average weekly wage, as determined for the purposes of the federal "Trade Act of 1974", as amended.

**Source: L. 82:** Entire section added, p. 236, § 2, effective July 1. **L. 2011:** (1) amended, (SB 11-010), ch. 76, p. 208, § 1, effective March 29.

**8-73-114. Enhanced unemployment insurance compensation benefits - eligibility - approved training programs - amount of benefits - outreach - notice of funding through gifts, grants, and donations - repeal.** (1) Enhanced unemployment insurance compensation benefits are available for an eligible unemployment insurance claimant who is engaged in and making satisfactory progress, as certified by the training program provider, in an approved training program.

(2) An approved training program must prepare the eligible unemployment insurance claimant for entry into an occupation. The director shall identify occupations based upon the recommendations of local work force investment boards, working with the section of the department responsible for labor market information.

(3) (a) Enhanced unemployment insurance compensation benefits shall be payable to an eligible unemployment insurance claimant who satisfies the requirements of subsection (1) of this section as follows:

(I) The total enhanced unemployment insurance compensation benefit amount shall be equal to twenty weeks of benefits on the regular claim or forty percent of the maximum benefit amount on the regular claim, whichever is less.

(II) The enhanced unemployment insurance compensation benefit shall be paid weekly, in addition to the regular weekly benefit amount, payable in increments equal to fifty percent of the regular weekly benefit amount, rounded down to the nearest whole dollar.

(b) The division shall not pay enhanced unemployment insurance compensation benefits pursuant to this section after June 30, 2014.

(4) (a) The director of the division shall adopt rules in accordance with article 4 of title 24, C.R.S., that the director deems necessary for the proper administration, implementation, and enforcement of federal law and this section.

(b) (I) The division shall develop and improve outreach efforts to unemployed workers, and particularly traditionally underserved populations, to inform them of the availability of enhanced unemployment insurance compensation benefits under this section.

(II) The division may seek, accept, and expend gifts, grants, and donations from private or public sources, consistent with section 8-71-102, to cover its administrative costs related to its outreach efforts and the implementation of this section. The division shall not accept a gift, grant, or donation if it is subject to conditions that are inconsistent with this section or any other law of the state. Any moneys given, granted, or donated to the division pursuant to this subparagraph (II) are subject to annual appropriation by the general assembly to the division for the direct and indirect costs associated with implementing this section.

(III) (A) The division shall notify the legislative council staff when it has received adequate funding through gifts, grants, or donations to implement this section and shall include in the notification the information specified in section 24-75-1303 (3), C.R.S.

(B) This subparagraph (III) is repealed, effective July 1, 2015.

(5) The division may pay enhanced unemployment insurance compensation benefits pursuant to this section but shall not obligate expenditures beyond the limits specified in this section or as otherwise established by the general assembly. For the 2009-10, 2010-11, and 2011-12 fiscal years, the director may obligate a total of fifteen million dollars to be expended over those three fiscal years. For the 2012-13 and 2013-14 fiscal years, the director may obligate a total of eight million dollars to be expended to pay enhanced unemployment compensation benefits during those two fiscal years.

(6) By December 31, 2009, and by each December 31 thereafter until December 31, 2013, the division shall submit a report to the joint budget committee, the economic and business development committee of the house of representatives, and the business, labor, and technology committee of the senate, or their successor committees, regarding the status of the enhanced unemployment insurance compensation benefits program and the resulting outcomes. The report shall include at least the following:

(a) A demographic analysis of participants in the enhanced unemployment insurance compensation benefits program under this section, including the gender, race, age, and geographic representation of participants;

(b) The duration of the enhanced unemployment insurance compensation benefits claimed per eligible unemployment insurance claimant;

(c) (Deleted by amendment, L. 2012.)

(d) The employment and wage history of participants, including the pre-training and post-training wage and whether those participating in training return to their previous employer or occupation after training;

(e) A return on investment calculation to determine the benefits and fiscal contribution of unemployment insurance claimants participating in the program who become employed. Employers participating in the program shall provide the department information on permanent hires of program participants, as well as feedback on program value and issues, for use by the department in calculating the return on investment.

(7) Any enhanced unemployment insurance compensation benefits awarded pursuant to this section to an eligible unemployment insurance claimant that are normally chargeable to the employer shall be charged to the fund.

(8) As used in this section:

(a) (I) "Approved training program" means a vocational training, registered apprenticeship, employer-based, or entrepreneurial training program, approved by the director that:

(A) Is targeted to training for an occupation, based on labor market information; and

(B) Is likely to enhance the unemployment insurance claimant's marketable skills and earning power.

(II) "Approved training program" includes entrepreneurial training approved by the director as part of the self-employment assistance program created in article 75.5 of this title.



(III) “Approved training program” does not include any course of education primarily intended to meet the requirements of an associate, baccalaureate, or higher degree, unless the training meets specific requirements for certification, licensing, or specific skills necessary for the occupation.

(b) “Director” means the director of the division or his or her designee.

(c) “Eligible unemployment insurance claimant” means an unemployment insurance claimant on a regular or extended benefits state unemployment claim or a military or federal claim who is receiving benefits and is eligible for enhanced unemployment insurance compensation benefits pursuant to this section.

(d) “Enhanced unemployment insurance compensation benefits” means additional benefits paid to an eligible unemployment insurance claimant in accordance with this section.

(e) “Training program provider” means a postsecondary educational institution, including an institution of higher education, a community or technical college, an occupational education program, an employer, or any other entity that provides an apprenticeship or entrepreneurial training program approved by the division or authorized under the federal “Workforce Investment Act of 1998”, 29 U.S.C. sec. 2801 et seq., as amended.

(9) This section is repealed, effective July 1, 2014.

**Source:** L. 2009: Entire section added, (SB 09-247), ch. 405, p. 2232, § 6, effective July 1. L. 2012: (1), (2), (3)(b), (4)(b), (5), (6), (8), and (9) amended, (HB 12-1272), ch. 265, p. 1380, § 1, effective July 1.

## ARTICLE 74

### Claims for Benefits

**Editor’s note:** This article was numbered as article 5 of chapter 82, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1976, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1976, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editors’ notes following those sections that were relocated.

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-74-101.	Claims for benefits.	8-74-107.	Court review.
8-74-102.	Deputy’s decision.	8-74-108.	Conclusiveness of determinations and decisions.
8-74-103.	Hearing officer review.		
8-74-104.	Industrial claim appeals office review.	8-74-109.	Payment of benefits.
8-74-105.	Reconsiderations.	8-74-110.	Decisions of industrial claim appeals panel. (Repealed)
8-74-106.	Appeals - time limits - procedures.		

**8-74-101. Claims for benefits.** (1) Claims for benefits shall be made, processed, and reviewed pursuant to articles 70 to 82 of this title and such regulations as the director of the division may prescribe.

(2) Every employer shall post and maintain notices to inform his employees that he is subject to the “Colorado Employment Security Act” and has been so registered by the division. Such notices shall be conspicuously posted at or near work locations after an employer’s account number has been assigned by the division and shall be supplied by the division in reasonable numbers and without cost.

(3) Copies of articles 70 to 82 of this title and rules and regulations shall be supplied without cost by the division to any person who requests a copy.

**Source:** **L. 76:** Entire article R&RE, p. 354, § 1, effective October 1. **L. 81:** Entire section R&RE, p. 484, § 7, effective July 1. **L. 86:** (1) amended, p. 489, § 90, effective July 1.

**Editor's note:** This section is similar to former § 8-74-101 as it existed prior to 1976.

#### ANNOTATION

**Law reviews.** For article, "Defending an Unemployment Compensation Claim", see 13 Colo. Law. 69 (1984).

**8-74-102. Deputy's decision.** (1) Upon receipt of a claim, the division shall notify any other interested parties of the claim by mail or electronic means in accordance with such rules as the director of the division may promulgate. Such interested parties shall be afforded twelve calendar days after the date of such notice of the claim to present any information pertinent to the claim by mail, telephone, or electronic means in accordance with such rules as the director of the division may promulgate. Such information shall be received by the division within twelve calendar days after said date. If the twelfth calendar day falls on a weekend or a state holiday, such date shall be moved to the first working day immediately following such weekend or holiday. The interested party may present information out of time only if good cause is shown. A deputy to be designated by the director of the division shall promptly examine all materials submitted. Whenever information submitted is not clearly adequate to substantiate a decision, the deputy shall promptly seek the necessary information. If it is necessary to obtain information by mail from any source, the information shall be received by the division no later than seven calendar days after the date of the request for information. On the basis of the deputy's review, the deputy shall determine the validity of the claim and, if valid, when payment shall commence, the amount payable, and the duration of payment. The deputy shall issue a decision in all cases, even if the claimant has insufficient qualifying wages, unless the interested employer did not receive notice of the claim, except when the separation from employment is due to a lack of work and no alleged disqualifying circumstances are indicated, or unless the claimant did not file a continued claim. The deputy's decision shall set forth findings of fact, conclusions of law, and an order. The division shall promptly provide all interested parties with copies of the deputy's decision.

(2) Notwithstanding articles 70 to 82 of this title, an initial determination of arithmetic computations, wage amounts, and dates of wage payments shall not be subject to immediate appeal. Interested parties who disagree with monetary determinations of the division may request reconsideration of determinations as the director of the division, by regulation, may prescribe. A reconsidered determination of the division is subject to the provisions of section 8-74-105.

**Source:** **L. 76:** Entire article R&RE, p. 354, § 1, effective October 1. **L. 79:** Entire section amended, p. 351, § 14, effective September 30. **L. 81:** (1) amended, p. 510, § 5, effective July 1. **L. 82:** (1) amended, p. 237, § 4, effective July 1. **L. 86:** (2) amended, p. 489, § 91, effective July 1. **L. 2002:** (1) amended, p. 336, § 1, effective April 19. **L. 2007:** (1) amended, p. 803, § 3, effective August 3. **L. 2008:** (1) amended, p. 998, § 1, effective August 5.

**Editor's note:** This section is similar to former § 8-74-102 as it existed prior to 1976.

#### ANNOTATION

**Duties of deputy of division of employment.** Where a claim was filed for benefits under the employment security act, it was the administrative duty of the deputy to examine the

claim, determine its validity and make an award of appropriate benefits. *Miller v. Indus. Comm'n*, 173 Colo. 476, 480 P.2d 565 (1971) (decided under former § 8-74-102).



**Good faith reliance upon the statements of department of labor employees.** Fundamental fairness demands that delay caused by good faith reliance upon the statements of department of labor employees shall not bar claimant from filing his claims and shall constitute good cause as a matter of law for late filing. *Tucker v. Indus. Comm'n*, 708 P.2d 484 (Colo. App. 1985).

**Private postage meter marks are postmarks within the meaning of this section.** Such marks are official postmarks imprinted under license from the postal service and are entitled to all the privileges applying to the various classes of mail. *Gutierrez v. Indus. Claim App. Off.*, 841 P.2d 407 (Colo. App. 1992).

**8-74-103. Hearing officer review.** (1) Any interested party who is dissatisfied with a deputy's decision may appeal that decision and obtain a hearing covering any issue relevant to the disputed claim. The issue of a claimant's availability will be relevant to the extent set forth in section 8-73-107 (1) (c) (I) (A). The initial appeal shall be to a hearing officer designated by the director of the division and must be received by the division within twenty calendar days after the date of notification of the decision of the deputy in accordance with such rules as the director of the division may promulgate. "Deputy", as used in this article, means a person who adjudicates claims for the division when Colorado is the paying state. Wages paid in Colorado and transferred to another state in which the claimant has filed shall not be subject to adjudication by a deputy of the division or to an appeal directed to this state.

(2) The hearing officer shall have the power and authority to call, preside at, and conduct hearings pursuant to the provisions of section 8-72-108 and such regulations as the director of the division may prescribe.

(3) The hearing officer, after affording all interested parties a reasonable opportunity for a fair hearing in conformity with the provisions of this article and the regulations of the division, shall make a decision on each relevant issue raised, including findings of fact, conclusions of law, and an order. The division shall promptly provide all interested parties with copies of the hearing officer's decision.

(4) The hearing officer may conduct all appeal hearings at designated locations which are most convenient to the claimant and employer. If the claimant and employer request that such hearing be bifurcated, the division may honor this request.

**Source:** **L. 76:** Entire article R&RE, p. 355, § 1, effective October 1. **L. 79:** (1) amended and (4) added, p. 352, § 15, effective September 30. **L. 81:** Entire section R&RE, p. 484, § 8, effective July 1. **L. 86:** (2) and (3) amended, p. 489, § 92, effective July 1. **L. 96:** (1) amended, p. 383, § 7, effective April 17. **L. 2002:** (1) amended, p. 337, § 2, effective April 19. **L. 2007:** (1) amended, p. 803, § 4, effective August 3.

**Editor's note:** This section is similar to former §§ 8-74-103 and 8-74-104 as they existed prior to 1976.

## ANNOTATION

**Inadequate notice.** Notice given pursuant to this section, and the regulation relating thereto, that "All issues and factual matters affecting claimant's eligibility and qualifications for benefits will be heard ..." deprived claimant of a fair hearing within the meaning of the Social Security Act, 42 U.S.C. § 503 (a)(3). *Shaw v. Valdez*, 819 F.2d 965 (10th Cir. 1987).

**Redetermination of disqualification period.** When a claimant appeals the merits of a deputy's decision finding him eligible for only a reduced award, the period of disqualification from benefits entirely is subject to redetermination by the hearing officer. *Armijo v. Indus. Comm'n*, 44 Colo. App. 171, 610 P.2d 107 (1980).

**Hearing officer is required to independently assess evidence presented at hearing and to reach own conclusions** regarding the reason for claimant's separation from employment as well as the probative value of evidence, the credibility of witnesses, and the resolution of any conflicting testimony. *Sch. Dist. No. 1 v. Fredrickson*, 812 P.2d 723 (Colo. App. 1991).

**Statute contemplates that the hearing before the hearing officer be conducted on a de novo basis.** *Lucero v. Indus. Claim App. Office*, 812 P.2d 1191 (Colo. App. 1991).

**The time for filing of appeal can only be waived for good cause shown.** There was no good cause shown where the claimant failed to keep the division informed of his mailing ad-

dress and therefore did not receive the decision in time to file an appeal. *Sproule v. Indus. Claim Appeals Office*, 830 P.2d 1152 (Colo. App. 1992).

**Applied** in *Andrews v. Dir., Div. of Emp.*, 41 Colo. App. 408, 585 P.2d 933 (1978); *Nguyen v. Indus. Claim Appeals Office*, 174 P.3d 847 (Colo. App. 2007).

**8-74-104. Industrial claim appeals office review.** (1) Any interested party who is dissatisfied by a hearing officer's decision may appeal that decision and obtain administrative review by the industrial claim appeals office. Any such appeal must be received by the industrial claim appeals office within twenty calendar days after the date of notification of the decision of the hearing officer. The director of the division may prescribe rules for the conduct of such appeals, including apportionment of transcript costs (not to exceed the actual costs of such materials), filing methods, briefing schedules, and similar matters.

(2) Upon petition to review by an interested party, the industrial claim appeals panel may affirm, modify, reverse, or set aside any decision of a hearing officer on the basis of the evidence in the record previously submitted in the case.

(3) The industrial claim appeals office shall promptly provide all interested parties with copies of the industrial claim appeals panel's written decision and order in each case.

(4) The panel shall have the power to issue such procedural orders as may be necessary to carry out its appellate review under subsection (2) of this section, including, but not limited to, orders concerning the acceptance of appeals before the panel and orders granting or denying requests for extension of time.

**Source:** **L. 76:** Entire article R&RE, p. 355, § 1, effective October 1. **L. 79:** (1) amended, p. 352, § 16, effective September 30. **L. 81:** (1) amended, p. 485, § 9, effective July 1. **L. 86:** Entire section R&RE, p. 490, § 93, effective July 1. **L. 92:** Entire section amended, p. 1812, § 2, effective March 19. **L. 96:** (1) amended, p. 383, § 8, effective April 17. **L. 2002:** (1) amended, p. 337, § 3, effective April 19. **L. 2007:** (1) amended, p. 804, § 5, effective August 3.

**Editor's note:** This section is similar to former § 8-74-105 as it existed prior to 1976.

## ANNOTATION

**Annotator's note.** (1) Since § 8-74-104 is similar to provisions in former §§ 8-74-104 and 8-74-105 as said sections existed prior to the 1976 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12, which abolished said commission and transferred its powers, duties, and functions under this section to the industrial claim appeals office.

**Under the provisions providing for a review by the commission, the "appeal" before the commission, while not mandatory, is permissible.** *Bryant v. Hayden Coat Co.*, 111 Colo. 93, 137 P.2d 417 (1943).

**The commission has the ultimate responsibility for making the final findings of fact necessary to support its decision.** *McGinn v. Indus. Comm'n*, 31 Colo. 6, 496 P.2d 1080 (1972); *Karton v. Indus. Comm'n*, 718 P.2d 255 (Colo. App. 1986).

**An appeal in an unemployment compensation case removes the claim in its entirety,**

**and the hearing is, in effect, a trial de novo.** The administrative appellate tribunal may consider all matters at issue regardless of the ground of basis of the appeal and an appellant cannot limit the scope of the appeal by a provision in his notice of appeal. *Anderson v. Indus. Comm'n*, 29 Colo. App. 263, 482 P.2d 403 (1971).

**Notice of appeal need not enumerate with particularity all possible issues.** Where the petitioner is given an opportunity to present his claim de novo at the hearing before the referee, the notice sent to petitioner apprised him of that fact, and its declaration that all relevant issues would be considered was clear, it cannot be expected that such notice enumerate with particularity all possible relevant issues. *Anderson v. Indus. Comm'n*, 20 Colo. App. 263, 482 P.2d 403 (1971); *Ward v. Indus. Comm'n*, 699 P.2d 960 (Colo. 1985).

**Section contains no provision that would authorize an appeal absent a transcript, even for questions of law.** *Movitz v. Division of Emp. and Train.*, 820 P.2d 1153 (Colo. App. 1991).

**Restricting the scope of cross-examination.** Referee has the authority to restrict the scope of



cross-examination, and only when the restriction is severe enough to constitute a denial of the right will the limitation of cross-examination in an administrative hearing be overturned as an abuse of discretion. *Ward v. Indus. Comm'n*, 699 P.2d 960 (Colo. 1985).

**Scope of review by industrial claim appeals panel.** The jurisdiction of the industrial claim appeals panel is limited to acting in an appellate capacity in reviewing the hearing officer's findings and conclusions. *Clark v. Colo. State Univ.*, 762 P.2d 698 (Colo. App. 1988); *Brannan Sand & Gravel v. Indus. Claim Appeals Office*, 761 P.2d 771 (Colo. App. 1988).

**The commission is not held to a crystalline standard when it articulates its findings of fact.** *Allmendinger v. Indus. Comm'n*, 40 Colo. App. 210, 571 P.2d 741 (1977).

**Standard for review by industrial claim appeals panel** allows the panel to weigh the evidence and to reject a hearing officer's findings which, although supported by some evidence, are contrary to the great weight thereof. *Clark v. Colo. State Univ.*, 762 P.2d 698 (Colo. App. 1988).

**Allowing the presentation of new evidence not originally presented to the hearing officer** whose decision is being appealed is contrary to requirements of subsection (2), though the industrial claim appeals panel has the power to enter procedural orders to remedy an insufficient record. *Alfaro v. Indus. Claim Appeals Office*, 78 P.3d 1147 (Colo. App. 2003).

**The industrial claim appeals panel exceeded its authority** by substituting its own evidentiary findings for those of the referee that are amply supported by the record. The Panel's order is set aside because its ultimate findings and conclusions are not supported by the referee's factual findings. *Prince-Walker v. Indus. Claim Appeals Office*, 870 P.2d 588 (Colo. App. 1993), *aff'd sub nom. Samaritan Inst. v. Prince-Walker*, 883 P.2d 3 (Colo. 1994).

**Under this act, it is the responsibility of the division of employment and training in the first instance, and ultimately the responsibility of the industrial commission, to determine claimant's eligibility for benefits.** Thus, an employer's desire to withdraw its objection did not moot the case. *Cordova v. Indus. Comm'n*, 706 P.2d 810 (Colo. App. 1985).

**Where the decision is justified, it may not be set aside "on the technicality of unclarity of expression on the part of the commission".**

*Allmendinger v. Indus. Comm'n*, 40 Colo. App. 210, 571 P.2d 741 (1977); *Allen Co., Inc. v. Indus. Comm'n*, 735 P.2d 889 (Colo. App. 1986), *aff'd*, 762 P.2d 677 (Colo. 1988).

**Conclusion permitted by substantial evidence not disturbed on review.** Where substantial evidence permits the conclusion drawn by the commission, it will not be disturbed on review. *Allmendinger v. Indus. Comm'n*, 40 Colo. App. 210, 571 P.2d 741 (1977).

**No abuse of direction for failure of commission to order new hearing** where letter did not reveal new facts but reflected a change in the employer's interpretation of previously submitted evidence. *Cordova v. Indus. Comm'n*, 706 P.2d 810 (Colo. App. 1985).

**Industrial claim appeals office abused its discretion** in refusing to consider latent ambiguities in its waiver of transcript fees request form and patent evidence which corroborated unemployment compensation claimant's claim of mistake, particularly where claimant never received a meaningful hearing. *Richardson v. Freund and Co.*, 755 P.2d 1 (Colo. App. 1988).

**The fact that the industrial commission reversed itself within a short period of time,** and did so without fresh evidence, was not the product of arbitrariness. *Allmendinger v. Indus. Comm'n*, 40 Colo. App. 210, 571 P.2d 741 (1977).

**A failure on the part of the commission to "promptly notify" interested parties** of a decision may constitute error of a constitutional dimension. *Patterson v. Indus. Comm'n*, 39 Colo. App. 255, 567 P.2d 385 (1977).

**Commission's disregarding hearsay testimony not erroneous.** The commission does not err in disregarding the hearsay testimony of the employer's witness based on a business memorandum where the memorandum originated after the claim was filed, was not mentioned during the hearing, and was not submitted until the employer filed a petition to review the referee's decision. *Santa Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983).

**The assessment of the credibility of witnesses** is within the authority of the commission in reviewing the referee's decision. *Gandy v. Indus. Comm'n*, 680 P.2d 1281 (Colo. App. 1983).

**Applied** in *Andrews v. Dir., Div. of Emp.*, 41 Colo. App. 408, 585 P.2d 933 (1978); *Matthews v. Indus. Comm'n*, 44 Colo. App. 159, 609 P.2d 1127 (1980); *Scotfield v. Indus. Comm'n*, 697 P.2d 815 (Colo. App. 1985).

**8-74-105. Reconsiderations.** The deputy, hearing officer, or industrial claim appeals panel may, on his or its own motion, reconsider a decision within a twelve-month period subsequent to the date of decision when it appears that an apparent procedural or substantive error has occurred in connection therewith. Notification of a decision on reconsideration and the reasons therefor shall be promptly given to all interested parties. In the event that an appeal involving an original decision is pending as of the date on which a decision as a result of reconsideration is issued by the division, such appeal shall be

considered void. Any interested party who is dissatisfied by a decision that is issued as a result of reconsideration may appeal that decision in the manner set forth in section 8-74-106.

**Source:** **L. 76:** Entire article R&RE, p. 355, § 1, effective October 1. **L. 86:** Entire section amended, p. 490, § 94, effective July 1; entire section amended, p. 543, § 8, effective July 1.

**Editor's note:** This section is similar to former § 8-74-110 as it existed prior to 1976.

### ANNOTATION

**Affirmation of a decision by the review panel after appeal does not bar sua sponte review under this section.** The doctrine of res judicata does not bar review under this section, because the statute expressly authorizes the deputy to reconsider a decision within 12 months.

Univ. of Colo. v. Indus. Claim Appeals Office, 74 P.3d 510 (Colo. App. 2003).

**Applied** in Yanish v. Indus. Comm'n, 38 Colo. App. 492, 558 P.2d 1007 (1976); City of Aurora v. Indus. Comm'n, 44 Colo. App. 132, 609 P.2d 129 (1980).

**8-74-106. Appeals - time limits - procedures.** (1) The following procedures and limitations shall apply to all appeals taken pursuant to this article:

(a) Any party may petition for review of a deputy's decision by filing a petition therefor with the division within twenty calendar days after the date of notification of such decision. Notification of the decision shall be by personal delivery of the decision to an interested party or by mailing a copy of the decision to the last-known address shown in the division records of an interested party and to the interested party's attorney or representative of record, if any, or by electronic means. The date of notification shall be the date of personal delivery, the date of transmission as recorded by the division, if notification is made by electronic means, or the date of mailing of a decision.

(b) Unless, within twenty calendar days after the date of notification of a deputy's decision, an interested party petitions for review of such decision, the decision shall be final. Petitions for review may be accepted out of time only for good cause shown and in accordance with rules adopted by the director of the division.

(c) The division shall give written notice to all interested parties when a petition for review is filed. Such notice shall be pursuant to regulations adopted by the director of the division.

(d) Pursuant to section 8-72-107, each interested party shall be given such reasonable access to division records concerning the claim as is necessary for proper presentation of his position concerning the claim.

(e) Any interested party to an appeal from a deputy's decision shall be entitled to a hearing before a hearing officer. All interested parties shall have the right to be present or to be represented by an attorney or other representative at the hearing, to present such testimony and evidence as may be pertinent to the claim, and to cross-examine witnesses. The division, pursuant to regulations adopted by the director of the division, shall notify all interested parties of the hearing. Such notification shall be made not less than ten calendar days prior to the hearing.

(f) (I) The manner in which disputed claims shall be presented, the reports required from interested parties, and the conduct of hearings shall be in accordance with the provisions of this article and the regulations prescribed by the director of the division, whether or not such regulations conform to common law or statutory or regulatory rules of evidence or other technical rules of procedure.

(II) Evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts of this state. However, when necessary to do so in order to ascertain facts affecting the substantial rights of the parties to the proceeding, the person conducting the hearing may receive and consider evidence not admissible under such rules, if such evidence possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs. Objections to evidentiary



offers may be made and shall be noted in the record. The person conducting a hearing shall give effect to the rules of privilege recognized by law. He may exclude incompetent and unduly repetitious evidence. Documentary evidence may be received in the form of a copy or excerpt if the original is not readily available; but, upon request, the party shall be given an opportunity to compare the copy with the original. The division may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented. The provisions of the "State Administrative Procedure Act", article 4 of title 24, C.R.S., and particularly sections 24-4-105 and 24-4-106, C.R.S., shall not apply to hearings and court review under this article. However, the rule-making provisions of section 24-4-103, C.R.S., shall apply to this article.

(III) When the same or substantially similar evidence is relevant and material to the matters at issue in claims by more than one individual or in claims by a single individual with respect to two or more weeks of unemployment, the same time and place for considering each such claim may be fixed, hearings thereon may be jointly conducted, a single record of the proceedings may be made, and evidence introduced with respect to one proceeding may be considered as introduced in the others, if, in the judgment of the tribunal having jurisdiction over the proceeding, such consolidation would not be prejudicial to any interested party.

(IV) No person shall participate on behalf of the division in any case in which he has a direct or indirect interest.

(V) A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded but need not be transcribed unless the disputed claim is presented for further review. If necessary, the industrial claim appeals panel may listen to the recorded testimony of a hearing on a disputed claim prior to rendering a decision. If review is sought pursuant to section 8-74-107, the division shall transcribe the testimony pursuant to such regulations as the director of the division may prescribe.

(g) Repealed.

**Source:** **L. 76:** Entire article R&RE, p. 356, § 1, effective October 1. **L. 79:** (1)(e) amended and (1)(g) repealed, pp. 352, 356, §§ 17, 25, effective September 30. **L. 81:** (1)(a) and (1)(b) amended, p. 485, § 10, effective July 1. **L. 86:** (1)(a), (1)(b), (1)(c), (1)(e), (1)(f)(I), (1)(f)(II), (1)(f)(IV), and (1)(f)(V) amended, p. 490, § 95, effective July 1. **L. 96:** (1)(a) and (1)(b) amended, p. 383, § 9, effective April 17. **L. 2002:** (1)(a) amended, p. 337, § 4, effective April 19. **L. 2007:** (1)(a) and (1)(b) amended, p. 804, § 6, effective August 3.

**Editor's note:** This section is similar to former §§ 8-74-102, 8-74-104, 8-74-106, and 8-74-107 as they existed prior to 1976.

## ANNOTATION

**Annotator's notes.** (1) Since § 8-74-106 is similar to provisions in former §§ 8-74-102, 8-74-104, 8-74-106, and 8-74-107 as said sections existed prior to the 1976 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12, which abolished said commission and transferred its powers, duties, and functions under this section to the industrial claim appeals panel.

**This section requires receipt by the division, not depositing in the mail, as the determinative factor as to whether a petition is filed**

timely under subsection (1). *Andrews v. Dir., Div. of Emp.*, 41 Colo. App. 408, 585 P.2d 933 (1978); *Fink v. Indus. Comm'n*, 689 P.2d 708 (Colo. App. 1984).

**Notice lacking.** Where there is neither evidence nor presumption that would support the finding that the notice was mailed, and since the only evidence in the record indicates that the employer did not receive notice of the claim, the employer was not given notice and was improperly denied its right to a hearing and determination on the merits of the claim. *Allred v. Squirrell*, 37 Colo. App. 84, 543 P.2d 110 (1975).

**Attorney's negligent failure to timely file appeal.** The negligence of claimant's attorney in failing to timely file an appeal pursuant to sub-

section (1)(a) constitutes "good cause" for accepting the untimely appeal. *Trujillo v. Indus. Comm'n*, 648 P.2d 1094 (Colo. App. 1982).

**Attorney's reliance on information from commission.** Reliance by attorney on conversation with employee of commission during which he was told that mailing and postmarking constituted filing constitutes "good cause" for accepting the untimely appeal. *Fink v. Indus. Comm'n*, 689 P.2d 708 (Colo. App. 1984).

**It is employer's responsibility to seek extension of time for filing appeal**, and it may not rely on the absence of the general counsel as an excuse for failing to do so. *Mohawk Data Sciences Corp. v. Indus. Comm'n*, 671 P.2d 1335 (Colo. App. 1983).

**Claimant's sworn statement that he did not actually receive a copy of the referee's decision** until eight days before filing his appeal was sufficient to establish prima facie "good cause" for filing a late appeal and to require an evidentiary hearing on claimant's credibility. The mere fact that an envelope bears a correct address and sufficient postage is not a guarantee that it was properly and timely delivered. While a presumption of such delivery may arise from those facts, it is a rebuttable one. *Trujillo v. Indus. Comm'n*, 735 P.2d 211 (Colo. App. 1987).

**A hearing officer's initial decision should have been reinstated in an unemployment compensation case** where it was not appealed from or reconsidered pursuant to applicable statutory provisions. *Landers v. Indus. Comm'n*, 721 P.2d 1227 (Colo. App. 1986).

**On allegation of improper notice, commission (now hearing officer) must conduct hearing.** When claimant alleges in a request for review that the division's decision was not sent to his "last-known address" because the commission was informed that claimant was not located at that address, the commission (now hearing officer) must conduct a hearing to determine if claimant's allegation is true, and if true whether the request for review was made within 15 days after a copy of the decision was actually delivered. *Henderson v. Indus. Comm'n*, 35 Colo. App. 124, 529 P.2d 651 (1974).

When claimant admitted that she received notice of withdrawal of her appeal for failure to appear before the referee, and such notice gave claimant the opportunity for a hearing on the issue of good cause for such failure, but she had not appealed it because she had misunderstood the deputy's decision and believed she would receive full benefits, such reason was not good cause for failing to take advantage of the opportunity. *Kreigel v. Indus. Comm'n*, 702 P.2d 290 (Colo. App. 1985).

**Notice must be given to parties and attorneys of record.** Due-process requirements qualify statutory enactment, which must be interpreted, if possible, so as to conform to

constitutional standards. The court interprets the statutory requirements that the parties be given notice of the decision to necessarily require that a like notice be given to their attorneys of record. *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 184 Colo. 334, 520 P.2d 586 (1974).

**Employer representative's late arrival for hearing caused by delays** not entirely within her control constituted good cause for failure to appear at the scheduled hearing. *Albertsons, Inc. v. Indus. Comm'n*, 735 P.2d 220 (Colo. App. 1987).

**This section allows but does not require representation by counsel** at hearing and decision to grant continuance based upon request for counsel lies within discretion of hearing officer. *Voisin v. Indus. Claim Appeals Office*, 757 P.2d 171 (Colo. App. 1988).

**Representation by an attorney.** Although the unemployment act allows a party to be represented by an attorney at the hearing, it does not require counsel for parties to be present, nor does it automatically mandate a continuance if a party appears without an attorney and fails to request a continuance in order to have one present. *Larsen-Oldaker v. Indus. Comm'n*, 735 P.2d 209 (Colo. App. 1987).

**Representation by non-attorneys allowed.** Persons entitled to a hearing regarding the appeal of a deputy's decision may be represented by a non-lawyer, even though such representation constitutes practicing law. *Unauthorized Prac. of Law v. Employers Unity*, 716 P.2d 460 (Colo. 1986).

**Interrogatories not permitted.** The commission has adopted no regulations permitting the use of interrogatories at hearings, and to extend by judicial fiat the tool of interrogatories to employers in unemployment compensation hearings could well lead to intimidation and harassment of claimants, and a stifling of their pursuit of otherwise valid claims. *Denver Symphony Ass'n v. Indus. Comm'n*, 34 Colo. App. 343, 526 P.2d 685 (1974).

**Which is not denial of due process.** Not allowing an employer to have answers to written interrogatories served on each of the employees in an unemployment compensation hearing violated no common-law or statutory right, nor was the employer thereby denied due process of law. *Denver Symphony Ass'n v. Indus. Comm'n*, 34 Colo. App. 343, 526 P.2d 685 (1974).

**Hearing officer has discretion** to determine the order and manner of presentation of witnesses and evidence. *Ward v. Indus. Claim Appeals Office*, 916 P.2d 605 (Colo. App. 1995).

**Neither the statutes nor the regulations require parties to exchange documents prior to a hearing that will be conducted in person.** *QFD v. Indus. Claim Appeals Office*, 873 P.2d 32 (Colo. App. 1993).



**Cross-examination in unemployment compensation hearings may be restricted,** and only where the restriction is severe enough to constitute a denial of the right will limitation of cross-examination be overturned as an abuse of discretion. *Denver Symphony Ass'n v. Indus. Comm'n*, 34 Colo. App. 343, 526 P.2d 685 (1974).

**May not deny benefits where only evidence hearsay.** Where the only evidence supporting the commission's decision is an affidavit which is clearly hearsay, this evidence alone cannot serve as the basis for the commission's ruling denying unemployment compensation benefits. *Olivas v. Indus. Comm'n*, 33 Colo. App. 78, 515 P.2d 110 (1973).

However, the commission erred in failing to consider new evidence in the form of a letter because the letter, combined with claimant's statement, had probative value and should have been considered in determining whether the employer had met his burden. *Perez v. Indus. Comm'n*, 711 P.2d 1283 (Colo. App. 1985) (decided prior to 1986 abolishment of industrial commission).

**It is improper for the industrial commission to arrive at a decision in an unemployment compensation case which may have been based partly on hearsay documents** not presented at the hearing conducted by the referee. *Wilson v. Colo. Indus. Comm'n*, 30 Colo. App. 154, 490 P.2d 91 (1971).

**And claimant's letter rebutting hearsay is not waiver as to its consideration.** Although claimant is aware that hearsay documents have been filed with the commission and attempts by letter to rebut their effect, his actions do not constitute a waiver as to the consideration of these documents. *Wison v. Colo. Indus. Comm'n*, 30 Colo. App. 154, 490 P.2d 91 (1971).

**Hearsay testimony found unreliable.** Hearsay testimony, pursuant to subsection (1)(f)(II), found not so reliable that "reasonable and prudent men" would necessarily assign it probative value. *Sante Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983).

**Weight of hearsay evidence.** Hearsay evidence alone may be basis of determination in an unemployment compensation proceeding but only if such evidence is reliable and trustworthy and possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. *Flower Stop Marketing Corp. v. Kilgore*, 762 P.2d 747 (Colo. App. 1988), *aff'd* in part and *rev'd* in part on other grounds, 782 P.2d 13 (Colo. 1989) (applying *Kirke v. State Dept. of Rev.*, 724 P.2d 77 (Colo. 1986) and overruling the "residuum rule" holding in *Sims v. Indus. Comm'n*, 627 P.2d 1107 (Colo. 1981) and subsequent cases which applied such rule).

**Factors useful in determining whether hearsay evidence is reliable, trustworthy, and of some probative value.** *Indus. Claims Appeals Office v. Flower Stop Marketing Corp.*, 782 P.2d 13 (Colo. 1989); *Tilley v. Indus. Claim Appeals Office*, 924 P.2d 1173 (Colo. App. 1996).

**The rules of evidence are somewhat relaxed in unemployment compensation hearings.** *QFD v. Indus. Claim Appeals Office*, 873 P.2d 32 (Colo. App. 1993); *Tilley v. Indus. Claim Appeals Office*, 924 P.2d 1173 (Colo. App. 1996).

**Industrial commission files are business records.** Industrial commission file used in good cause determination of untimely requests for review of referees decision, pursuant to commission regulations enacted under an express grant of legislative authority, is admissible as a business records exception to the hearsay rule. *Kriegel v. Indus. Comm'n*, 702 P.2d 290 (Colo. App. 1985).

**Hearing officer in unemployment compensation case did not abuse discretion or deny employer fair hearing by admitting into evidence claimant's personal diary containing entries concerning incidents of alleged harassment by employer, despite employer's argument that claimant should have disclosed it prior to hearing.** When employer objected to claimant's testimony about contents of the diary, hearing officer provided employer with opportunity to review it, and at no time did employer request a continuance or adjournment of hearing to allow it further time to prepare for cross-examination or rebuttal on the exhibit. *QFD v. Indus. Claim Appeals Office*, 873 P.2d 32 (Colo. App. 1993).

**Action beyond jurisdiction of the commission.** In an unemployment compensation hearing, the industrial commission has not competency to set aside solemn pronouncement of district court in divorce proceedings pertaining to a property division agreement in which claimant voluntarily resigned her position as secretary and bookkeeper of corporation of which her husband was president in exchange for cash, property, and stock; this was beyond commission's jurisdiction. *Indus. Comm'n v. Lyle Adjustment Co.*, 160 Colo. 241, 417 P.2d 5 (1966).

**Section contains no provision which would authorize an appeal absent a transcript, even for questions of law.** *Movitz v. Division of Emp. and Training*, 820 P.2d 1153 (Colo. App. 1991).

**The time for filing of appeal can only be waived for good cause shown.** There was no good cause shown where the claimant failed to keep the division informed of his mailing address and therefore did not receive the decision in time to file an appeal. *Sproule v. Indus. Claim Appeals Office*, 830 P.2d 1152 (Colo. App. 1992).

**Applied** in *Yanish v. Indus. Comm'n*, 38 Colo. App. 492, 558 P.2d 1007 (1976); *Sanchez v. Straight Creek Constructors*, 41 Colo. App. 19, 580 P.2d 827 (1978); *Anders v. Indus.*

*Comm'n*, 649 P.2d 732 (Colo. App. 1982); *FlaHavhan v. Hewlett Packard Co.*, 675 P.2d 19 (Colo. App. 1983); *Sproule v. Indus. Claim Appeals Office*, 830 P.2d 1152 (Colo. App. 1992).

**8-74-107. Court review.** (1) No action, proceeding, or suit to set aside an industrial claim appeals panel's decision or to enjoin the enforcement thereof shall be brought unless the petitioning party has first complied with the review provisions of sections 8-74-104 and 8-74-106.

(2) Actions, proceedings, or suits to set aside, vacate, or amend any final decision of the industrial claim appeals panel or to enjoin the enforcement thereof may be commenced in the court of appeals by any interested party, including the division. Such actions, proceedings, or suits shall be commenced by filing a notice of appeal in the court of appeals within twenty days of the mailing of the industrial claim appeals panel's decision, together with a certificate of service showing service of a copy of said notice of appeal on the division, the industrial claim appeals office, and all other parties who appeared in the administrative proceedings. The industrial claim appeals office, within twenty days after the service of the notice, shall make return to said court of all documents and papers on file in the matter, of all testimony taken therein, and of certified copies of all findings, orders, and awards, which return shall be deemed its answer to said petition. Such return of the industrial claim appeals office shall constitute the judgment roll in any such action, proceeding, or suit, and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action, proceeding, or suit.

(3) The industrial claim appeals panel may certify to the court of appeals questions of law involved in any of its decisions.

(4) In judicial proceedings under this article, administrative findings as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive.

(5) Actions, proceedings, and suits to review any final decision of the industrial claim appeals panel or questions certified to the court of appeals by such panel shall be heard in an expedited manner and shall be given precedence over all other civil cases, except cases arising under the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title.

(6) The industrial claim appeals panel's decision may be set aside only upon the following grounds:

- (a) That the industrial claim appeals panel acted without or in excess of its powers;
- (b) That the decision was procured by fraud;
- (c) That the findings of fact do not support the decision;
- (d) That the decision is erroneous as a matter of law.

**Source:** **L. 76:** Entire article R&RE, p. 357, § 1, effective October 1. **L. 84:** (2) amended, p. 318, § 8, effective July 1. **L. 86:** (1) to (5), IP(6), and (6)(a) amended, p. 492, § 96, effective July 1. **L. 90:** (5) amended, p. 557, § 11, effective July 1. **L. 92:** (2) amended, p. 1812, § 3, effective March 19.

**Editor's note:** This section is similar to former §§ 8-74-108 and 8-74-109 as they existed prior to 1976.

## ANNOTATION

**Annotator's notes.** (1) Since § 8-74-107 is similar to provisions in former § 8-74-109 as it existed prior to the 1976 repeal and reenactment of this article, relevant cases construing that provisions have been included with the annotations to this section.

(2) Cases included in the annotations to this section which refer to the industrial commission were decided prior to the enactment of 1986 Senate Bill No. 12, which abolished said com-

mission and transferred its powers, duties, and functions under this section to the industrial claim appeals panel.

**Appellate review not inherent right.** Appellate review of an industrial commission order is not an inherent right. Appellate jurisdiction is derived from the statutory and constitutional provisions by which the right of appeal is created and can be acquired and exercised only in the manner prescribed therein. Colo. Div. of



Emp. & Training v. Indus. Comm'n, 665 P.2d 631 (Colo. App. 1983).

**In construing the employment security act, the court should apply a liberal construction favoring claimants.** Adams v. Indus. Comm'n, 31 Colo. App. 340, 501 P.2d 1334 (1972); Allen v. Indus. Comm'n, 36 Colo. App. 330, 540 P.2d 358 (1975).

**But one seeking to exercise a statutory right of review or appeal must follow and comply with the procedure prescribed.** Washburn v. Indus. Comm'n, 153 Colo. 500, 386 P.2d 975 (1963).

**Statute contains no provision that allows a court to engraft the principles or provisions of C.R.C.P. 60(b), either directly or indirectly, into the court's review proceedings.** Huddy v. Indus. Claim Appeals Office, 894 P.2d 60 (Colo. App. 1995).

**Proper parties must be aggrieved by commission's decision.** Absent allegation or evidence that department of labor and employment was aggrieved by decision of industrial commission, division of employment and department of labor and employment were not proper parties to bring the appeal from decision of industrial commission denying an award of unemployment compensation. Division of Emp. ex rel. Scachez v. Colo. Indus. Comm'n, 31 Colo. App. 259, 500 P.2d 1192 (1972).

**Commission's factual determinations conclusive where supported by substantial evidence.** The commission's factual determinations concerning the reasons for an employer's failure timely to file an appeal are conclusive if supported by substantial evidence. Mohawk Data Sciences Corp. v. Indus. Comm'n, 671 P.2d 1335 (Colo. App. 1983).

**Judicial review by the court of appeals is limited to a review of the commission's findings and decision.** McGinn v. Indus. Comm'n, 31 Colo. 6, 496 P.2d 1080 (1972).

**And if the evidence would support the findings made by the industrial commission, the court of appeals must affirm.** Bryant v. Hayden Coal Co., 111 Colo. 93, 137 P.2d 417 (1943); Indus. Comm'n v. Brady, 128 Colo. 490, 263 P.2d 578 (1953); Indus. Comm'n v. Wilbanks, 130 Colo. 36, 274 P.2d 99 (1954); Burak v. Am. Smelting & Ref. Co., 134 Colo. 255, 302 P.2d 182 (1956); Morrison Rd. Bar. Inc. v. Indus. Comm'n, 138 Colo. 16, 328 P.2d 1076 (1958); Sayers v. Am. Janitorial Serv., Inc., 162 Colo. 292, 425 P.2d 693 (1967); Ruby v. Yellow Cab, Inc., 163 Colo. 297, 430 P.2d 463 (1967); Stensvad v. Indus. Comm'n, 167 Colo. 140, 445 P.2d 898 (1968); Gatewood v. Russell, 29 Colo. App. 11, 478 P.2d 679 (1970); Tague v. Coors Porcelain Co., 30 Colo. App. 158, 490 P.2d 96 (1971); Radis v. Indus. Comm'n, 31 Colo. App. 355, 502 P.2d 977 (1972).

Where the resolution of a factual issue was within the province of the commission and

where there is substantial evidence to support the finding, an appellate court will not disturb it on review. Wade v. Hurley, 33 Colo. App. 30, 515 P.2d 491 (1973).

If there is substantial evidence in the record to support the factual determinations of the commission, a court should not substitute its judgment for that of the commission. Denver Symphony Ass'n v. Indus. Comm'n, 34 Colo. App. 343, 526 P.2d 685 (1974).

On judicial review of unemployment proceedings, the findings of the commission as to the facts, if supported by the evidence, shall be conclusive. Allen v. Indus. Comm'n, 36 Colo. App. 330, 540 P.2d 358 (1975).

Resolution of conflicts in the evidence is a matter properly left to the commission. Where there is evidence supporting the commission's conclusion on an issue, the commission's decision may not be disturbed on appeal. In re Krantz v. Kelran Constructors, Inc., 669 P.2d 1049 (Colo. App. 1983).

A decision of the panel may not be set aside where there are findings of fact supported by substantial evidence. Colo. Div. of Emp. & Train. v. Hewlett, 777 P.2d 704 (Colo. 1989).

**And will not be set aside where based upon conflicting evidence.** Findings of fact by the industrial commission should not be set aside by reviewing court where such findings are the result of a resolution on conflicting evidence. Bryant v. Hayden Coal Co., 111 Colo. 93, 137 P.2d 417 (1943); McGinn v. Indus. Comm'n, 31 Colo. 6, 496 P.2d 1080 (1972).

Where evidence is conflicting and susceptible to conflicting inferences, the commission's decision will not be disturbed. Olivas v. Indus. Comm'n, 33 Colo. App. 273, 518 P.2d 304 (1974).

**But court not bound by commission's findings where no conflict in evidence.** Where there is not material conflict in the evidence before the industrial commission acting as the unemployment compensation commission, the courts may reach their own conclusions and are not bound by the findings of fact of the commission. Indus. Comm'n v. Emerson W. Co., 149 Colo. 529, 369 P.2d 791 (1962); Denver Post Corp. v. Indus. Comm'n, 677 P.2d 436 (Colo. App. 1984).

**The commission's order may be set aside if there is not substantial evidence to support it.** Stern v. Indus. Comm'n, 667 P.2d 244 (Colo. App. 1983).

**Commission decisions must be set aside if erroneous.** Ward v. Indus. Comm'n, 44 Colo. App. 301, 612 P.2d 1164 (1980).

**Denial of benefits by referee was ambiguous and reversible error** when it did not clearly set out the effect of the disqualification on claimant's future benefits and failed to advise claimant of the amount of benefits the claimant

was eligible to receive. *Davis v. Indus. Claim Appeals Office*, 982 P.2d 330 (Colo. App. 1999).

**Finding that claimant was unemployed through no fault of his own supported by substantial evidence.** See *Sante Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983).

**A determination as to whether a claimant is responsible or "at fault" for separation from employment is a legal conclusion based on established findings of evidentiary fact, rather than a question of evidentiary fact.** Accordingly, ruling based on lack of fault must be set aside if established findings of evidentiary fact do not support conclusion that claimant was at fault. *Bd. of Water Comm'rs v. Indus. Claim Appeals Office*, 881 P.2d 476 (Colo. App. 1994).

**Substantial evidence** is evidence which is probative, credible, and competent and which would warrant a reasonable belief in the existence of facts supporting finding. *Kalkbrenner v. Indus. Claim Appeals Office*, 801 P.2d 545 (Colo. App. 1990).

**Perfection of appeal includes correct joinder of indispensable parties** within the original 20-day period. *Sakal v. Indus. Comm'n*, 620 P.2d 65 (Colo. App. 1980); *E.E.O.C. v. Indus. Comm'n*, 680 P.2d 855 (Colo. App. 1984).

**Failure to join a former employer who is considered an indispensable party** will deprive the court of jurisdiction. *Johnson v. Indus. Comm'n*, 652 P.2d 1109 (Colo. App. 1982).

**But employer who is not indispensable party need not be joined.** An employer who has no direct involvement in the issue on appeal is not an indispensable or necessary party, and need not be joined. *Asche v. Indus. Comm'n*, 654 P.2d 813 (Colo. 1982).

**Employer's status as indispensable party determined on facts.** An employer's status as an indispensable party in unemployment compensation appeals is not automatic but must be determined on the facts of each case. *Asche v. Indus. Comm'n*, 654 P.2d 813 (Colo. 1982).

**Former employer deemed indispensable party.** In an appeal of an unemployment compensation claim, a former employer has an interest which could be adversely affected by the outcome and is, therefore, an indispensable party. *Sakal v. Indus. Comm'n*, 620 P.2d 65 (Colo. App. 1980).

**Filing petition in court of appeals commences appellate process.** Filing a petition for review directly in the court of appeals within the statutory 20-day period sufficiently commenced the appellate process for purposes of this section, even though petitioner did not effect service of process on the commission until after the expiration of that period. *Bd. of County Comm'rs v. Indus. Comm'n*, 664 P.2d 256 (Colo. App. 1983) (decided prior to 1984 amendment to subsection (2)).

In an unemployment compensation case, an appeal is perfected by filing a petition for review

of a final decision of the industrial commission with the court of appeals within 20 days after notification of the final decision. In *re Lowery v. Indus. Comm'n*, 666 P.2d 562 (Colo. 1983) (decided prior to 1984 amendment to subsection (2)).

**Twenty-day period for filing notice of appeal of final orders of commission** commences to run when the commission mails its final order. *Lutheran Hosp. & Homes Soc. v. Indus. Comm'n*, 710 P.2d 496 (Colo. App. 1985).

**Notice sufficient** where notice to commission was timely mailed to an address other than that specified in the commission's final order and the commission was clearly set up to accept service of some matters at that address. *Haynes v. Interior Investments*, 725 P.2d 100 (Colo. App. 1986) (decided prior to 1986 abolishment of industrial commission).

**Where the notice of final order** failed to state the requirements of this section, as changed by the 1984 amendment, the order is misleading and lack of service on the commission will not be fatal to the petition for review. *Scofield v. Indus. Comm'n*, 697 P.2d 815 (Colo. App. 1985).

**A final order is one** which completely determines the rights of the parties without further action by the tribunal. A finding by the industrial claim appeals office that claimant showed good cause for her late appeal allows further action on the merits of claimant's appeal, and is therefore not a final decision subject to appeal. *Agren, Blando & Assocs., Inc. v. Oleston*, 746 P.2d 68 (Colo. App. 1987).

**Petition for review in court of appeals does not need to state grounds.** Following the 1976 revision of the Employment Security Act, there is no longer a requirement of a specification of the grounds for appeal in a separate petition for review in the court of appeals. *Stern v. Indus. Comm'n*, 653 P.2d 742 (Colo. 1982).

**Inadequacy of findings.** Where the only finding made by the industrial commission upon reversal is that claimant became separated from his employment under conditions contemplated in § 8-73-108 (6)(i), the finding of the commission is inadequate. Subsection (6)(i) covers a number of causative factors and from such a finding the court of appeals is unable to determine the evidentiary and ultimate facts upon which the commission based its conclusion. *Wilson v. Indus. Comm'n*, 30 Colo. App. 154, 490 P.2d 91 (1971).

Where there is no substantial supportive evidence of the facts found by the commission, the commission's determination must be set aside. *Allen v. Indus. Comm'n*, 36 Colo. App. 330, 540 P.2d 358 (1975).

**But where there are no material factual errors** in the findings of the commission, the commission's order will not be set aside. *Gandy*



v. Indus. Comm'n, 680 P.2d 1281 (Colo. App. 1983).

**Hearing officer has jurisdiction** to remand a matter for further proceedings when it appears the claimant has become separated from employment after the filing of the initial claim, but before the hearing date. *Debalco v. Indus. Claim Appeals Office*, 32 P.3d 621 (Colo. App. 2001).

**Test for fraud is the same as that for setting aside a judgment.** *Cisneros v. Cisneros*, 163 Colo. 245, 430 P.2d 86 (1967); *Cordova v. Indus. Comm'n*, 706 P.2d 810 (Colo. App. 1985).

**Statute as basis for jurisdiction.** See *In re Interrogatories by Indus. Comm'n*, 30 Colo. App. 599, 496 P.2d 1064 (1972); *Schenk v. Indus. Comm'n*, 40 Colo. App. 350, 579 P.2d 1171 (1978).

**Applied** in *Pierce v. Indus. Comm'n*, 195 Colo. 10, 576 P.2d 1012 (1978); *Mountain States Tel. & Tel. Co. v. Indus. Comm'n*, 637 P.2d 401 (Colo. App. 1981); *Marlin Oil Co. v. Indus. Comm'n*, 641 P.2d 312 (Colo. App. 1982); *Nielson v. AMI Indus., Inc.*, 759 P.2d 834 (Colo. App. 1988); *Cole v. Indus. Claim Appeals Office*, 964 P.2d 617 (Colo. App. 1998).

**8-74-108. Conclusiveness of determinations and decisions.** Any right, fact, or matter in issue directly passed upon or necessarily involved in a decision of a deputy, a hearing officer, the industrial claim appeals office, or the court of appeals which has become a final decision under this article, after appeal procedures, if initiated, have been completed or otherwise terminated, shall be conclusive for all the purposes of articles 70 to 82 of this title as between all interested parties. No finding of fact or law, judgment, conclusion, or final order made with respect to a determination made under articles 70 to 82 of this title may be conclusive or binding or used as evidence in any separate or subsequent action or proceeding in another forum, except proceedings under articles 70 to 82 of this title, regardless of whether the prior action was between the same or related parties or involved the same facts. No findings of fact or law, judgment, conclusion, or final order made by any other agency, administrative body, or forum that are not made pursuant to articles 70 to 82 of this title shall be binding on the division for the purposes of articles 70 to 82 of this title.

**Source:** L. 76: Entire article R&RE, p. 358, § 1, effective October 1. L. 84: Entire section amended, p. 318, § 9, effective July 1. L. 86: Entire section amended, p. 493, § 97, effective July 1. L. 87: Entire section amended, p. 404, § 2, effective April 16. L. 92: Entire section amended, p. 1795, § 5, effective April 10.

**Editor's note:** This section is similar to former § 8-74-111 as it existed prior to 1976.

## ANNOTATION

**Law reviews.** For article, "Claim and Issue Preclusion Arising from Unemployment Compensation Decisions", see 13 Colo. Law. 815 (1984).

**Determinations made under employment security act are not binding on the parties under any other statutory or contractual relationship** or on any other agency or court. *City of Colo. Springs v. Indus. Comm'n*, 720 P.2d 601 (Colo. App. 1985), *aff'd*, 749 P.2d 412 (Colo. 1988).

**In conducting unemployment proceeding, hearing officer was not bound by determinations** of administrative law judge pursuant to Teacher Employment, Dismissal, and Tenure Act that employment of teacher be terminated because of using physical force in disciplining students and insubordination. *Sch. Dist. No. 1 v. Fredrickson*, 812 P.2d 723 (Colo. App. 1991).

**8-74-109. Payment of benefits.** (1) Notwithstanding any other provisions of this article, if a decision grants benefits to a claimant, such benefits shall be promptly paid in accordance with and upon issuance of the decision. If further benefits are granted by a subsequent decision, all accrued and unpaid benefits shall be promptly paid. If a subsequent decision denies or reduces benefits, subsequent benefits shall be denied or reduced pursuant to and upon issuance of the decision. If the final decision denies benefits, no employer's rating account shall be charged with benefits paid.

(2) If by reason of fraud, mistake, or clerical error a claimant receives moneys in excess of benefits to which he is entitled or if a claimant receives benefits to which he is

subsequently determined to be not entitled as a result of a final decision in the appeals process, the division shall recoup such moneys in accordance with section 8-79-102 and such regulations as may be prescribed by the director of the division.

**Source:** **L. 76:** Entire article R&RE, p. 358, § 1, effective October 1. **L. 83:** (2) amended, p. 430, § 5, effective June 3. **L. 86:** (2) amended, p. 493, § 98, effective July 1.

### ANNOTATION

The essence of the act is its provision for the prompt payment of benefits to those unemployed. Any substantial delay would defeat this purpose and would bring back the evil sought to be avoided. Withholding benefits for long periods through the slow process of appeal to the court is not harmony with the beneficent and remedial purposes of the act. *Bayly Mfg. Co. v. Dept. of Emp.*, 155 Colo. 433, 395 P.2d 216 (1964) (decided under former § 8-74-102).

**Knowledge of section presumed of claimant.** A claimant who has requested benefits pursuant to the unemployment compensation statutes must be presumed to have knowledge of § 8-81-101 and this section, which specifically provide for recovery of benefits paid in error. *Paul v. Indus. Comm'n*, 632 P.2d 638 (Colo. App. 1981).

### 8-74-110. Decisions of industrial claim appeals panel. (Repealed)

**Source:** **L. 89:** Entire section added, p. 371, § 2, effective July 1. **L. 92:** Entire section repealed, p. 1812, § 4, effective March 19.

## ARTICLE 75

### Extended Benefits Program

**Editor's note:** This article was numbered as article 13 of chapter 82, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1971, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1971, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

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#### PART 2

##### WORK SHARE PROGRAM

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## PART 1

## EXTENDED BENEFITS

**8-75-101. Definitions.** As used in this part 1, unless the context otherwise requires:

(1) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and, if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(2) (a) "Exhaustee" means an individual who, with respect to any week of unemployment in his or her eligibility period:

(I) Has received, prior to such week, all of the regular benefits that were payable to him under articles 70 to 82 of this title or any other state law (including dependents' allowances and regular benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C., chapter 85) for his benefit year that includes such week;

(II) Has received, prior to such week, all of the regular benefits that were available to him under articles 70 to 82 of this title or any other state law (including dependents' allowances and regular benefits available to federal civilian employees and ex-servicemen under 5 U.S.C., chapter 85) in his benefit year that includes such week, after the cancellation of some or all of his wage credits or the total or partial reduction of his right to regular benefits. For the purposes of this subparagraph (II) and subparagraph (I) of this paragraph (a), an individual shall be deemed to have received in his applicable benefit year all of the regular benefits that were payable to him or available to him, as the case may be, even though:

(A) As a result of a pending appeal with respect to wages or employment, or both, that was not included in the original monetary determination with respect to such benefit year, he may subsequently be determined to be entitled to more regular benefits; or

(B) By reason of the seasonal provisions of another state law, he is not entitled to regular benefits with respect to such week of unemployment (although he may be entitled to regular benefits with respect to future weeks of unemployment in the next season or off-season, as the case may be, in such benefit year), and he is otherwise an exhaustee within the meaning of this subsection (2) with respect to his right to regular benefits under such other state law's seasonal provisions during the season or off-season in which that week of unemployment occurs; or

(C) Having established a benefit year, no regular benefits are payable to him during such year because his wage credits were cancelled or his right to regular benefits was totally reduced as a result of the application of a disqualification;

(III) His benefit year having ended prior to such week, has insufficient wages or employment, or both, on the basis of which he could establish in any state a new benefit year that would include such week or, having established a new benefit year that includes such week, he is precluded from receiving regular benefits by reason of the provisions of section 8-73-107 (2) which meet the requirements of section 3304 (a) (7) of the "Federal Unemployment Tax Act" or a similar provision in any other state law;

(IV) Has no right for such week to unemployment benefits or allowances, as the case may be, under the "Railroad Unemployment Insurance Act", the "Trade Expansion Act of 1962", and such other federal laws as are specified in regulations issued by the United States secretary of labor;

(V) Has not received and is not seeking for such week unemployment benefits under an unemployment compensation law of Canada, unless the appropriate agency finally determines that he is not entitled to unemployment benefits under such law for such week; or

(VI) Has received all of the unemployment compensation benefits pursuant to part 2 of this article and regular unemployment compensation benefits available in a benefit year.

(b) "Applicable benefit year", as used in this subsection (2), means, with respect to an individual, his current benefit year if at the time he files a claim for extended benefits he has an unexpired benefit year only in the state in which he files such claim or, in any other case, his most recent benefit year. For the purpose of this paragraph (b), his "most recent benefit year", if he has unexpired benefit years in more than one state when he files a claim for extended benefits, is the benefit year with the latest ending date or, if such benefit years have

the same ending date, the benefit year in which his latest continued claim for regular benefits was filed.

(3) (a) "Extended benefit period" means a period which:

- (I) Begins with the third week after a week for which there is an "on" indicator; and
- (II) Ends with either of the following weeks, whichever occurs later:
  - (A) The third week after the first week for which there is an "off" indicator; or
  - (B) The thirteenth consecutive week of such period.

(b) But no extended benefit period may begin by reason of an "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state.

(4) "Extended benefits" means benefits as defined in section 8-70-110 (1) (b).

(4.5) "High unemployment period" means a period in which the seasonally adjusted total unemployment rate, as determined by the United States secretary of labor, for the most recent three months for which data for all states is published, equals or exceeds eight percent.

(5) and (6) Repealed.

(7) "Rate of insured unemployment", for the purposes of subsection (11) of this section, means the percentage derived by dividing: The average weekly number of individuals filing claims for regular compensation in this state for weeks of unemployment with respect to the most recent consecutive thirteen-week period as determined by the division on the basis of its reports to the United States secretary of labor, by the average monthly employment covered under articles 70 to 82 of this title for the first four of the six most recently completed calendar quarters ending before the end of such thirteen-week period.

(8) "Regular benefits" means benefits as defined in section 8-70-110 (1) (a).

(9) "State law" means the unemployment insurance law of any state, approved by the United States secretary of labor under section 3304 of the federal "Internal Revenue Code of 1986", as amended.

(9.5) "Total unemployment rate" or "TUR" means the percentage derived by dividing the number of all unemployed persons in the civilian labor force by the number of individuals comprising the total labor force, including both employed and unemployed individuals, and then multiplying that number by one hundred.

(10) There is an "off" indicator for a week if, for the period consisting of such week and the immediately preceding twelve weeks, either:

(a) Sub-subparagraph (A) or (C) of subparagraph (I) of paragraph (a) of subsection (11) of this section was not satisfied, and subparagraph (II) of paragraph (a) of subsection (11) of this section was not satisfied; or

(b) Sub-subparagraph (B) or (C) of subparagraph (I) of paragraph (a) of subsection (11) of this section was not satisfied, and subparagraph (II) of paragraph (a) of subsection (11) of this section was not satisfied.

(11) (a) There is an "on" indicator for a week if the rate of insured unemployment under articles 70 to 82 of this title for the period consisting of such week and the immediately preceding twelve weeks:

(I) (A) Equaled or exceeded one hundred twenty percent of the average of such rates for the corresponding thirteen-week period ending in each of the preceding two calendar years; or

(B) Equaled or exceeded one hundred twenty percent of the average of such rates for the corresponding thirteen-week period ending in each of the preceding three calendar years with respect to weeks beginning on or after December 17, 2010, and ending December 31, 2011, or while Pub.L. 111-312 and any amendments thereto are in effect; and

(C) Equaled or exceeded five percent; or

(II) Equaled or exceeded six percent.

(b) Repealed.

**Source:** L. 71: R&RE, p. 943, § 18. C.R.S. 1963: § 82-13-1. L. 73: p. 961, § 12. L. 76: (2) R&RE, p. 349, § 15, effective October 1. L. 77: (2)(a)(V) amended and (5), (6), (10), and (11) R&RE, pp. 465, 466, §§ 17, 18, effective July 7. L. 82: (3)(a)(I),



(3)(a)(II)(A), (3)(b), (7), (10), and (11)(a) amended and (5), (6), and (11)(b) repealed, pp. 237, 240, §§ 5, 11, effective July 1. **L. 83:** (10) amended, p. 2047, § 1, effective October 14. **L. 90:** (4) and (8) amended, p. 604, § 8, effective April 3. **L. 92:** (2)(a)(V) amended, p. 1796, § 6, effective April 10. **L. 2000:** (9) amended, p. 1838, § 3, effective August 2. **L. 2009:** (4.5) and (9.5) added, (SB 09-247), ch. 405, p. 2235, § 8, effective July 1. **L. 2010:** IP and IP(2)(a) amended and (2)(a)(VI) added, (SB 10-028), ch. 397, p. 1890, § 2, effective June 9. **L. 2011:** (10) and (11)(a) amended, (SB 11-010), ch. 76, p. 209, § 2, effective March 29.

**8-75-102. Effect of state law provisions relating to regular benefits on claims for, and payment of, extended benefits.** Except when the result would be inconsistent with the other provisions of this section as provided in the regulations of the division, the provisions of articles 70 to 82 of this title which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

**Source:** **L. 71:** R&RE, p. 945, § 18. **C.R.S. 1963:** § 82-13-2.

**8-75-103. Eligibility requirements for extended benefits.** (1) An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the division finds that with respect to such week:

- (a) He is an exhaustee;
- (b) He has satisfied the requirements of articles 70 to 82 of this title for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits; and
- (c) He files his interstate claim from a state in which there is an extended benefits state "on" indicator. If he files his interstate claim from a state in which there is an extended benefits state "off" indicator, he shall be paid for not more than the first two weeks in which extended benefits are payable in an interstate claim.

**Source:** **L. 71:** R&RE, p. 946, § 18. **C.R.S. 1963:** § 82-13-3. **L. 81:** (1)(a) and (1)(b) amended and (1)(c) added, p. 512, § 4, effective July 1.

**8-75-103.5. Additional extended benefit requirements.** (1) An individual shall be ineligible for payment of extended benefits for any week of unemployment in his eligibility period if the division finds that during such period:

- (a) He failed to accept any offer of suitable work as defined under subsection (3) of this section or failed to apply for any suitable work to which he was referred by the division; or
  - (b) He failed to actively engage in seeking work which is prescribed as suitable work under subsection (5) of this section.
- (2) Any individual who has been found ineligible for extended benefits by reason of the provisions of subsection (1) of this section shall also be denied benefits beginning with the first day of the week following the week in which such failure occurred and until he has been employed in each of four subsequent weeks, whether or not consecutive, and has earned remuneration equal to not less than four times the extended weekly benefit amount.
- (3) For the purposes of this section, "suitable work" means, with respect to any individual, any work which is within such individual's capabilities. The gross average weekly remuneration payable for such work shall:

(a) Exceed the sum of the individual's extended weekly benefit amount as determined under sections 8-73-102 and 8-75-104 plus the amount, if any, of supplemental unemployment benefits, as defined in section 501 (c) (17) (D) of the federal "Internal Revenue Code of 1986", as amended, payable to such individual for such week;

(b) Not be less than the higher of the minimum wage provided by section 206 (a) (1) of the "Fair Labor Standards Act of 1938", as amended, without regard to any exemption, or the applicable state or local minimum wage.

(4) No individual shall be denied extended benefits for failure to accept an offer of or apply for any job which meets the definition of suitability, provided in subsection (3) of this section, if:

(a) The position was not offered to such individual in writing or was not listed with the state employment service;

(b) Such failure could not result in a denial of benefits under the definition of suitable work for regular benefit claimants in section 8-73-108 (5) (b) to the extent that the criteria of suitability in that section are not consistent with the provisions of subsection (3) of this section;

(c) The individual furnishes satisfactory evidence to the division that his prospects for obtaining work in his customary occupation within a reasonably short period are good. If such evidence is deemed satisfactory for this purpose, the determination of whether any work is suitable with respect to such individual shall be made in accordance with the definition of suitable work for regular benefit claimants in section 8-73-108 without regard to the definition specified by subsection (3) of this section.

(5) Notwithstanding the provisions of paragraph (b) of subsection (3) of this section to the contrary, no work shall be deemed suitable work for an individual which does not accord with the labor standards provisions required by section 3304 (a) (5) of the federal "Internal Revenue Code of 1986", as amended, and set forth under section 8-73-108 (5) (b).

(6) For the purposes of paragraph (b) of subsection (1) of this section, an individual shall be treated as actively engaged in seeking work during any week if:

(a) The individual has engaged in a systematic and sustained effort to obtain work during such week;

(b) The individual furnishes tangible evidence that he has engaged in such effort during such week.

(7) The state employment service shall refer any claimant entitled to extended benefits under the "Colorado Employment Security Act", articles 70 to 82 of this title, to any suitable work which meets the criteria prescribed in subsection (3) of this section.

(8) An individual shall not be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period if such individual has been disqualified for regular benefits under the "Colorado Employment Security Act", articles 70 to 82 of this title, because he voluntarily left work, was discharged for misconduct, or failed to accept an offer of or apply for suitable work unless the disqualification imposed for such reasons has been terminated in accordance with specific conditions established under said act, requiring the individual to perform service for remuneration subsequent to the date of such disqualification.

(9) Repealed.

**Source:** L. 81: Entire section added, p. 512, § 5, effective July 1. L. 83: (4)(a) amended, p. 430, § 6, effective June 3. L. 84: (4)(b) and (5) amended, p. 330, § 5, effective July 1. L. 94: (9) added, p. 641, § 5, effective April 14. L. 2000: (3)(a) and (5) amended, p. 1838, § 4, effective August 2.

**Editor's note:** Subsection (9)(b) provided for the repeal of subsection (9), effective July 1, 2005. (See L. 94, p. 641.)

**8-75-104. Weekly extended benefit amount.** The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year; except that, for any week during a period in which federal payments to states under section 204 of the "Federal-State Extended Unemployment Compensation Act of 1970" and amendments thereto are reduced under section 252 of the "Balanced Budget and Emergency Deficit Control Act of 1985" and amendments thereto, the weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. Such reduced weekly extended benefit amount, if not an even dollar amount, shall be rounded to the next lower full dollar amount.



**Source:** L. 71: R&RE, p. 946, § 18. C.R.S. 1963: § 82-13-4. L. 87: Entire section amended, p. 412, § 1, effective April 16.

**8-75-105. Total extended benefit amount.** (1) The total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

(a) Fifty percent of the total amount of regular benefits which were payable to him under articles 70 to 82 of this title in his applicable benefit year; or

(b) Thirteen times his weekly benefit amount which was payable to him under articles 70 to 82 of this title for a week of total unemployment in the applicable benefit year.

(2) Notwithstanding any other provisions of this part 1, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this subsection (2), be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by an amount equal to the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year multiplied by the individual's weekly benefit amount for extended benefits.

(3) Notwithstanding any other provision of this part 1, during any fiscal year in which federal payments to states under section 204 of the "Federal-State Extended Unemployment Compensation Act of 1970" and amendments thereto are reduced under section 252 of the "Balanced Budget and Emergency Deficit Control Act of 1985" and amendments thereto, the total extended benefit amount payable to an individual with respect to his or her applicable benefit year shall be reduced by an amount equal to the aggregate of the reductions in the weekly amounts paid to the individual under section 8-75-104.

**Source:** L. 71: R&RE, p. 946, § 18. C.R.S. 1963: § 82-13-5. L. 82: (2) added, p. 238, § 6, effective July 1. L. 87: (3) added, p. 412, § 2, effective April 16. L. 2010: (2) and (3) amended, (SB 10-028), ch. 397, p. 1890, § 3, effective June 9.

**8-75-106. Beginning and termination of extended benefit period.** (1) Whenever an extended benefit period is to become effective in this state as a result of an "on" indicator, or an extended benefit period is to be terminated in this state as a result of an "off" indicator, the division shall make an appropriate public announcement.

(2) Computations required by the provisions of section 8-75-101 (10) shall be made by the division, in accordance with regulations prescribed by the United States secretary of labor.

**Source:** L. 71: R&RE, p. 946, § 18. C.R.S. 1963: § 82-13-6. L. 82: (1) amended, p. 238, § 7, effective July 1.

**8-75-107. Amended determination of "on" or "off" indicator. (Repealed)**

**Source:** L. 75: Entire section added, p. 325, § 1, effective January 1. L. 79: Entire section repealed, p. 1632, § 3, effective July 19.

**8-75-108. Total unemployment rate extended benefits.** (1) With respect to weeks of unemployment beginning on or after March 22, 2009, and ending four weeks before the last week for which federal sharing is authorized by section 2005 (a) of Pub.L. 111-5 and any amendments thereto, whichever is later:

(a) There is an "on" indicator for a week of TUR extended benefits, in the amount determined pursuant to sections 8-75-104 and 8-75-105, if subparagraphs (I) and (II) of this paragraph (a) apply or if subparagraphs (I) and (III) of this paragraph (a) apply:

(I) The seasonally adjusted TUR, as determined by the United States secretary of labor, for the most recent three months for which data for all states is published, equals or exceeds six and one-half percent;

(II) The average TUR in the state equals or exceeds one hundred ten percent of the TUR for either or both of the corresponding three-month periods in the two preceding calendar years;

(III) With respect to weeks beginning on or after December 17, 2010, and ending December 31, 2011, or while Pub.L. 111-312 and any amendments thereto are in effect, the average TUR in the state equals or exceeds one hundred ten percent of the TUR for all or any of the corresponding three-month periods in the three preceding calendar years;

(b) There is an "off" indicator for weeks of TUR extended benefits if any of the following applies:

(I) The TUR falls below six and one-half percent; or

(II) The requirements described in subparagraph (II) or (III) of paragraph (a) of this subsection (1) are not satisfied.

(2) The total amount of TUR extended benefits payable in a high unemployment period to an eligible individual with respect to his or her applicable benefit year shall be the least of the following amounts:

(a) Eighty percent of the total amount of regular benefits that were payable to the eligible individual under articles 70 to 82 of this title in the applicable benefit year; or

(b) Twenty times the weekly benefit amount that was payable to the eligible individual under articles 70 to 82 of this title for a week of total unemployment in the applicable benefit year.

**Source: L. 2009:** Entire section added, (SB 09-247), ch. 405, p. 2235, § 9, effective July 1. **L. 2011:** (1) amended, (SB 11-010), ch. 76, p. 209, § 3, effective March 29.

## PART 2

### WORK SHARE PROGRAM

**8-75-201. Short title.** This part 2 shall be known and may be cited as the "Colorado Work Share Program".

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1886, § 1, effective June 9.

**8-75-202. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Affected unit" means a specified plant, department, shift, or other definable unit to which a work share plan applies.

(2) "Director" means the director of the division or his or her designee.

(3) "Normal weekly work hours" means the number of hours in a week that an employee ordinarily works for a participating employer or forty hours, whichever is less.

(4) "Work share plan" means a plan for reducing unemployment under which employees who are members of an affected unit share the work remaining after a reduction in their normal weekly work hours.

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1886, § 1, effective June 9. **L. 2012:** (2) amended, (HB 12-1120), ch. 27, p. 105, § 14, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**8-75-203. Work share program - work share plan - eligibility of employer - approval - denial - repeal.** (1) (a) (I) The director shall establish a voluntary work share program for the purpose of allowing the payment of unemployment compensation benefits to employees whose wages and hours have been reduced. In order to participate in the work share program, an employer shall submit a work share plan in writing to the director for



approval. If the employer is subject to a collective bargaining agreement, the collective bargaining unit must agree in writing to the work share plan prior to implementation. An employer that is a negative excess employer pursuant to section 8-76-103 (3) (b) is not eligible to participate in the work share program.

(II) This paragraph (a) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

(b) (I) The director shall establish a voluntary work share program for the purpose of allowing the payment of unemployment compensation benefits to employees whose wages and hours have been reduced. In order to participate in the work share program, an employer shall submit a work share plan in writing to the director for approval. If the employer is subject to a collective bargaining agreement, the collective bargaining unit must agree in writing to the work share plan prior to implementation. An employer that is a negative excess employer pursuant to section 8-76-102.5 (3) is not eligible to participate in the work share program.

(II) This paragraph (b) is effective on and after the repeal of paragraph (a) of this subsection (1).

(2) An employer shall submit a work share plan to the division on forms and following procedures required by the director. The director may approve a work share plan if:

(a) The plan applies to and identifies a specific affected unit;

(b) The plan identifies the employees in the affected unit by name and social security number;

(c) The plan reduces the normal work for an employee in the affected unit by at least ten percent and not more than forty percent;

(d) The plan applies to at least ten percent of the employees in the affected unit; and

(e) The plan includes a strategy that restores the total number of work hours to each participating employee to the amount of hours worked prior to participation in the program.

(3) The director shall not approve a work share plan unless the employer:

(a) Agrees that for the duration of the employer's participation in the work share program, the employer shall not eliminate or diminish health insurance, retirement benefits received under a pension plan, paid vacation and holidays, sick leave, or any other similar employee benefit provided by the employer immediately prior to submitting the work share plan to the division, if the employer provides benefits to his or her employees;

(b) Certifies that the collective bargaining agent for the employees, if applicable, has agreed to the work share plan;

(c) Certifies that the implementation of a shared work plan and the resulting reduction in work hours is in lieu of temporary layoffs that would affect at least ten percent of the employees in the affected unit and that would result in an equivalent reduction in work hours;

(d) Certifies that the employer will not employ additional employees in the affected unit while participating in the work share program;

(e) Agrees that no employee participating in the work share program shall receive, in the aggregate, more than eighteen weeks of benefits; and

(f) Agrees to submit reports concerning the operation of the work share plan to the division upon request of the director.

(4) The director shall approve or deny the work share plan in writing no later than thirty days after the date the division receives the plan. If the director denies the work share plan, he or she shall inform the employer in writing of the reasons for the denial.

**Source:** L. 2010: Entire part added, (SB 10-028), ch. 397, p. 1887, § 1, effective June 9. L. 2011: (1) amended, (HB 11-1288), ch. 212, p. 928, § 12, effective July 1. L. 2012, 1st Ex. Sess.: (1)(a)(II) amended, (HB 12S-1002), ch. 2, p. 2428, § 7, effective June 1.

**Editor's note:** As of publication date, the revisor of statutes has not received the notice specified in subsection (1)(a)(II) of this section.

**8-75-204. Employee eligibility for unemployment benefits under the work share plan.** (1) Notwithstanding any other provision of this title, an employee may be eligible for unemployment compensation benefits for a particular week pursuant to this part 2 if:

(a) The employee is employed as a member of an affected unit that is subject to an approved work share plan that is in effect for that week;

(b) The employee's normal weekly work hours have been reduced by at least ten percent but not more than forty percent and the employee has received a corresponding reduction in wages for that week; and

(c) The employee is able and available to work additional or full-time hours with his or her employer.

(2) The eligibility requirements for the receipt of unemployment compensation benefits related to the availability for work, actively seeking work, and refusing to apply for or to accept work with an employer other than the employee's current employer, pursuant to sections 8-73-107 and 8-73-108 (5), shall not apply to an employee subject to this part 2.

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1888, § 1, effective June 9.

**8-75-205. Benefits formula - limitation of benefits.** (1) **Formula.** The division shall pay an employee who is eligible for unemployment compensation benefits under a work share plan a weekly benefit that is the product of the employee's regular weekly benefit amount pursuant to article 73 of this title, multiplied by the nearest full percentage of the reduction of the employee's work hours, rounded down to the next full dollar.

(2) **Limitations.** (a) An individual is not entitled to receive unemployment compensation benefits pursuant to this part 2 and regular unemployment compensation benefits that exceed the maximum allowable total benefits payable to an individual in a benefit year pursuant to articles 70 to 82 of this title.

(b) The division shall not pay unemployment compensation benefits to an employee for a week in which the employee is compensated for work for his or her employer that exceeds the reduced hours established under the work share plan.

(c) An employee receiving weekly unemployment compensation benefits under a work share plan is not entitled to receive benefits for partial employment pursuant to section 8-73-103 for the same week.

(d) The waiting period of one week in section 8-73-107 (1) (d) that applies to the payment of benefits for total or partial unemployment shall apply to the payment of benefits pursuant to this part 2.

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1888, § 1, effective June 9.

**8-75-206. Work share plan - effective date - expiration - termination.** (1) A work share plan and the payment of unemployment compensation benefits pursuant to the plan shall begin the first week following approval of the plan by the director or the first week specified by the employer, whichever is later.

(2) A work share plan shall expire twelve months after the effective date of the plan.

(3) The director may terminate a work share plan for good cause if the plan is not executed according to the terms and intent of the program. "Good cause" may include failure to comply with section 8-75-203, unreasonable revision of productivity standards for the affected unit, or other conduct by the employer that may compromise the purpose, intent, and effectiveness of a work share plan.

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1889, § 1, effective June 9.

**8-75-207. Work share plan modifications.** (1) An employer may modify a work share plan to meet changed conditions if the modification conforms to the basic provisions of the plan as originally approved by the director.



(2) Before a proposed change to a work share plan may be implemented:

(a) The collective bargaining agent shall approve the modification to the plan if an employee is covered by a collective bargaining unit;

(b) The employer shall report the change in writing to the division; and

(c) The director shall approve the modified plan.

(3) The director shall approve or deny a modified work share plan using the same standards and requirements that are used for the original work share plan in accordance with section 8-75-203.

(4) Approval of a modified work share plan shall not affect the original expiration date of the work share plan.

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1889, § 1, effective June 9.

**8-75-208. Benefits payments charged to employer.** Unemployment compensation benefits paid to an employee pursuant to this part 2 shall be charged to the account of the employer participating in the work share plan in the same manner as regular benefits pursuant to section 8-73-108 (3) (e) (I).

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1890, § 1, effective June 9.

**8-75-209. Repeal of article.** (1) This article is repealed, effective July 1, 2013. Prior to its repeal, the "Colorado Work Share Program" shall be reviewed as provided for in section 24-34-104, C.R.S.

(2) If the director finds that the provisions of this part 2 cause the insolvency of the unemployment insurance cash fund to accelerate, the director shall notify the revisor of statutes in writing and this part 2 shall be repealed.

**Source: L. 2010:** Entire part added, (SB 10-028), ch. 397, p. 1890, § 1, effective June 9.

## ARTICLE 76

### Premiums - Coverage

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-76-101.	Payment.	8-76-108.	Coverage by political subdivisions.
8-76-102.	Rate of premiums - surcharge - repeal.	8-76-109.	Payments in lieu of premiums by state hospitals and state institutions of higher education.
8-76-102.5.	Rates effective upon fund solvency - repeal of prior rates - solvency surcharge - definitions.	8-76-110.	Financing benefits paid to employees of nonprofit organizations.
8-76-103.	Future rates based on benefit experience - definitions - repeal.	8-76-111.	Coverage of state employees.
8-76-103.5.	Transitional provisions - combined premium rate for 2012 - repeal.	8-76-112.	Political subdivisions - security for collection of premiums or reimbursable payments.
8-76-104.	Transfer of experience - assignment of rates - definitions - repeal.	8-76-113.	Protest - appeal - filed by an employer.
8-76-105.	Period of employer's coverage.	8-76-114.	Local government advisory council. (Repealed)
8-76-106.	Termination of employer liability.	8-76-115.	Coverage of Indian tribes.
8-76-107.	Election to become liable.		

**8-76-101. Payment.** (1) Premiums shall accrue and become payable by each employer for each calendar year in which the employer is subject to articles 70 to 82 of this title with respect to wages for employment. The premiums shall become due and be paid by each employer to the division for the fund in accordance with rules prescribed by the director of the division and shall not be deducted, in whole or in part, from the wages of individuals in the employer's employ.

(2) In the payment of any premiums, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(3) When the quarterly amount of premiums due is less than five dollars, payment of the premiums shall not be required.

**Source:** L. 36, 3rd Ex. Sess.: p. 26, § 7. CSA: C. 167A, § 7. L. 41: p. 773, § 7. CRS 53: § 82-6-1. C.R.S. 1963: § 82-6-1. L. 81: Entire section amended, p. 492, § 7, effective July 1. L. 86: (1) amended, p. 493, § 99, effective July 1. L. 2001: (3) added, p. 34, § 1, effective March 9. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1883, § 11, effective July 1.

#### ANNOTATION

**Law reviews.** For note, "The Unemployment Compensation Recipient — Should He Accept a Job?", see 44 Den. L.J. 147 (1967).

**Federal instrumentalities like the Red Cross, exempted from federal tax, are like-**

**wise exempt from state taxation.** Dept. of Emp. v. United States, 385 U.S. 355, 87 S. Ct. 464, 17 L. Ed.2d 414 (1966).

**8-76-102. Rate of premiums - surcharge - repeal.** (1) Each employer shall pay premiums equal to two and seven-tenths percent of chargeable wages paid by the employer during each calendar year, except as may be otherwise prescribed in section 8-76-103. As used in this section, "chargeable wages paid" shall include chargeable wages constructively paid as well as chargeable wages actually paid.

(2) Each employing unit becoming an employer under the new definition of employer contained in articles 70 to 82 of this title who would not be an employer under the old definition for employer shall be liable for premiums only on chargeable wages paid with respect to employment.

(3) (a) A political subdivision or its instrumentality that has elected to become a premium-paying employer shall have its account charged with the full amount of all regular and extended benefits that are attributable to service in its employ.

(b) (I) The premium rate for political subdivisions or their instrumentalities shall be examined annually in conjunction with the employers' benefit experience and may be adjusted on a year-by-year basis as prescribed by section 8-76-103 (3) (b) (I).

(II) The division shall notify all political subdivisions or their instrumentalities, as defined in paragraph (a) of this subsection (3), of the premium rate no later than January 1 of the year for which the rate applies.

(c) Repealed.

(4) (a) (Deleted by amendment, L. 2009, (HB 09-1363 and SB 09-076), chs. 363, 409, pp. 1883, 2251, §§ 12, 1, effective July 1, 2009.)

(b) Effective July 1, 1999, and until such time as employers' federal unemployment taxes are returned to the state by the federal government at levels sufficient to permit the effective administration of articles 70 to 82 of this title, the premium surcharge established by this subsection (4) shall be segregated and deposited in the employment support fund created in section 8-77-109.

(c) Effective January 1, 1998, the premium surcharge established by this subsection (4) shall not be assessed against any employer whose benefit-charge account balance for the last three fiscal years immediately preceding the computation date is less than one hundred dollars.

(d) Effective calendar year 2009, the annual premium surcharge rate shall be established at 0.22 percent, with thirty percent of the premium surcharge allocated to the



unemployment compensation fund created in section 8-77-101, fifty percent of the premium surcharge allocated to the employment support fund created under section 8-77-109, and twenty percent of the premium surcharge allocated to the employment and training technology fund created in section 8-77-109 (2) (a.9). Effective January 1, 2017, fifty percent of the premium surcharge shall be allocated to the unemployment compensation fund and fifty percent of the premium surcharge shall be allocated to the employment support fund. The premium surcharge rate shall then be added to the employer's standard or computed premium rate. The premium surcharge rate added to the employer premium rate shall also be identified separately on the employer premium rate notice as the premium surcharge for benefits not effectively charged. The combined rate shall be the employer's premium rate for the ensuing calendar year. The premium surcharge established by this subsection (4) shall not be assessed against any employer whose benefit-charge account balance is zero; except that, if the employer is still being rated under the provisions of section 8-76-103 (3) (a), such employer is subject to the premium surcharge rate.

(5) (a) (I) A solvency surcharge shall be assessed when the fund balance on any June 30 is equal to or less than nine-tenths of one percent of the total wages reported by ratable employers for the calendar year, or the most recent available four consecutive quarters prior to the last computation date. The solvency surcharge shall be assessed on all ratable employers beginning with the next calendar year, and the solvency surcharge shall then be added to the employer's standard or computed premium rate. The solvency surcharge rate added to the employer's premium rate shall also be identified separately on the employer's premium rate notice as the solvency surcharge. The solvency surcharge shall be initially assessed and then increased in the yearly increments established by paragraph (b) of this subsection (5) until the June 30 fund balance is greater than the fund level established by this subsection (5) but in no case shall exceed the rate schedule in effect January 1, 1990.

(II) (Deleted by amendment, L. 2009, (HB 09-1363), ch. 363, p. 1883, § 12, effective July 1, 2009.)

(III) The solvency surcharge shall not be assessed against:

- (A) The covered employers of state and local governments;
- (B) Nonprofit organizations that are reimbursing employers; or
- (C) Political subdivisions electing the special rate.

(b) **Solvency surcharge rate schedule.**

Percent of excess	Solvency surcharge yearly increment	January 1, 1990, rate table limit on solvency	Percent of excess	Solvency surcharge yearly increment	January 1, 1990, rate table limit on solvency
+20 or more	.000	.002	-0	.006	.028
+19 through			-1	.006	.029
+11	.001	.003	-2	.006	.030
+10	.001	.004	-3	.006	.031
+9	.001	.005	-4	.006	.032
+8	.001	.006	-5	.007	.033
+7	.001	.007	-6	.007	.034
+6	.002	.008	-7	.007	.035
+5	.002	.009	-8	.007	.036
+4	.002	.010	-9	.007	.037
+3	.003	.013	-10	.008	.038
+2	.003	.016	-11	.008	.039
+1	.004	.020	-12	.008	.040
+0	.005	.024	-13	.008	.041
Unrated	.006	.027	-14	.008	.042
			-15	.009	.043
			-16	.009	.044

-17	.009	.045
-18	.009	.046
-19	.009	.047
-20	.010	.048
-21	.010	.049
-22	.010	.050
-23	.010	.051
-24	.010	.052
-25	.011	.053
more than		
-25	.011	.054

(6) This section is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with Title XII of the federal "Social Security Act", as amended, have been repaid.

**Source:** L. 36, 3rd Ex. Sess.: p. 26, § 7. CSA: C. 167A, § 7. L. 41: p. 773, § 7. CRS 53: § 82-6-2. C.R.S. 1963: § 82-6-2. L. 77: (3) added, p. 466, § 19, effective July 7. L. 79: (3)(b)(II)(A) amended and (3)(c) repealed, pp. 353, 356, §§ 18, 25, effective September 30. L. 81: (1), (2), (3)(a), and (3)(b) amended, p. 492, § 8, effective July 1; (3)(a) amended, p. 486, § 11, effective July 1. L. 83: (4) added, p. 2043, § 7, effective October 1. L. 84: (4) amended, p. 329, § 3, effective July 1. L. 85: (1), (2), and (4) amended, p. 363, § 2, effective March 1; (4) amended, p. 373, § 2, effective July 1. L. 86: (4) amended, p. 544, § 9, effective July 1. L. 90: (5) added, p. 1765, § 5, effective June 8; (4) amended, p. 1764, § 3, effective July 1. L. 91: (5) amended, p. 1347, § 1, effective July 1. L. 92: (4)(b) amended, p. 1822, § 2, effective April 10. L. 96: (4)(b) amended and (4)(c) added, p. 384, § 10, effective April 17; (4)(a) and (4)(b) amended, p. 995, § 1, effective May 23. L. 99: (4) amended, p. 973, § 1, effective May 28. L. 2000: (4)(d) amended, p. 1838, § 5, effective August 2. L. 2003: (4)(d) amended, p. 1540, § 1, effective May 1. L. 2005: (5)(a) amended, p. 548, § 1, effective May 25. L. 2009: Entire section and (4)(d) amended, (HB 09-1363), ch. 363, pp. 1883, 1887, §§ 12, 13, effective July 1; (4)(a), (4)(b), and (4)(d) amended, (SB 09-076), ch. 409, p. 2251, § 1, effective July 1. L. 2011: (6) added, (HB 11-1288), ch. 212, p. 916, § 4, effective July 1. L. 2012, 1st Ex. Sess.: (6) amended, (HB 12S-1002), ch. 2, p. 2428, § 8, effective June 1.

**Editor's note:** (1) Amendments to subsections (4)(a) and (4)(b) by House Bill 09-1363 and Senate Bill 09-076 were harmonized.

(2) As of publication date, the revisor of statutes has not received the notice specified in subsection (6) of this section.

**Cross references:** For the unemployment compensation fund, see § 8-77-101.

#### ANNOTATION

**Tax liability issues must be decided, in the first instance, by the division of employment and training.** Claim of Woloson, 796 P.2d 1 (Colo. App. 1989).

**8-76-102.5. Rates effective upon fund solvency - repeal of prior rates - solvency surcharge - definitions.** (1) On each August 31, the executive director shall file a written report with the general assembly, the governor, and the legislative audit committee indicating the balance in the unemployment compensation fund. When the written report indicates that the fund balance on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid, the executive director shall also report these facts in writing to the revisor of statutes. Upon receipt by the revisor of statutes of the written report, the following provisions are repealed, effective December 31 of the calendar year of



the written report to the revisor of statutes, and thereafter this section governs the payment of premiums:

(a) Section 8-76-102; and

(b) Section 8-76-103.

(2) Effective January 1 of the calendar year after the calendar year of the repeal of the provisions under subsection (1) of this section, each employer shall pay premiums in the manner prescribed by this section.

(3) (a) (I) Each employer's rate for the twelve months commencing January 1 of any calendar year is determined on the basis of the employer's record prior to the computation date for the year. The computation date for any calendar year is July 1 of the year preceding the calendar year for which the rate is computed.

(II) The total of all of an employer's premiums paid on his or her own behalf on or before thirty-one days immediately after the computation date and the total benefits that were chargeable to the employer's account and were paid before the computation date, with respect to weeks, or any established payroll period of unemployment, beginning before the computation date, is used to compute his or her premium rate for the ensuing calendar year; except that the maximum rate for negative excess employers that is credited to the unemployment compensation fund must be at least 0.0613 assessed as part of each employer's premium under this paragraph (a), and for these employers the maximum combined premium rate must be at least 0.0628 but not greater than 0.1039. "Percent of excess" means the percentage resulting from dividing the excess of premiums paid over benefits charged by the average chargeable payroll, computed to the nearest one percent. The word "to" in the column headings, which make reference to fund balances (resources available for benefits), means "not including". "Reserve ratio" means the fund balance on any June 30 as a proportion of total wages reported by experience-rated employers.

Standard Premium Rate Schedule					
Reserve Ratio	Reserve Ratio	Reserve Ratio	Reserve Ratio	Reserve Ratio	
0.014 or Greater	0.011 to 0.014	0.008 to 0.011	0.006 to 0.008	0.004 to 0.006	
Eligible Employers Percent of Excess	+20 or more				
	+18 to +19	0.0056	0.0058	0.0062	0.0066
	+16 to +17	0.0062	0.0064	0.0069	0.0073
	+14 to +15	0.0063	0.0065	0.0070	0.0074
	+12 to +13	0.0067	0.0069	0.0075	0.0080
	+10 to +11	0.0072	0.0075	0.0082	0.0088
	+8 to +9	0.0083	0.0087	0.0094	0.0102
	+6 to +7	0.0105	0.0110	0.0120	0.0130
	+4 to +5	0.0129	0.0135	0.0148	0.0160
	+2 to +3	0.0154	0.0161	0.0177	0.0192
	+0 to +1	0.0214	0.0225	0.0247	0.0269
	Unrated	0.0302	0.0317	0.0348	0.0379
	-0 to -1	0.0170	0.0170	0.0170	0.0170
	-2 to -3	0.0386	0.0406	0.0447	0.0487
	-4 to -5	0.0412	0.0433	0.0476	0.0519
	-6 to -7	0.0437	0.0460	0.0506	0.0552
	-8 to -9	0.0462	0.0487	0.0535	0.0584
	-10 to -11	0.0488	0.0514	0.0565	0.0617
	-12 to -13	0.0513	0.0540	0.0595	0.0649
	-14 to -15	0.0539	0.0567	0.0624	0.0681
	-16 to -17	0.0564	0.0594	0.0654	0.0714
	-18 to -19	0.0589	0.0621	0.0683	0.0746
	-20 to -21	0.0615	0.0648	0.0713	0.0779
	-22 to -23	0.0640	0.0674	0.0743	0.0811
	-24 to -25	0.0666	0.0701	0.0772	0.0843
More than -25	0.0690	0.0727	0.0801	0.0875	
	0.0703	0.0740	0.0815	0.0890	
				0.0964	



(b) Only those wages paid for covered employment that occurred before the computation date and were reported to the division on or before thirty-one days immediately following the computation date will be used to determine the experience rate effective for the next calendar year.

(c) Whenever an employer subject to articles 70 to 82 of this title acquires, before the computation date and pursuant to section 8-76-104, all or a segregable portion of the organization, trade, and business or substantially all of the assets of an employer who was subject to articles 70 to 82 of this title at the time of the acquisition, and the successor submitted in writing that the successor met the conditions set forth in section 8-76-104, a total or partial transfer of the experience rating record of the predecessor employer shall be made as provided in section 8-76-104. No merger of the accounts for experience rating purposes will be made for the rate effective the next calendar year unless the information is submitted to the division on or before sixty days following the computation date.

(d) Notwithstanding any provision to the contrary, an employer, at any time before March 15 of any year, may pay voluntary premiums in addition to the premiums and surcharges provided under articles 70 to 82 of this title. Voluntary premiums shall allow for a reduction of the employer's experience rate and shall be credited to the employer's account and be used in determining the employer's rate for the current calendar year and subsequent calendar years; except that, if an employer is delinquent in the payment of any premiums or surcharges due, the voluntary premium payments shall be reduced by the total amount of delinquent premiums and surcharges before such computation is made. No voluntary premiums paid pursuant to this paragraph (d) shall be refunded or applied to future premium liability.

(e) As used in sections 8-76-101 to 8-76-104, for the purpose of computing the premium rate of any employer, the term "annual payroll" means the total amount of wages for employment paid by an employer during the twelve-month period ending on June 30. The term "average chargeable payroll" means the average of the chargeable payrolls for the last three fiscal years ending on June 30. For any employer who has not reported payrolls to the division for thirty-six consecutive months ending on June 30, the division shall compute the average chargeable payroll by dividing the total chargeable payrolls of the employer during the three fiscal years ending on June 30 by the total months during which such wages were paid and multiplying the amount so determined by twelve.

(f) An employer shall have sixty calendar days after the mailing date or the transmission date as recorded by the division of a quarterly statement of benefits charged to the employer's account in which to file a written application for a review and determination of benefit charges. The application must specify in detail the grounds upon which the employer relies and may be filed in person, by mail, or by electronic means in accordance with such rules as the director of the division may promulgate. The division shall investigate the matters specified and shall give the employer notice of its redetermination by mail or by electronic means. If the employer fails to act within the prescribed time, benefits charged to the account shall be deemed correct and final. Appeal from the redetermination decision may be made pursuant to section 8-76-113 (2).

(g) By December 1 of each year, or as soon as practicable, the division shall notify each employer of the employer's premium rate as determined for the next calendar year pursuant to sections 8-76-101 to 8-76-104. The notification shall include the amount determined as the employer's average annual payroll, the total of all the employer's premiums paid on his or her own behalf and credited to his or her account for all past years, and the total benefits charged to the employer's account for all such years.

(h) No later than January 1, 2013, the division shall develop an on-line computer application that allows employers to review and manage account information. The on-line computer application shall include at least the following:

- (I) A method for employers to file premium reports and make premium payments;
- (II) A method for employers to review account balances, charging history, premium rates, and account status;
- (III) A method for employers to change the physical address of an account, reinstate an account, and close an account; and
- (IV) A method for employers to receive and return division forms and correspondence.

(i) Whenever there has been a period of five consecutive calendar years during which there were no chargeable wages paid for services considered employment under articles 70 to 82 of this title, any balance shown in the employer's account will not be transferred nor be used for premium rating purposes if the employer again becomes liable under articles 70 to 82 of this title.

(4) (a) The division shall determine employer premium rates for employers newly subject to articles 70 to 82 of this title each year as of the computation date in accordance with subsection (3) of this section. New employers pay the same premiums as unrated employers as prescribed in subsection (3) of this section or at the computed rate, whichever is higher, unless there have been twelve consecutive calendar months immediately preceding the computation date during which an employer's account has been chargeable with benefit payments.

(b) An employer that elects reimbursement under sections 8-76-108 to 8-76-110 is exempt from this section.

(c) An "employer newly subject", as used in this article, means an employer who has never, at any time, been an employer under any provision of articles 70 to 82 of this title, an employer who has lost his or her prior experience under subsection (3) of this section, or an employer who, under section 8-76-110 (2) (e), terminates his or her election to make payments in lieu of premiums or whose election to make payments in lieu of premiums has been terminated by the division under the authority of section 8-76-110 (4) (e) or (4) (f).

(5) (a) Those employers newly subject to articles 70 to 82 of this title and assigned the three-digit North American industry classification code 236, 237, or 238 for the construction industry must pay the same premiums as unrated employers as prescribed in subsection (3) of this section, at the actual experience rate, at a rate equal to the average actual experience rate, or at a rate equal to the average industry premium rate as determined by the division, whichever is greater, unless there have been thirty-six consecutive calendar months immediately preceding the computation date.

(b) For purposes of this subsection (5), assignment by the division of employment and training of industrial classifications to employers pursuant to this subsection (5) must be in accordance with procedures and guidelines of the bureau of labor statistics of the United States department of labor and be the appropriate three-digit subsector level found in the North American industry classification system manual issued by the office of management and budget.

(c) For purposes of this subsection (5), "average industry premium rate" means the average premium rate of all employers assigned the same three-digit North American industry classification code pursuant to this subsection (5). The rate is computed annually by the division using the latest data as of the computation date.

(6) (a) A political subdivision or its instrumentality that has elected to become a premium-paying employer will have its account charged with the full amount of all regular and extended benefits that are attributable to service in its employ.

(b) (I) The premium rate for political subdivisions or their instrumentalities will be examined annually in conjunction with the employer's benefit experience and may be adjusted on a year-by-year basis as prescribed by subparagraph (I) of paragraph (a) of subsection (3) of this section.

(II) The division must notify all political subdivisions or their instrumentalities, as defined in paragraph (a) of this subsection (6), of the premium rate no later than January 1 of the year for which the rate applies.

(7) (a) A solvency surcharge will be assessed when the fund balance of the unemployment compensation fund on any June 30 is equal to or less than 0.005 multiplied by the total wages reported by experience-rated employers for the previous calendar year, or for the most recent available four consecutive quarters before the last computation date. The solvency surcharge will be assessed on all experience-rated employers beginning with the next calendar year, and the solvency surcharge is added to the employer's premium rate. The solvency surcharge rate added to the employer's premium rate will also be identified separately on the employer's premium rate notice as the solvency surcharge. The solvency surcharge remains in effect until the June 30 fund balance in the unemployment compen-



sation fund is equal to or greater than 0.007 multiplied by the total wages reported by experience-rated employers for the calendar year, or for the most recent available four consecutive quarters:

<b>Eligible Employers Percent of Excess</b>	<b>Solvency Surcharge</b>
+20 or more	0.00100
+18 to +19	0.00150
+16 to +17	0.00150
+14 to +15	0.00150
+12 to +13	0.00150
+10 to +11	0.00175
+8 to +9	0.00275
+6 to +7	0.00375
+4 to +5	0.00475
+2 to +3	0.00725
+0 to +1	0.01100
Unrated	0.01350
-0 to -1	0.01425
-2 to -3	0.01525
-4 to -5	0.01625
-6 to -7	0.01725
-8 to -9	0.01825
-10 to -11	0.01925
-12 to -13	0.02025
-14 to -15	0.02125
-16 to -17	0.02225
-18 to -19	0.02325
-20 to -21	0.02425
-22 to -23	0.02525
-24 to -25	0.02625
More than -25	0.02700

(b) The solvency surcharge shall not be assessed against:

- (I) The covered employers of state and local governments;
- (II) Nonprofit organizations that are reimbursing employers; or
- (III) Political subdivisions electing the special rate.

(8) (a) Subject to the conditions stated in paragraph (b) of this subsection (8), an employer is eligible for a premium credit, as determined by the division, of a proportionate amount of the excess of the amount specified in subparagraph (IV) of paragraph (b) of this subsection (8). Each employer that qualifies for the premium credit receives a share of the total available premium credit equal to his or her proportionate share of the total chargeable wages paid by qualifying employers.

(b) An employer does not receive premium credit under this subsection (8) unless all of the following conditions are met:

(I) As of the most recent computation date, the employer has filed all required reports and paid all premiums and surcharges due under articles 70 to 82 of this title;

(II) The employer is not a negative excess employer under the table in subsection (3) of this section;

(III) The employer has not elected to make reimbursement payments in lieu of premiums; and

(IV) As of the computation date immediately preceding the calendar year for which the premium credit is to be taken, the unexpended and unencumbered surplus balance in the unemployment compensation fund created in section 8-77-101 (1) exceeded one and six-tenths percent of total wages reported by experience-rated employers. Amounts in excess of one and six-tenths percent of total covered wages are considered available for disbursement as part of the premium credit.

(9) Any premium credit remaining to an employer after the first year in which the premium credit is applied is available to the employer in subsequent calendar years.

(10) As used in subsections (8) and (9) of this section, "premium credit" means the dollar amount discount available to eligible employers under the conditions set forth in paragraph (b) of subsection (8) of this section to be applied against premiums due in any given calendar year. For purposes of computing an employer's future rate, any premium credit claimed by an employer under subsection (8) of this section is disregarded, and the premium that would otherwise be due is deemed paid.

(11) (a) The division shall maintain a separate account for each employer and shall credit the employer's account with all premiums and surcharges paid on the employer's behalf. Nothing in articles 70 to 82 of this title shall be construed to grant any employer or individuals in the employer's service prior claims or rights to the amounts paid by the employer into the fund, either on the employer's behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged, in the amount provided in this section, against the accounts of his or her employers in the base period in the inverse chronological order in which the employment of the individual occurred. Benefits paid to a seasonal worker during the normal seasonal periods shall be charged against the account of his or her most recent seasonal employers in the corresponding normal seasonal period of his or her base period in the inverse chronological order in which the seasonal employment of the individual occurred and prior to the charging of benefits based on nonseasonal employment.

(b) The maximum amount charged against the experience rating account of any employer pursuant to paragraph (a) of this subsection (11) may not exceed one-third of the wages paid to an individual by the employer for insured work during the individual's base period, but not more per completed calendar quarter or portion thereof than one-third of the maximum wage credits as computed in section 8-73-104. Nothing in sections 8-76-101 to 8-76-104 shall be construed to limit benefits payable pursuant to sections 8-73-101 to 8-73-106. Notwithstanding section 8-73-108 or any administrative practice that results in fund charging, a reimbursing employer shall bear the cost of all benefits paid to its former employees, with the exception of benefit overpayments. The director of the division, by general rules, shall prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment at the same time.

(c) If, by reason of fraud, mistake, or clerical error, an individual receives benefits in excess of those to which he or she is entitled and the employer's account is charged, the employer's account shall be credited an amount equal to the benefits erroneously charged to the account.

**Source:** L. 2011: Entire section added, (HB 11-1288), ch. 212, p. 916, § 5, effective July 1. L. 2012: (3)(a) and (4)(a) amended, (HB 12-1127), ch. 29, p. 116, § 1, effective March 19.

**Editor's note:** As of publication date, the revisor of statutes has not received the notice specified in subsection (1) of this section.

### **8-76-103. Future rates based on benefit experience - definitions - repeal.**

(1) (a) The division shall maintain a separate account for each employer and shall credit the employer's account with all premiums and surcharges paid on his or her own behalf. Nothing in articles 70 to 82 of this title shall be construed to grant any employer or individuals in his or her service prior claims or rights to the amounts paid by the employer into the fund either on his or her own behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged, in the amount provided in this section, against the accounts of his or her employers in the base period in the inverse chronological order in which the employment of such individual occurred. Benefits paid to a seasonal worker during the normal seasonal periods shall be charged against the account of his or her most recent seasonal employers in the corresponding normal seasonal period of his or her base



period in the inverse chronological order in which the seasonal employment of the individual occurred and prior to the charging of benefits based on nonseasonal employment.

(b) The maximum amount so charged against the experience rating account of any employer shall not exceed one-third of the wages paid to such individual by each such employer for insured work during such individual's base period, but not more per completed calendar quarter or portion thereof than one-third of the maximum wage credits as computed in section 8-73-104. Nothing in sections 8-76-101 to 8-76-104 shall be construed to limit benefits payable pursuant to sections 8-73-101 to 8-73-106. Notwithstanding the provisions of section 8-73-108 and administrative practices which result in fund charging, a reimbursing employer shall bear the cost of all benefits paid to its former employees, with the exception of benefit overpayments. The director of the division, by general rules, shall prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment at the same time.

(c) This subsection (1) shall become effective July 1, 1963, and the provisions hereof respecting determination of weekly benefit amounts and duration of benefits shall apply only to benefit years commencing on or after July 1, 1963. Benefits for individuals whose current benefit year has not expired on July 1, 1963, shall be completed in accordance with the provisions in effect at the time said benefit year began.

(d) If, by reason of fraud, mistake, or clerical error, an individual receives benefits in excess of those to which he or she is entitled and the employer's account is charged, the employer's account shall be credited an amount equal to the benefits erroneously charged to the account.

(2) Repealed.

(3) (a) (I) The standard premium rate shall be one and seven-tenths percent. Employer premium rates for employers newly subject to articles 70 to 82 of this title on or after July 1, 1997, shall be determined each year as of the computation date in accordance with the provisions of subparagraph (II) of paragraph (b) of this subsection (3). Such new employers shall pay premiums at the standard rate or at the computed rate, whichever is higher, unless and until there have been twelve consecutive calendar months immediately preceding the computation date during which an employer's account has been chargeable with benefit payments.

(II) An employer who elects reimbursement under sections 8-76-108 to 8-76-110 is exempt from this section.

(III) (A) to (D) Repealed.

(E) On and after January 1, 2002, those employers newly subject to articles 70 to 82 of this title and assigned the three-digit North American industry classification code 236, 237, or 238 for the construction industry, unless and until there have been thirty-six consecutive calendar months immediately preceding the computation date, shall pay premiums at the standard rate, at the actual experience rate, or at a rate equal to the average industry premium rate as determined by the division, whichever is greater.

(F) On and after January 1, 2002, for purposes of this subsection (3), the division shall assign industrial classifications to employers pursuant to sub-subparagraph (E) of this subparagraph (III) in accordance with procedures and guidelines of the bureau of labor statistics of the United States department of labor and to the appropriate three-digit subsector level found in the North American industry classification system manual issued by the office of management and budget.

(G) On and after January 1, 2002, for purposes of this subsection (3), "average industry premium rate" means the average premium rate of all employers assigned the same three-digit North American industry classification code pursuant to sub-subparagraph (E) of this subparagraph (III). The rate shall be computed annually by the division using the latest available data as of the computation date.

(H) Repealed.

(IV) An "employer newly subject", as used in this article, means an employer who has never, at any time, been an employer under any provision of articles 70 to 82 of this title, an employer who has lost his or her prior experience under subsection (6) of this section, or an employer who, under the provisions of section 8-76-110 (2) (e), terminates his or her





Percent of Excess	450 Million Plus	396 to 450 Million	342 to 396 Million	306 to 342 Million	270 to 306 Million	234 to 270 Million	198 to 234 Million	162 to 198 Million	126 to 162 Million	90 to 126 Million	More than Zero to 90 Million	0 or Deficit
-5	.033	.033	.033	.033	.033	.033	.033	.033	.033	.033	.033	.035
-6	.034	.034	.034	.034	.034	.034	.034	.034	.034	.034	.034	.036
-7	.035	.035	.035	.035	.035	.035	.035	.035	.035	.035	.035	.037
-8	.036	.036	.036	.036	.036	.036	.036	.036	.036	.036	.036	.038
-9	.037	.037	.037	.037	.037	.037	.037	.037	.037	.037	.037	.039
-10	.038	.038	.038	.038	.038	.038	.038	.038	.038	.038	.038	.040
-11	.039	.039	.039	.039	.039	.039	.039	.039	.039	.039	.039	.041
-12	.040	.040	.040	.040	.040	.040	.040	.040	.040	.040	.040	.042
-13	.041	.041	.041	.041	.041	.041	.041	.041	.041	.041	.041	.043
-14	.042	.042	.042	.042	.042	.042	.042	.042	.042	.042	.042	.044
-15	.043	.043	.043	.043	.043	.043	.043	.043	.043	.043	.043	.045
-16	.044	.044	.044	.044	.044	.044	.044	.044	.044	.044	.044	.046
-17	.045	.045	.045	.045	.045	.045	.045	.045	.045	.045	.045	.047
-18	.046	.046	.046	.046	.046	.046	.046	.046	.046	.046	.046	.048
-19	.047	.047	.047	.047	.047	.047	.047	.047	.047	.047	.047	.049
-20	.048	.048	.048	.048	.048	.048	.048	.048	.048	.048	.048	.050
-21	.049	.049	.049	.049	.049	.049	.049	.049	.049	.049	.049	.051
-22	.050	.050	.050	.050	.050	.050	.050	.050	.050	.050	.050	.052
-23	.051	.051	.051	.051	.051	.051	.051	.051	.051	.051	.051	.053
-24	.052	.052	.052	.052	.052	.052	.052	.052	.052	.052	.052	.054
-25	.053	.053	.053	.053	.053	.053	.053	.053	.053	.053	.053	.054
More than -25	.054	.054	.054	.054	.054	.054	.054	.054	.054	.054	.054	.054

(III) Only those wages paid for covered employment that occurred prior to the computation date and reported to the division on or before thirty-one days immediately following the computation date will be used to determine the experience rate effective for the next calendar year.

(IV) Whenever an employer subject to the provisions of articles 70 to 82 of this title acquires, prior to the computation date and pursuant to section 8-76-104, all or a segregable portion of the organization, trade, and business or substantially all of the assets of an employer who was subject to the provisions of articles 70 to 82 of this title at the time of such acquisition, and such successor submitted in writing that he met the conditions set forth in section 8-76-104, a total or partial transfer of the experience rating record of the predecessor employer shall be made as provided in section 8-76-104. No merger of such accounts for experience rating purposes will be made for the rate effective the next calendar year unless such information is submitted to the division on or before sixty days following the computation date.

(V) When the fund level on July 1 of any year reaches one and six-tenths percent of the total wages, the director of the division shall recommend to legislative council a proposed premium rate decrease.

(c) If the federal unemployment tax rate is reduced below three percent, the maximum rate listed in the table shall not exceed ninety percent of the reduced federal unemployment tax rate.

(d) Notwithstanding any provisions to the contrary, any employer, at any time prior to March 15 of any year, may pay voluntary premiums in addition to the premiums and surcharges provided under articles 70 to 82 of this title. Voluntary premiums shall be credited to the employer's account and be used in determining the employer's rate for the current calendar year and subsequent calendar years; except that, if an employer is delinquent in the payment of any premiums or surcharges due, the voluntary premium payments shall be reduced by the total amount of delinquent premiums and surcharges before such computation is made. No voluntary premiums paid pursuant to this paragraph (d) shall be refunded or applied to future premium liability.

(e) As used in this section, for the purpose of computing the premium rate of any employer, "annual payroll" means the total amount of wages for employment paid by an employer during the twelve-month period ending June 30. "Average chargeable payroll" means the average of the chargeable payrolls for the last three fiscal years ending June 30. For any employer who has not reported payrolls to the division for thirty-six consecutive months ending June 30, the division shall compute the average chargeable payroll by dividing the total chargeable payrolls of the employer during the three fiscal years ending

June 30 by the total months during which such wages were paid and multiplying the amount so determined by twelve.

(4) An employer shall have sixty calendar days from the mailing date or the transmission date as recorded by the division of a quarterly statement of benefits charged to the employer's account in which to file a written protest or application requesting a review and determination of benefit charges. Such application shall specify in detail the grounds upon which such employer relies and may be filed in person, by mail, or by electronic means in accordance with such rules as the director of the division may promulgate. The division shall investigate the matters specified and give such employer notice of its redetermination by mail or by electronic means. If the employer fails to act within the prescribed time, benefits charged to such account shall be deemed correct and final. Appeal from the redetermination decision may be made pursuant to section 8-76-113 (2).

(5) The division shall notify each employer, as nearly as possible prior to the date upon which any premiums for each calendar year become due, of the employer's premium rate as determined for such calendar year pursuant to sections 8-76-101 to 8-76-104. The notification shall include the amount determined as the employer's average annual payroll, the total of all the employer's premiums paid on his or her own behalf and credited to his or her account for all past years, and the total benefits charged to the employer's account for all such years.

(6) Whenever there has been a period of five consecutive calendar years during which there were no chargeable wages paid for services considered employment under the provisions of articles 70 to 82 of this title, any balance shown in the employer's account will not be transferred nor be used for premium rating purposes if the employer again becomes liable under articles 70 to 82 of this title.

(7) (a) Subject to the conditions stated in paragraph (b) of this subsection (7), an employer shall be eligible for a credit of twenty percent against premiums otherwise due under section 8-76-102 (3) and subsection (3) of this section. For purposes of computing an employer's future rates, any credit claimed by the employer under this subsection (7) shall be disregarded, and the premiums that would otherwise have been due shall be deemed paid.

(b) An employer shall not receive credits under this subsection (7) unless all of the following conditions are met:

(I) As of the most recent computation date, the employer has filed all required reports and paid all premiums and surcharges due under articles 70 to 82 of this title;

(II) The employer is not a negative excess employer assigned the maximum premium rate under sub-subparagraph (C) of subparagraph (II) of paragraph (b) of subsection (3) of this section;

(III) The employer has not elected to make reimbursement payments in lieu of premiums; and

(IV) As of the computation date immediately preceding the calendar year for which the credit is to be taken, the unexpended and unencumbered balance in the unemployment compensation fund, created in section 8-77-101 (1), equaled or exceeded one and one-tenth percent of the total amount of insured wages paid in Colorado during the calendar year immediately preceding the computation date.

(8) This section is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

**Source:** L. 36, 3rd Ex. Sess.: p. 26, § 7. L. 37: p. 1258, § 5. CSA: C. 167A, § 7. L. 39: p. 572, § 5. L. 41: p. 773, § 7. L. 43: p. 602, § 4. L. 45: p. 713, § 3. L. 49: p. 724, §§ 5, 6. L. 51: p. 808, § 5. L. 53: p. 629, §§ 4-6. CRS 53: § 82-6-3. L. 57: p. 518, § 7. L. 58: 1st Ex. Sess., p. 26, §§ 2, 3. L. 59: pp. 564, 567, §§ 5, 6, 2, 3. L. 63: p. 681, § 9. C.R.S. 1963: § 82-6-3. L. 65: p. 846, § 8. L. 69: pp. 671, 685-687, §§ 8, 1-3. L. 71: p. 935, § 12. L. 73: pp. 960, 961, §§ 8-10, 13. L. 76: (1)(b) R&RE and (3)(a) amended, p. 351, §§ 16, 17, effective October 1. L. 77: (3)(b)(II) R&RE, p. 475, § 2,



effective July 1; (1)(b) amended, p. 485, § 4, effective October 1. **L. 79:** (3)(b)(II)(A) amended and (4) R&RE, p. 353, §§ 19, 20, effective September 30. **L. 81:** (1)(a), (3)(a), (3)(b)(II), (3)(d), (3)(e), (5), and (6), amended, p. 493, § 9, effective July 1; (1)(b) amended, p. 486, § 12, effective July 1. **L. 83:** (3)(e) R&RE, p. 430, § 7, effective June 3; (3)(a), (3)(b)(I), (3)(b)(II), and (3)(d) amended, p. 2043, § 8, effective October 1. **L. 84:** (3)(a)(I) and (3)(b)(I) amended, p. 318, § 10, effective July 1. **L. 85:** (3)(b)(IV) and (3)(d) amended and (2) repealed, pp. 373, 376, §§ 3, 8, effective July 1. **L. 86:** (1)(b) amended, p. 493, § 100, effective July 1; (3)(b)(II)(B) and (3)(b)(II)(C) amended, p. 544, § 10, effective July 1. **L. 90:** (3)(a)(III) R&RE, p. 1765, § 4, effective June 8. **L. 91:** (3)(a)(V) added, p. 1289, § 1, effective May 16; (3)(a)(III), (3)(b)(II)(B), and (3)(b)(II)(C) amended and (3)(b)(V) added, p. 1348, § 2, effective July 1; (3)(b)(I) amended, p. 1360, § 3, effective September 1. **L. 92:** (3)(a)(III)(A) and (3)(b)(V) amended, p. 1796, § 7, effective April 10. **L. 94:** (3)(a)(V) repealed, p. 641, § 6, effective July 1. **L. 97:** (3)(a)(I) amended and (3)(a)(VI) added, p. 1141, § 1, effective May 28. **L. 2000:** (7) added, p. 142, § 1, effective March 16. **L. 2001:** (3)(a)(III) amended, p. 221, § 1, effective August 8. **L. 2002:** (4) amended, p. 337, § 5, effective April 19; (7)(a) amended, p. 941, § 1, effective August 7. **L. 2006:** (3)(b)(II)(B) amended, p. 1517, § 88, effective June 1. **L. 2009:** (1)(a), (3)(a)(I), (3)(a)(III)(E), (3)(a)(III)(G), (3)(a)(IV), (3)(b)(II), (3)(b)(V), (3)(d), (3)(e), and (5) to (7) amended, (HB 09-1363), ch. 363, p. 1887, § 14, effective July 1; (3)(a)(III)(H) repealed, (SB 09-292), ch. 369, p. 1939, § 7, effective August 5. **L. 2011:** (1)(d) and (8) added, (HB 11-1288), ch. 212, p. 925, §§ 6, 7, effective July 1; (3)(e) amended, (HB 11-1303), ch. 264, p. 1149, § 6, effective August 10. **L. 2012:** (3)(a)(III)(F) and (3)(b)(V) amended, (HB 12-1120), ch. 27, p. 105, § 15, effective June 1. **L. 2012, 1st Ex. Sess.:** (8) amended, (HB 12S-1002), ch. 2, p. 2428, § 9, effective June 1.

**Editor's note:** (1) Subsection (3)(a)(VI)(B) provided for the repeal of subsection (3)(a)(VI), effective July 1, 2000. (See L. 97, p. 1141.)

(2) Subsection (3)(a)(III)(H) provided for the repeal of subsections (3)(a)(III)(A) to (3)(a)(III)(D), effective January 1, 2005. (See L. 2001, p. 221.)

(3) As of publication date, the revisor of statutes has not received the notice specified in subsection (8) of this section.

(4) The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

## ANNOTATION

**This section requires that the administrative agency maintain a separate account for each employer** and credit his account with all contributions paid on his own behalf. After a fixed period of "contributions" to the fund on the part of an employer, the amount thereof depends upon his benefit experience; that is to say, if his turnover of employees is large and numerous claims for compensation are made by his one-time employees, his contribution, or tax, is higher. If no claims are shown by his benefit experience or if they are few, he may conceiv-

ably be relieved of further contributions to the fund, so long as required reserves in this account are available. *Cottrell Clothing Co. v. Teets*, 139 Colo. 558, 342 P.2d 1016 (1959).

**The division of employment and training is required to maintain a separate tax account for each entity that meets the definition of an "employer"** under § 8-70-113, even if the entities in question fall under common ownership and control. *Accord Human Res., Inc. v. Indus. Claim Appeals Office*, \_\_ P.3d \_\_ (Colo. App. 2010).

### 8-76-103.5. Transitional provisions - combined premium rate for 2012 - repeal.

(1) For calendar year 2012, the incremental increase in the solvency surcharge established in section 8-76-102 will be applied, and an amount equal to the amount of the increase in the surcharge will be subtracted from the computation on the experience-rated employer's rate for the calendar year 2012.

(2) This section is repealed, effective January 1, 2014.

**Source:** **L. 2011:** Entire section added, (HB 11-1288), ch. 212, p. 926, § 8, effective July 1.

**8-76-104. Transfer of experience - assignment of rates - definitions - repeal.**

(1) (a) An employing unit, as defined in section 8-70-113 (1) (f), that becomes an employer because it acquires all of the organization, trade, or business or substantially all of the assets of one or more employers subject to articles 70 to 82 of this title shall succeed to the entire experience rating record of the predecessor employer, and the entire separate account, including the actual premiums, benefits, and payroll experience of the predecessor employer, shall pass to the successor for the purpose of determining the premium rate for the successor.

(b) If the successor was not an employer prior to the date of acquisition, the successor's rate shall be the rate applicable to the predecessor employer in the period immediately preceding the date of acquisition if there was only one predecessor or if there were multiple predecessors with identical rates. If there were multiple predecessor employers with rates that were not identical, the successor's rate shall be the highest rate applicable to any of the predecessor employers in the period immediately preceding the date of acquisition.

(c) (I) (A) If, at the time of transfer, a person who is not an employer under this section acquires the trade or business of an employer and the division finds that the successor acquired the trade or business solely or primarily for the purpose of obtaining a lower rate of contributions, the unemployment experience of the predecessor employer shall not be transferred to the successor and the division shall assign the successor the applicable new employer rate determined pursuant to section 8-76-103 (3).

(B) This subparagraph (I) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

(II) (A) If, at the time of transfer, a person who is not an employer under this section acquires the trade or business of an employer and the division finds that the successor acquired the trade or business solely or primarily for the purpose of obtaining a lower rate of contributions, the unemployment experience of the predecessor employer shall not be transferred to the successor and the division shall assign the successor the applicable new employer rate determined pursuant to section 8-76-102.5 (4).

(B) This subparagraph (II) is effective on and after the repeal of subparagraph (I) of this paragraph (c).

(2) (a) Notwithstanding any other provision of sections 8-76-101 to 8-76-104, if the successor employer was an employer subject to articles 70 to 82 of this title prior to the date of acquisition and, at the time of the transfer, there is no substantial common ownership, management, or control of the two employers, the successor's premium rate for the remainder of the calendar year shall be the same as the successor's rate in the period immediately preceding the date of acquisition.

(b) If an employer transfers all or a portion of its trade or business to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the predecessor employer shall be transferred to the successor employer. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer of the trade or business. If, following a transfer experience, the division determines that the purpose of the transfer of the trade or business was solely or primarily to obtain a reduced liability for contributions, the division shall combine the experience rating accounts of the employers into a single account and shall assign a single rate to the account.

(c) If an employer transfers all or a portion of its trade or business to another employer and the division finds that the successor acquired the trade or business solely or primarily for the purpose of obtaining a lower rate of contributions, the experience and reserve account attributable to the predecessor employer shall not be transferred to the successor employer and shall revert to the predecessor employer.

(3) (a) Whenever an employer in any manner transfers a clearly segregable unit of the employer's business for which the predecessor employer has maintained, in such form as to be separable, continuous records of wages, premiums, and benefits paid on account of the segregable unit, the predecessor employer and successor employer may jointly request that



the division transfer a proportionate share of premium, benefit, and payroll experience attributable to the unit based on the ratio of the chargeable payrolls paid during the twelve calendar quarters immediately preceding the computation date of the segregable unit to the total employer account prior to the notice to the division of the transfer. A transfer of experience may not be made under this subsection (3) unless the segregable unit has fourteen consecutive quarters of payroll immediately preceding the computation date. If, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the predecessor employer shall be transferred to the successor employer. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer of the trade or business.

(b) The division may transfer the experience and perform all other acts required by this subsection (3). The proportionate share of the predecessor employer's reserve account attributable to the transferred unit shall pass to the successor employer.

(c) The experience rate established for the predecessor employer for all units of the business shall continue in effect for the remainder of the calendar year in which the transfer is made, and, for succeeding calendar years, it shall be computed on the experience of those units retained.

(d) If the successor was an employer prior to the effective date of the transfer, the experience rate for the calendar year in which the transfer is made shall be the same as that previously established without reference to the acquired segregable unit, and, for succeeding calendar years, it shall be computed on the combined experience of all units of the successor's business.

(e) If the successor was not an employer prior to the effective date of transfer and two or more segregable units are simultaneously transferred to the successor by a single employer, the successor's premium rate shall be computed from the combined premium, benefit, and payroll experience of the units.

(f) If the successor was not an employer prior to the effective date of transfer and two or more segregable units are simultaneously transferred to the successor by different employers, the successor's premium rate shall be the highest rate applicable to any of the units unless the rates with respect to the transferred units are identical.

(g) The transfer of experience with respect to a segregable unit shall be of no force and effect unless an application for the transfer, signed by both the predecessor employer and the successor employer, is filed with the division in the form and manner prescribed by the director by rule. The application shall be filed within sixty days after the notice of employer liability from the division is mailed or transmitted by electronic means to the successor employer. The notice shall contain information pertaining to segregable unit transfers.

(h) Whenever a predecessor employer and a successor employer jointly request that the division transfer the proportionate share of premium, benefit, and payroll experience attributable to a clearly segregable unit to the successor employer, the predecessor employer shall furnish to the division any information requested by the division for such purpose.

(4) (a) In determining whether the trade or business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the division shall use objective factors that may include, without limitation, the cost of acquiring the trade or business, whether and for how long the successor continued the business enterprise of the acquired trade or business, and whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to the acquisition.

(b) The division may void a rate determination if it finds that a successor has no business existence separate and apart from the predecessor and should not have been established as a separate employer for unemployment compensation purposes. Under the circumstances described in this paragraph (b), the experience and reserve account attributable to the predecessor employer shall not be transferred to the successor employer and shall revert to the predecessor employer.

(5) When determining whether one or more employers have common ownership, management, or control, the division may consider factors such as stock ownership, officers, employees, payroll systems, and common business interests.

(6) The division shall establish procedures to identify the transfer or acquisition of a business or trade for purposes of this section.

(7) Notwithstanding any provision of section 8-70-113 to the contrary, any subject employer whose entire reserve account has been transferred to a successor employer, as provided in subsection (1) of this section, shall immediately cease to be a subject employer and shall thereafter become a subject employer only upon any future employment experience.

(8) A transfer of experience shall not occur when a work-site employer's account is made inactive as a result of entering into a contract with an employee leasing company, as defined in section 8-70-114 (2) (a) (V), or when a contract between a work-site employer and an employee leasing company is terminated unless there is substantial common ownership, management, and control of the work-site employer and the employee leasing company. The existence of an employee leasing arrangement, without other evidence of common control, shall not constitute substantial common ownership, management, and control.

(9) When any part of the predecessor employer's trade or business utilizes the services of ninety percent or more of the total number of employees in covered employment on the payroll for each of the four pay periods immediately preceding the transfer to a successor employer, the entire separate account, including the actual premium, benefit, and payroll experience of the predecessor employer, shall pass to the successor employer for the purpose of the rate of computation of the successor.

(10) (a) If a person knowingly violates or attempts to violate any provision of this section in order to obtain a lower contribution rate, the person shall pay all owed premiums with applicable penalties and interest and may be subject to the penalties set forth in paragraph (c) of this subsection (10).

(b) If a person knowingly advises another person in a way that results in a violation of paragraph (a) of this subsection (10), the person may be subject to the penalties set forth in paragraph (c) of this subsection (10).

(c) If the person who violates this section as described in paragraph (a) or (b) of this subsection (10) is an employer, the division may assign the employer the highest contribution rate assignable under this article for the rate year during which the violation or attempted violation occurred and the next three years. If, during the rate year in which a violation occurs, the subject employer was assigned the highest contribution rate, or the amount of the rate increase would be less than two and seven-tenths percent for the rate year, the division may impose a penalty contribution rate of two and seven-tenths percent of chargeable wages for that rate year and the next three years. If the person is not an employer, the person may be subject to a civil fine of not more than five thousand dollars, which shall be deposited in the unemployment revenue fund created in section 8-77-106.

(d) In addition to any penalty imposed pursuant to paragraphs (a), (b), and (c) of this subsection (10), any violation of this section may be prosecuted as a class 1 misdemeanor pursuant to section 18-1.3-501, C.R.S.

(11) As used in this section, unless the context otherwise requires:

(a) "Knowingly" or "willfully" means being aware that one's conduct is practically certain to cause the result or having reckless disregard for the prohibition involved.

(b) "Person" means any individual, trust, estate, partnership, association, company, corporation, joint venture, limited liability company, or other legal or commercial entity.

(c) "Trade" or "business" includes an employer's work force.

(d) "Violates or attempts to violate" includes, but is not limited to, intent to evade, misrepresentation, or willful nondisclosure.

**Source:** L. 41: p. 773, § 7. CSA: C. 167A, § 7. L. 43: p. 602, § 4. L. 47: p. 887, § 3. L. 51: p. 810, § 6. L. 53: p. 632, § 7. CRS 53: § 82-6-4. L. 55: pp. 530, 531, §§ 4, 5. C.R.S. 1963: § 82-6-4. L. 71: p. 936, § 13. L. 81: (1) and (2) amended, p. 496, § 10, effective July 1. L. 83: (1) amended, p. 430, § 8, effective June 3. L. 85: (1) amended and (5) added, p. 374, § 4, effective July 1. L. 90: (1) and (4) amended, p. 604, § 9, effective April 3. L. 93: (6) added, p. 707, § 2, effective May 6. L. 94: (5)(a), (5)(b), and (5)(j) amended, p. 641, § 7, effective July 1. L. 97: (6) amended, p. 210, § 3, effective April 8.



**L. 98:** (5)(g), (5)(h), and (5)(i) amended and (7) and (8) added, p. 70, § 7, effective March 23. **L. 2002:** (5)(g) amended, p. 338, § 6, effective April 19. **L. 2005:** Entire section R&RE, p. 543, § 1, effective July 1. **L. 2006:** (8) amended, p. 654, § 2, effective April 24. **L. 2009:** (1)(a), (2)(a), (3)(a), (3)(e), (3)(f), (3)(h), (9), (10)(a), and (10)(c) amended, (HB 09-1363), ch. 363, p. 1895, § 15, effective July 1; (8) amended, (SB 09-292), ch. 369, p. 1940, § 8, effective August 5. **L. 2011:** (1)(c) amended, (HB 11-1288), ch. 212, p. 929, § 13, effective July 1. **L. 2012, 1st Ex. Sess.:** (1)(c)(I)(B) amended, (HB 12S-1002), ch. 2, p. 2428, § 10, effective June 1.

**Editor's note:** As of publication date, the revisor of statutes has not received the notice specified in subsection (1)(c)(I)(B) of this section.

**Cross references:** For the legislative declaration contained in the 1997 act amending subsection (6), see section 1 of chapter 77, Session Laws of Colorado 1997.

## ANNOTATION

**Annotator's note.** The following annotations include cases decided under this section as it existed prior to its 2005 repeal and reenactment.

**This section does not deny due process of law.** Statute governing unemployment tax rate for a successor business does not deny due process of law because persons in the same situation are not treated differently. *Manpower, Inc. v. Indus. Comm'n*, 677 P.2d 346 (Colo. App. 1983).

**And is not unconstitutionally vague.** Provisions delineate two-pronged requirement for successor tax rate. The test is clearly stated in the statute and does not leave persons of ordinary intelligence guessing as to its meaning or differing as to its application. *Manpower, Inc. v. Indus. Comm'n*, 677 P.2d 346 (Colo. App. 1983).

**8-76-105. Period of employer's coverage.** (1) Any employing unit which is or becomes an employer subject to articles 70 to 82 of this title within any calendar year shall be deemed to be an employer during the whole of such calendar year.

(2) No employing unit shall be deemed to be an employer liable under articles 70 to 82 of this title for any period prior to five calendar years immediately preceding the calendar year in which the division determines the employing unit to be an employer as defined in section 8-70-103.

**Source:** **L. 36, 3rd Ex. Sess.:** p. 29, § 8. **CSA:** C. 167A, § 8. **L. 41:** p. 799, § 8. **L. 49:** p. 726, § 8. **L. 51:** p. 811, § 7. **CRS 53:** § 82-6-5. **C.R.S. 1963:** § 82-6-5. **L. 73:** p. 961, § 11.

**8-76-106. Termination of employer liability.** (1) An employing unit shall cease to be an employer subject to articles 70 to 82 of this title only as of the first day of any calendar year, only if, not later than the last day of February of such year, it has filed with the division a written application for termination of coverage as an employer as of the first day of January, and the division finds that during the preceding calendar year:

(a) Such employing unit was not an employer as defined in the introductory portion to section 8-70-113 (1) and section 8-70-113 (1) (g);

(b) Such employing unit was not liable by having elected to become liable during such year; or

(c) Such employing unit did first become liable under and by virtue of section 8-76-104

and was not liable under the introductory portion to section 8-70-113 (1) and section 8-70-113 (1) (g) or section 8-76-107.

(2) Any employer who does not employ any individual whose services are considered in employment at any time in this state for a period of one calendar year shall cease to be an employer subject to articles 70 to 82 of this title as of the thirty-first day of December of such calendar year.

(3) Any employing unit which became liable during any calendar year preceding the calendar year in which its liability by virtue of the introductory portion to section 8-70-113 (1) and section 8-70-113 (1) (g) was determined may terminate coverage effective as of the end of the first year during which such employing unit was not an employer by virtue of the introductory portion to section 8-70-113 (1) and section 8-70-113 (1) (g) if such year was prior to the date the determination was made by the division, by filing a written application to terminate coverage as an employer within thirty days of the date of such determination.

(4) For the purposes of this section, written applications shall be filed in such form and manner as the director of the division may prescribe by rule, including in person, by mail, by telephone, or by electronic means.

**Source:** L. 36, 3rd Ex. Sess.: p. 29, § 8. L. 37: p. 1261, § 6. CSA: C. 167A, § 8. L. 39: p. 572, § 6. L. 41: p. 779, § 8. L. 45: p. 713, § 4. L. 49: p. 726, § 8. L. 51: p. 811, § 7. CRS 53: § 82-6-6. C.R.S. 1963: § 82-6-6. L. 65: p. 846, § 9. L. 71: p. 937, § 14. L. 90: (1)(a), (1)(c), and (3) amended, p. 604, § 10, effective April 3. L. 2002: (4) added, p. 338, § 7, effective April 19.

**8-76-107. Election to become liable.** (1) An employing unit, not otherwise subject to articles 70 to 82 of this title, which files with the division its written election to become an employer subject hereto for not less than two calendar years, with the written approval of such election by the division, shall become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January first of any calendar year subsequent to such two calendar years, only if such employing unit has filed with the division a written application for termination as provided in subsection (2) of this section.

(2) Any employing unit for which services that do not constitute employment are performed may file with the division a written election that all such services performed by individuals in its employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of articles 70 to 82 of this title for not less than two calendar years. Upon the written approval of such election by the division, such services shall be deemed to constitute employment subject to articles 70 to 82 of this title from and after the date stated in such approval. Such services shall cease to be deemed employment subject hereto as of January 1 of any calendar year subsequent to such two calendar years, only if such employing unit has filed with the division a written application for termination as provided in this section.

(3) For the purposes of this section, written applications shall be filed in such form and manner as the director of the division may prescribe by rule, including in person, by mail, by telephone, or by electronic means.

**Source:** L. 36, 3rd Ex. Sess.: p. 29, § 8. CSA: C. 167A, § 8. L. 41: p. 779, § 8. L. 51: p. 811, § 7. CRS 53: § 82-6-7. C.R.S. 1963: § 82-6-7. L. 2002: (3) added, p. 338, § 8, effective April 19.

**8-76-108. Coverage by political subdivisions.** (1) (a) Political subdivisions are covered employers if employees employed by such political subdivisions perform services in employment as defined by section 8-70-119. Such political subdivisions may elect to pay premiums in lieu of reimbursements. Any political subdivision that makes reimbursement shall not be liable to make such payments with respect to the benefits paid to any individual whose base period wages include wages for previously uncovered services as defined in



section 8-70-141 (1) (d) to the extent that the unemployment compensation fund is reimbursed for such benefits pursuant to section 121 of Public Law 94-566.

(b) Repealed.

(c) The amounts required to be paid in lieu of premiums by any political subdivision under this section shall be billed and payment made as provided in section 8-76-110 (3) with respect to similar payments by nonprofit organizations.

(d) An election by a contributing political subdivision to become a reimbursing employer or an election by a reimbursing political subdivision to become a contributing employer may be made by filing with the division written notice, in such form and manner as the director of the division may prescribe by rule, not later than March 1 of the calendar year in which the election is to be effective. Such election becomes effective as of the first day of the calendar year with respect to services performed after that date. Notwithstanding the effective date of any election, the political subdivision remains liable for all benefits chargeable against its account that it has not paid.

(e) Political subdivisions or their instrumentalities that are liable for payments in lieu of premiums shall pay to the division for the unemployment compensation fund the full amount of all regular and extended benefits paid that are attributable to service in their employ. Political subdivisions or their instrumentalities that have elected to pay premiums as permitted by this section shall have their accounts charged with the full amount of all regular and extended benefits that are attributable to service in their employ.

(f) Any extension of unemployment insurance coverage to political subdivisions mandated by Public Law 94-566 shall again become optional in the event such mandatory coverage is declared unconstitutional or null and void by the supreme court of the United States or is repealed by an act of congress.

**Source:** L. 71: p. 937, § 15. C.R.S. 1963: § 82-6-8. L. 75: (1)(a) amended, p. 322, § 4, effective June 20. L. 76: (1)(a) amended, p. 361, effective April 20; (1)(a) amended, p. 351, § 18, effective October 1. L. 77: (1)(a) amended and (1)(e) and (1)(f) added, p. 467, § 20, effective July 7. L. 79: (1)(a) and (1)(d) amended and (1)(b) repealed, pp. 354, 356, §§ 21, 25, effective September 30. L. 81: (1)(e) amended, p. 486, § 13, effective July 1; (1)(a), (1)(c), and (1)(e) amended, p. 497, § 11, effective July 1. L. 82: (1)(d) amended, p. 239, § 8, effective July 1. L. 90: (1)(a) amended, p. 604, § 11, effective April 3. L. 2002: (1)(d) amended, p. 338, § 9, effective April 19. L. 2009: (1)(a), (1)(c), and (1)(e) amended, (HB 09-1363), ch. 363, p. 1896, § 16, effective July 1.

**8-76-109. Payments in lieu of premiums by state hospitals and state institutions of higher education.** State hospitals and state institutions of higher education as defined in section 8-70-103 (14) and (15) may elect to make reimbursements in lieu of premiums as provided for nonprofit organizations in section 8-76-110 (1) to (3) and (5).

**Source:** L. 71: p. 938, § 15. C.R.S. 1963: § 82-6-9. L. 81: Entire section amended, p. 497, § 12, effective July 1. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1897, § 17, effective July 1.

**8-76-110. Financing benefits paid to employees of nonprofit organizations.** (1) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this section. For the purpose of this section, a nonprofit organization is an organization or group of organizations described in section 501 (c) (3) of the federal "Internal Revenue Code of 1986", as amended, which are exempt from income tax under section 501 (a) of such code.

(2) **Liability for premiums and election of reimbursement.** (a) Any nonprofit organization that, pursuant to section 8-70-113 (1) (c), is or becomes subject to articles 70 to 82 of this title shall pay premiums under the provisions of section 8-76-101, unless it elects, in accordance with this subsection (2), to pay to the division for the unemployment compensation fund an amount equal to the amount of regular benefits and one-half of the extended benefits paid, that is attributable to service in the employ of such nonprofit

organization, to individuals for weeks of unemployment that begin during the effective period of such election.

(b) (Deleted by amendment, L. 2009, (HB 09-1363), ch. 363, p. 1897, § 18, effective July 1, 2009.)

(c) Any nonprofit organization that becomes subject to articles 70 to 82 of this title may elect to become liable for payments in lieu of premiums for a period of not less than the calendar year within which such subjection begins by filing a written notice of its election with the division not later than thirty days immediately following the date of the determination of such subjection. Any nonprofit organization that elects to make payments in lieu of premiums into the unemployment compensation fund as provided in this paragraph (c) shall not be liable to make such payments with respect to the benefits paid to any individual whose base period wages include wages for previously uncovered services as defined in section 8-70-141 (1) (d) to the extent that the unemployment compensation fund is reimbursed for such benefits pursuant to section 121 of Public Law 94-566.

(d) (Deleted by amendment, L. 2009, (HB 09-1363), ch. 363, p.1897, § 18, effective July 1, 2009.)

(e) Any nonprofit organization that makes an election in accordance with paragraph (c) of this subsection (2) will continue to be liable for payments in lieu of premiums until it files with the division a written notice terminating its election not later than thirty days prior to the beginning of the calendar year for which such termination is first effective.

(f) Any nonprofit organization that pays premiums under articles 70 to 82 of this title may change to a reimbursing basis by filing with the division not later than thirty days prior to the beginning of any calendar year a written notice of election to become liable for payments in lieu of premiums. Such election shall not be terminable by the organization for that and the next year. Any organization making such an election remains liable for the payment of all charges to its account and all premiums and surcharges due the division, and past due premiums and surcharges are subject to all interest and penalties as provided in articles 70 to 82 of this title.

(g) The division may for good cause extend the period within which a notice of election, or a notice of termination, must be filed and may permit an election to be retroactive.

(h) The division, in accordance with such rules as it may prescribe, shall notify each nonprofit organization of any determination that it may make of the status of the organization as an employer and of the effective date of any election and of any termination of such election.

(i) Notwithstanding any other provisions of articles 70 to 82 of this title, any nonprofit organization that, prior to January 1, 1969, paid premiums required by articles 70 to 82 of this title and that elects, pursuant to paragraph (d) of this subsection (2) as it existed prior to its repeal in 2009, to make payments in lieu of premiums shall not be required to make any such payment on account of any regular or extended benefits paid and attributable to wages paid for service performed in its employ for weeks of unemployment that begin on or after the effective date of such election until the total amount of such benefits equals the amount by which the premiums paid by such organization with respect to a period before such election exceed benefits paid for the same period and charged to the experience rating account of such organization, as of the effective date of such election.

(3) **Reimbursement payments.** (a) Payments in lieu of premiums shall be made in accordance with the provisions of this subsection (3).

(b) At the end of each calendar quarter, the division shall bill each nonprofit organization, or group of such organizations, that has elected to make payments in lieu of premiums for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits paid during such quarter or other prescribed period that is attributable to service in the employ of such organization.

(c) Payment of any bill rendered under paragraph (b) of this subsection (3) shall be made not later than thirty days after such bill was mailed to the last-known address of the nonprofit organization or was otherwise delivered to it, unless there has been an application for review and redetermination in accordance with paragraph (e) of this subsection (3).



(d) Payments made by any nonprofit organization under the provisions of this subsection (3) shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the organization.

(e) The amount due specified in any bill from the division shall be conclusive on the organization unless, not later than fifteen days after the bill was mailed to its last-known address or otherwise delivered to it, the organization files an application for redetermination by the division setting forth the grounds for such application. The division shall promptly review and reconsider the items specified and shall thereafter issue a redetermination in any case in which such application for redetermination has been filed. The amount due on the specified items in such redetermination shall become due and payable not later than thirty days following the date of mailing of the redetermination. All other charges specified on the original bill are due and payable within thirty days as provided by paragraph (c) of this subsection (3).

(f) Past-due payments of amounts in lieu of premiums shall be subject to the same interest and penalties that, pursuant to sections 8-79-101 and 8-79-104, apply to past-due premiums and surcharges.

(4) **Provision of bond or other security.** (a) In the discretion of the division, any nonprofit organization that elects to become liable for payments in lieu of premiums shall be required, within fifteen days after the effective date of its election, to execute and file with the division a surety bond approved by the division, or it may elect instead to deposit with the division money or securities. The amount of such bond or deposit shall be determined in accordance with the provisions of this subsection (4).

(b) The amount of bond or deposit required by this subsection (4) shall be equal to three times the sum of the amount of regular benefits plus one-half the extended benefits paid, if any, that are attributable to service in the employ of the nonprofit organization during the previous calendar year or the sum of said payments during the three previous calendar years, whichever is greater, but shall not exceed three and six-tenths percent nor be less than one-tenth of one percent of the total covered payroll of such organization for the preceding calendar year. If the employer has not been subject to articles 70 to 82 of this title for a sufficient period of time to acquire three calendar years' experience, then the bond shall be an amount computed by multiplying the total covered payroll for the previous calendar year, or the equivalent thereof, by two and seven-tenths percent. Any organization that, under the provisions of paragraph (i) of subsection (2) of this section, is not required to make payments in lieu of premiums will not be required to file a surety bond or make a surety deposit with the division as provided in this paragraph (b) until such time as said organization is required to make payments in lieu of premiums.

(c) Any bond deposited under this subsection (4) shall be in force for a period of not less than two calendar years and shall be renewed with the approval of the division, at such times as the division may prescribe, but not less frequently than at two-year intervals as long as the organization continues to be liable for payments in lieu of premiums. The division shall require such adjustments to be made in a previously filed bond as it deems appropriate. If the bond is to be increased, the adjusted bond shall be filed by the organization within fifteen days after the date notice of the required adjustment was mailed or otherwise delivered to it. Failure by any organization covered by such bond to pay the full amount of payments in lieu of premiums when due, together with any applicable interest and penalties provided for in paragraph (f) of subsection (3) of this section, shall render the surety liable on said bond to the extent of the bond, as though the surety were such organization.

(d) Any deposit of money or securities in accordance with this subsection (4) shall be retained by the division in an escrow account until liability under the election is terminated, at which time it shall be returned to the organization, less any deductions as provided in this subsection (4). The division may deduct from the money deposited under this paragraph (d) by a nonprofit organization or sell the securities a nonprofit organization has so deposited to the extent necessary to satisfy any due and unpaid payments in lieu of premiums and any applicable interest and penalties provided for in paragraph (f) of subsection (3) of this section. The division shall require the organization, within fifteen days following any deduction from a money deposit or sale of deposited securities under the provisions of this paragraph (d), to deposit sufficient additional money or securities to make whole the

organization's deposit at the prior level. Any cash remaining from the sale of such securities shall be a part of the organization's escrow account. The division may, at any time, review the adequacy of the deposit made by any organization. If, as a result of such review, the division determines that an adjustment is necessary, it shall require the organization to make an additional deposit within fifteen days after written notice of its determination or shall return to it such portion of the deposit as it no longer considers necessary, whichever action is appropriate. Disposition of income from securities held in escrow shall be governed by the applicable provisions of state law.

(e) If any nonprofit organization fails to file a bond or make a deposit, or to file a bond in an increased amount or to increase or make whole the amount of a previously made deposit, as provided under this subsection (4), the division may terminate the organization's election to make payments in lieu of premiums, and the termination shall continue for not less than the four-consecutive-calendar-quarter period beginning with the quarter in which the termination becomes effective, but the division may, for good cause, extend the applicable filing, deposit, or adjustment period by not more than fifteen days.

(f) If any nonprofit organization is delinquent in making payments in lieu of premiums as required under subsection (2) of this section, the division may terminate the organization's election to make payments in lieu of premiums as of the beginning of the next calendar year, and the termination shall be effective for that and the next calendar year.

(5) **Allocation of benefit costs.** (a) A political subdivision that is liable for payments in lieu of premiums shall pay to the division for the unemployment compensation fund the full amount of all regular and extended benefits paid that are attributable to service in the employ of such employer. A nonprofit organization liable for payments in lieu of premiums shall pay to the division for the unemployment compensation fund the amount of regular benefits plus the amount of one-half of extended benefits paid that are attributable to service in the employ of such employer. If benefits paid to an individual are based on wages paid by more than one employer and one or more of such employers are liable for payments in lieu of premiums, the amount payable to the fund by each employer that is liable for such payments shall be determined in accordance with the provisions of paragraph (b) or (c) of this subsection (5).

(b) If benefits paid to an individual are based on wages paid by one or more employers that are liable for payments in lieu of premiums and on wages paid by one or more employers that are liable for premiums, the amount of benefits payable by each employer that is liable for payments in lieu of premiums shall be an amount that bears the same ratio to the total benefits paid to the individual as the total base period wages paid to the individual by such employer bear to the total base period wages paid to the individual by all of his or her base period employers.

(c) If benefits paid to an individual are based on wages paid by two or more employers that are liable for payments in lieu of premiums, the amount of benefits payable by each such employer shall be an amount that bears the same ratio to the total benefits paid to the individual as the total base period wages paid to the individual by such employer bear to the total base period wages paid to the individual by all of his or her base period employers.

(6) **Group accounts.** Two or more employers that are liable for payments in lieu of premiums, in accordance with the provisions of subsection (2) of this section and sections 8-76-108 and 8-76-109, may file a joint application with the division for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of such employers. Each application shall identify and authorize a group representative to act as the group's agent for the purposes of this subsection (6). Upon its approval of the application, the division shall establish a group account for the employers effective as of the beginning of the calendar quarter in which it receives the application and shall notify the group's representative of the effective date of the account. The account shall remain in effect for not less than two years and thereafter until terminated at the discretion of the division or upon application by the group. Upon establishment of the account, each member of the group shall be liable for payments in lieu of premiums with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in that quarter that are attributable to service performed in the employ of all members of the group as the total wages paid for service in employment by the member in that quarter



bear to the total wages paid during that quarter for service performed in the employ of all members of the group. The division shall prescribe rules as necessary with respect to applications for establishment, maintenance, and termination of group accounts that are authorized by this subsection (6); for addition of new members to, and withdrawal of active members from, such accounts; and for the determination of the amounts that are payable under this subsection (6) by members of the group and the time and manner of such payments.

(7) Repealed.

(8) For the purposes of this section, applications, filings, and notices of election shall be filed in such form and manner as the director of the division may prescribe by rule, including in person, by mail, by telephone, or by electronic means.

**Source:** **L. 71:** p. 937, § 15. **C.R.S. 1963:** § 82-6-10. **L. 77:** (2)(c) amended and (7) repealed, pp. 468, 471, §§ 21, 27, effective July 7. **L. 81:** (2)(a) to (2)(f), (2)(i), (3)(a), (3)(b), (3)(f), (4), (5), and (6) amended, p. 498, § 13, effective July 1; (5)(a) amended, p. 487, § 14, effective July 1. **L. 83:** (2)(f) amended, p. 431, § 9, effective June 3. **L. 85:** (2)(d) and (3)(e) amended, p. 375, § 5, effective July 1. **L. 90:** (2)(a) and (2)(c) amended, p. 604, § 12, effective April 3. **L. 2000:** (1) and (2)(d) amended, p. 1839, § 6, effective August 2. **L. 2002:** (8) added, p. 339, § 10, effective April 19. **L. 2009:** (2), (3)(a), (3)(b), (3)(f), and (4) to (6) amended, (HB 09-1363), ch. 363, p. 1897, § 18, effective July 1.

#### ANNOTATION

**Applicability of subsection (2)(d).** Only those employers that elect reimbursable coverage prior to January 31, 1972, are entitled to use account excess and are exempt from the surety

bond requirement until the excess is depleted. *Division of Emp. v. Parkview Episcopal Hospital*, 725 P.2d 787 (Colo. 1986); *Division of Emp. v. Indus. Comm'n*, 725 P.2d 793 (Colo. 1986).

**8-76-111. Coverage of state employees.** (1) (a) The state of Colorado hereby elects, effective January 1, 1976, with respect to all services performed in the employ of this state or any branch or department thereof or any instrumentality thereof which is not otherwise an employer subject to this title, to become a reimbursing employer subject to this title, and all services performed in the employ of this state or any branch or department or instrumentality thereof shall constitute employment. This election does not apply to political subdivisions of this state.

(b) Repealed.

(2) As used in this section, prior to January 1, 1978, "services performed in the employ of this state" means employment in the state personnel system of this state as defined in section 13 of article XII of the state constitution and article 50 of title 24, C.R.S., regular full-time employment in the legislative branch of this state, and employment in the judicial department of this state; but such employment shall not include employees of the legislative branch who serve only for the period that the general assembly is in session or judges and justices within the judicial department.

(3) Repealed.

(4) The amounts required to be paid in lieu of premiums by the state under this section shall be billed and payment made as provided in section 8-76-110 (3) with respect to similar payments by nonprofit organizations.

(5) Repealed.

(6) This state or any branch or department thereof or any instrumentality thereof shall pay to the division for the unemployment compensation fund the amount of regular benefits plus the amount of one-half of extended benefits paid through December 31, 1978, and the full amount of all regular and extended benefits paid beginning January 1, 1979, that are attributable to service in their employ.

**Source:** **L. 75:** Entire section added, p. 326, § 1, effective January 1, 1976. **L. 77:** (1)(a) and (2) amended and (5) and (6) added, p. 468, § 22, effective July 7. **L. 79:** (3)

repealed, p. 1632, § 4, effective July 19; (1)(b) and (5) repealed, p. 356, § 25, effective September 30. **L. 81:** (4) amended, p. 502, § 14, effective July 1. **L. 2009:** (4) amended, (HB 09-1363), ch. 363, p. 1902, § 19, effective July 1.

**8-76-112. Political subdivisions - security for collection of premiums or reimbursable payments.** (1) In the event of default in payment of premiums or surcharges due or reimbursements of benefit costs, the state treasurer, upon the request of the division, shall set aside state funds otherwise payable to the political subdivision as security to ensure payment of the funds due from the political subdivision to the unemployment trust fund.

(2) Funds which may be used for this purpose include any funds in the possession of the state treasurer which are allocated to the political subdivision for any purpose, with the exception of funds earmarked for a specific purpose.

(3) The division may not request the state treasurer to set aside funds to cover obligations of the political subdivision until at least six months have elapsed since the due date for payment of the premium or surcharge or reimbursable obligation.

**Source:** **L. 77:** Entire section added, p. 469, § 23, effective July 7. **L. 81:** (1) and (3) amended, p. 502, § 15, effective July 1. **L. 2009:** (1) and (3) amended, (HB 09-1363), ch. 363, p. 1902, § 20, effective July 1.

**8-76-113. Protest - appeal - filed by an employer.** (1) Any employer who wishes to appeal a determination of liability for premiums or surcharges, a determination of coverage under the provisions of articles 70 to 82 of this title, or a seasonality determination pursuant to section 8-73-106 may file a written notice of appeal with the division in such form and manner as the director of the division may prescribe by rule, including in person, by mail, or by electronic means. Except as otherwise provided by this section, proceedings on appeal shall be governed by the provisions of article 74 of this title. No appeal shall be heard unless the notice of appeal has been received by the division within twenty calendar days after the date the notice of such determination is mailed or transmitted by the division to the employer in accordance with such rules as the director of the division may promulgate.

(2) Any employer who wishes to protest an assessment of premiums or surcharges, a notice of premium rate, a recomputation of premium rate, or any notice of correction of any matter set forth in this subsection (2) shall file a request for redetermination with the division, in accordance with rules promulgated by the director of the division. The division shall thereafter promptly notify the employer of its redetermination decision. Any employer who wishes to appeal from a redetermination decision may file a written notice of appeal with the division. Except as otherwise provided by this section, proceedings on appeal shall be governed by the provisions of article 74 of this title. No appeal shall be heard unless notice of appeal has been received by the division within twenty calendar days after the date the notice of such redetermination is mailed or transmitted by the division to the employer in accordance with such rules as the director of the division may promulgate.

(3) Any determination or redetermination from which appeal may be taken pursuant to subsection (1) or (2) of this section shall be final and binding upon the employer unless a notice of appeal is filed in accordance with the time limits set forth in subsections (1) and (2) of this section or unless the employer establishes to the satisfaction of the division that he had good cause for failure to file a timely notice of appeal. Guidelines for determining what constitutes good cause shall be established by the director of the division.

(3.5) Any administrative appeal pursuant to this section shall be conducted by a referee or hearing officer of the division.

(4) In connection with any appeal proceeding conducted pursuant to this section, the referee may, upon application by any party or upon his own motion:

(a) Convene a prehearing conference to discuss the issues on appeal, the evidence to be presented, and any other relevant matters which may simplify further proceedings;

(b) Permit the parties to engage in prehearing discovery, insofar as practicable, in accordance with the Colorado rules of civil procedure and, in connection therewith, to shorten or extend any applicable response time; and



(c) Permit or require the filing by the parties of briefs, arguments of law, or statements of position.

(5) In matters involving a pending claim for benefits, the referee shall give due regard to the rights of the claimant to a speedy and informal hearing and may impose such limitations upon discovery as he deems reasonable.

(6) Repealed.

**Source:** **L. 77:** Entire section added, p. 469, § 23, effective July 7. **L. 79:** Entire section R&RE, p. 354, § 22, effective September 30. **L. 81:** (1) and (2) amended, p. 502, § 16, effective July 1. **L. 86:** (2) and (3) amended and (3.5) and (6) added, p. 494, § 101, effective July 1. **L. 86, 2nd Ex. Sess.:** (2) amended and (6) repealed, p. 56, §§ 3, 5, effective August 15. **L. 2002:** (1) and (2) amended, p. 339, § 11, effective April 19. **L. 2007:** (1) and (2) amended, p. 804, § 7, effective August 3. **L. 2009:** (1) and (2) amended, (HB 09-1363), ch. 363, p. 1902, § 21, effective July 1.

#### **8-76-114. Local government advisory council. (Repealed)**

**Source:** **L. 77:** Entire section added, p. 469, § 23, effective July 7. **L. 81:** Entire section repealed, p. 488, § 17, effective July 1.

**8-76-115. Coverage of Indian tribes.** (1) Indian tribes or tribal units, including all subdivisions or subsidiaries of, and business enterprises wholly owned by, such Indian tribes, subject to the provisions of articles 70 to 82 of this title shall pay premiums and surcharges under the same terms and conditions under sections 8-76-101 to 8-76-103 as apply to other premium-paying employers unless an election is made, in the same manner provided in section 8-76-108 (1) (d), to make payments in lieu of premiums into the unemployment compensation fund in amounts equal to the amount of benefits attributable to service in the employ of the Indian tribe.

(2) Indian tribes shall determine if payments in lieu of premiums will be elected by the tribe as a whole, by individual tribal units, or by combinations of individual tribal units. Two or more individual tribal units may apply with the division for the establishment of a group account in the same manner and subject to the same terms as set forth in section 8-76-110 (6).

(3) Indian tribes or tribal units electing to make payments in lieu of premiums shall be billed for the full amount of benefits attributable to service in the employ of said Indian tribes or tribal units, and payment shall be made with respect to said billings in the manner provided in section 8-76-108 (1) (c).

(4) The division may require any Indian tribe or tribal unit that elects to become liable for payments in lieu of premiums to execute and file with the division a surety bond or to deposit money or securities in the manner provided in section 8-76-110 (4).

(5) (a) Failure of the Indian tribe or tribal unit to make required payments pursuant to subsection (3) of this section, to pay premiums pursuant to sections 8-76-101 to 8-76-103, to pay assessments of interest and penalties pursuant to sections 8-79-101 and 8-79-104, or to execute and file a surety bond or deposit money or other security pursuant to section 8-76-110 (4) within ninety days after receipt of a delinquency notice by the division shall cause the Indian tribe to lose the option to make payments in lieu of premiums effective with the beginning of the following calendar year unless a division-approved payment plan is established or payment in full is received within the ninety-day period.

(b) The division shall notify the United States internal revenue service and the United States department of labor of failures by the Indian tribe or tribal unit to comply with this subsection (5).

(6) Any Indian tribe that loses the option to make payments in lieu of premiums due to late payment or nonpayment, as described in subsection (5) of this section, shall have such option reinstated effective with the beginning of the following calendar year if, by March 1 of said year, all contributions have been timely made and no premiums or surcharges, payments in lieu of premiums for benefits paid, penalties, or interest remain outstanding.

(7) (a) Failure of the Indian tribe or any tribal unit thereof to make any payment required by subsection (5) of this section, after all collection activities deemed necessary by the division have been exhausted, shall cause services performed for such tribe to not be treated as "employment" for purposes of section 8-70-125.5.

(b) The division may determine that any Indian tribe that loses coverage under the provisions of this subsection (7) may have services performed for such tribe again included as "employment" for purposes of section 8-70-125.5 if all premiums and surcharges, payments in lieu of premiums, penalties and interest, or surety bond or payment of other money or security have been paid.

(8) Notices of payment and reporting delinquency to Indian tribes or their tribal units shall include information stating that failure to make full payment within the prescribed time period:

(a) Shall cause the Indian tribe to be liable for taxes under the "Federal Unemployment Tax Act", 26 U.S.C. sec. 3301 et seq.;

(b) Shall cause the Indian tribe to lose the option to make payments in lieu of premiums; and

(c) May cause the Indian tribe to be excepted from the definition of "employer" as provided in section 8-70-113 (1) (k) and may cause services in the employ of the Indian tribe, as provided in section 8-70-125.5, to be excepted from "employment".

(9) Extended benefits paid that are attributable to service in the employ of an Indian tribe and not reimbursed by the federal government shall be financed in their entirety by such Indian tribe in the manner provided in section 8-76-108 (1) (e).

**Source: L. 2001:** Entire section added, p. 1548, § 5, effective December 21, 2000.  
**L. 2009:** (1) to (4), (5)(a), (6), (7)(b), and (8)(b) amended, (HB 09-1363), ch. 363, p. 1903, § 22, effective July 1.

**Editor's note:** The federal "Consolidated Appropriations Act, 2001", Pub.L. 106-554, which became law on December 21, 2000, required all states to amend their laws regarding how Indian tribes are treated for unemployment insurance purposes. The 2001 act enacting this section provided for an effective date of December 21, 2000. (See L. 2001, p. 1550.)

## ARTICLE 77

### Unemployment Compensation and Revenue Funds

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-77-101.	Unemployment compensation fund - state treasurer custodian.	8-77-105.	payment of benefits. Discontinuance of unemployment trust fund.
8-77-102.	Collection and transmittal of receipts - clearing account - re-funds - transfers.	8-77-106.	Unemployment revenue fund.
8-77-103.	Advances from federal unemployment trust fund.	8-77-107.	Appropriation of administrative costs.
8-77-103.5.	Issuance of unemployment revenue bonds and notes - unemployment bond repayment account - creation.	8-77-108.	Federal advance interest repayment fund.
8-77-104.	Benefit account - requisitions -	8-77-109.	Employment support fund - employment and training technology fund - created - uses - repeal.

**8-77-101. Unemployment compensation fund - state treasurer custodian.**  
 (1) (a) There is hereby established the unemployment compensation fund, which is a special fund administered by the division exclusively for the purposes of articles 70 to 82 of this title. The state treasurer is the custodian of the fund and is liable under his or her official bond for the faithful performance of all his or her duties in connection with the fund. The state treasurer shall establish and maintain within the fund the accounts specified in this



article and such other accounts as may be necessary to reflect the administration of the fund by the division. Notwithstanding any other law, in lieu of or in addition to the assessment described in section 29-4-710.7, C.R.S., the division may pay amounts necessary and appropriate from the unemployment compensation fund to the Colorado housing and finance authority for the repayment of the principal of bonds issued under section 29-4-710.7, C.R.S., and may apply amounts necessary and appropriate from the unemployment compensation fund to the repayment of principal of bonds issued under section 8-71-103 (2) (d).

(b) The unrestricted year-end balance of the unemployment compensation fund, created pursuant to paragraph (a) of this subsection (1), for the 1991-92 fiscal year shall constitute a reserve, as defined in section 24-77-102 (12), C.R.S., and, for purposes of section 24-77-103, C.R.S.:

(I) Any moneys credited to the unemployment compensation fund in any subsequent fiscal year shall be included in state fiscal year spending, as defined in section 24-77-102 (17), C.R.S., for such fiscal year; and

(II) Any transfers or expenditures from the unemployment compensation fund in any subsequent fiscal year shall not be included in state fiscal year spending, as defined in section 24-77-102 (17), C.R.S., for such fiscal year.

(2) The state treasurer, as treasurer and custodian of the unemployment compensation fund, is hereby authorized and directed to cancel of record and refuse to honor warrants or checks issued against any of the accounts established with the unemployment compensation fund which have not been presented for payment within one calendar year from the date of issue.

**Source:** L. 36, 3rd Ex. Sess.: p. 31, § 9. CSA: C. 167A, § 9. L. 41: p. 780, § 9. L. 43: p. 605, § 5. L. 51: p. 811, § 8. CRS 53: § 82-7-1. C.R.S. 1963: § 82-7-1. L. 73: p. 965, § 1. L. 86: Entire section amended, p. 546, § 11, effective May 28. L. 93: (1) amended, p. 1506, § 4, effective June 6. L. 2012: (1)(a) amended, (HB 12-1120), ch. 27, p. 105, § 16, effective June 1. L. 2012, 1st Ex. Sess.: (1)(a) amended, (HB 12S-1002), ch. 2, p. 2428, § 11, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

#### ANNOTATION

**Law reviews.** For note, "The Unemployment Compensation Recipient — Should He Accept a Job?", see 44 Den. L.J. 147 (1967).

**This section creates the unemployment compensation fund** to which contributions

must be made by employers who come within the provisions of the act. Cottrell Clothing Co. v. Teets, 139 Colo. 558, 342 P.2d 1016 (1959).

**8-77-102. Collection and transmittal of receipts - clearing account - refunds - transfers.** (1) The division or its agent shall collect or receive all premiums, surcharges, payments in lieu of premiums, fines, and penalties provided for in articles 70 to 82 of this title, all interest on delinquent premiums and surcharges provided for in section 8-79-101, and all other moneys accruing to the fund from the federal government or any other source whatsoever and shall transmit all such moneys to the state treasurer, who shall cause the same to be deposited in a clearing account in his or her name in a state or national bank doing business in this state.

(2) Repealed.

(3) As instructed by the division, the state treasurer shall transfer from the clearing account to the employment security administration fund all amounts received pursuant to the provisions of section 8-72-110 (5). All interest collected by the division pursuant to the provisions of section 8-79-101, all penalties collected by the division pursuant to sections 8-79-104 (1) (a) and (1) (c) and 8-81-101 (4) (a) (II), and all investigative costs collected

by the division pursuant to section 8-81-101 (4) (a) (III) shall be paid into the unemployment revenue fund.

(4) All amounts remaining in the clearing account after payment of refunds and the transfers provided for in subsection (3) of this section shall be paid to the secretary of the treasury of the United States for credit to the account of the state of Colorado in the federal unemployment trust fund established and maintained pursuant to section 904 of the federal "Social Security Act", as amended.

**Source:** L. 36, 3rd Ex. Sess.: p. 31, § 9. L. 37: p. 1262, § 7. CSA: C. 167A, § 9. L. 41: p. 780, § 9. L. 43: p. 605, § 5. L. 51: p. 811, § 8. CRS 53: § 82-7-2. C.R.S. 1963: § 82-7-2. L. 71: p. 943, § 16. L. 73: p. 965, § 2. L. 80: (3) amended, p. 791, § 33, effective June 5. L. 81: (1) amended, p. 503, § 18, effective July 1. L. 85: (2) repealed, p. 376, § 8, effective July 1. L. 2000: (3) amended, p. 814, § 1, effective July 1. L. 2009: (1) amended, (HB 09-1363), ch. 363, p. 1904, § 23, effective July 1.

**Cross references:** For section 904 of the "Social Security Act", see 42 U.S.C. § 1104.

**8-77-103. Advances from federal unemployment trust fund.** (1) The division may apply for advances to the state of Colorado from its account in the federal unemployment trust fund and accept responsibility for repayment of advances in accordance with the conditions specified in Title XII of the "Social Security Act", as amended, in order to secure to this state the advantages available under the federal act.

(2) (a) Advances from the federal unemployment trust fund which are interest-bearing shall have such interest cost together with all associated administrative costs assessed against each employer subject to experience rating. This interest assessment shall not apply to the covered employers of state and local government nor to those nonprofit organizations that are reimbursable. This interest assessment shall not apply to the political subdivisions electing the special rate.

(a.1) The interest cost assessment provided for in paragraph (a) of this subsection (2) shall not apply to any employer whose benefit-charge account balance is zero or to any employer with a positive excess of plus seven percent or more.

(b) Using the most recently available data to the division, the total covered wages of all employers subject to the interest assessment, as found for the calendar quarter nearest to the quarter in which a trust fund deficit occurred, shall be summed. This sum shall be divided into the amount of interest due on the advance. The percent resulting from this calculation shall contain four significant figures. The percent shall be applied by the employer to the total covered wages reported on the next contribution report received or that contribution report indicated in the notification of the percent sent to the employer by the division. The amount resulting shall be submitted in the same manner as normal contributions, but as a separate payment, to the division. Each interest-bearing advance may be treated separately.

(c) The amounts received as a result of paragraph (b) of this subsection (2) shall be segregated and collected in the federal advance interest repayment fund.

**Source:** L. 36, 3rd Ex. Sess.: p. 31, § 9. L. 37: p. 1262, § 7. CSA: C. 167A, § 9. L. 41: p. 780, § 9. L. 51: p. 811, § 8. CRS 53: § 82-7-3. C.R.S. 1963: § 82-7-3. L. 73: p. 966, § 3. L. 82: Entire section amended, p. 239, § 9, effective July 1. L. 84: (2)(a) and (2)(a.1) amended, pp. 324, 330, § 4, effective July 1. L. 85: (2)(a) amended, p. 376, § 6, effective July 1; (2)(a) amended, p. 1359, § 5, effective July 1. L. 2012: (1) amended, (HB 12-1120), ch. 27, p. 106, § 17, effective June 1.

**Editor's note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**Cross references:** (1) For the federal advance interest repayment fund, see § 8-77-108.

(2) For Title XII of the "Social Security Act", see 42 U.S.C. §§ 1321 to 1324.



**8-77-103.5. Issuance of unemployment revenue bonds and notes - unemployment bond repayment account - creation.** (1) The executive director of the department of labor and employment is authorized to request the Colorado housing and finance authority to issue such bonds and notes as are necessary to maintain adequate balances in the unemployment compensation fund or to repay moneys advanced to the state from the federal unemployment trust fund, or both. Such requests shall be made in accordance with the provisions of section 29-4-710.7, C.R.S.

(2) There is hereby created the unemployment bond repayment account, which shall be credited with bond assessments for nonprincipal-related bond costs collected on behalf of the Colorado housing and finance authority under section 29-4-710.7, C.R.S., or by the division under section 8-71-103. After the division's costs have been deducted from the bond repayment account, moneys in the fund shall be paid to the account or accounts maintained by the Colorado housing and finance authority under section 29-4-710.7, C.R.S., or by the division with respect to bonds issued under section 8-71-103.

**Source:** L. 91: Entire section added, p. 717, § 3, effective July 1. L. 2012, 1st Ex. Sess.: (2) amended, (HB 12S-1002), ch. 2, p. 2429, § 12, effective June 1.

**8-77-104. Benefit account - requisitions - payment of benefits.** (1) The benefit account shall consist of moneys requisitioned by the division from the account of the state of Colorado in the federal unemployment trust fund. Expenditures from the benefit account shall be made by the division solely for payment of benefits provided in articles 70 to 82 of this title, in accordance with regulations prescribed by the director of the division. Such expenditures shall not be subject to any provisions of law requiring specific appropriations for payment thereof.

(2) From time to time the division shall requisition from such account such amounts as it deems necessary to provide for payment of benefits for a reasonable future period of time. Upon receipt of such requisitioned amounts, the state treasurer shall cause the same to be deposited in an account in the name of the division in some state or national bank doing business in this state.

(3) The division is authorized to make all lawful benefit payments by checks drawn against said bank account. The state treasurer shall have no responsibility whatsoever with respect to such benefit payments, nor shall he be responsible for any amounts requisitioned as provided in subsection (2) of this section other than to deposit the same in said bank account.

(4) Any unexpended balance remaining in the benefit account after the expiration of the period of time for which amounts were requisitioned may be used by the division for payment of benefits during a subsequent period of time, or deducted from the amount of a subsequent requisition, or, at the discretion of the division, redeposited with the secretary of the treasury of the United States for credit to the account of the state of Colorado in the federal unemployment trust fund.

(5) Benefits shall be deemed to be due and payable under the provisions of articles 70 to 82 of this title, only to the extent provided for in said articles, and only to the extent that moneys are available in the unemployment compensation fund, and neither the state nor the division shall be liable for payments in excess of the amount of such available moneys.

**Source:** L. 36, 3rd Ex. Sess.: p. 31, § 9. CSA: C. 167A, § 9. L. 41: p. 780, § 9. L. 51: p. 811, § 8. CRS 53: § 82-7-4. C.R.S. 1963: § 82-7-4. L. 73: p. 966, § 4. L. 86: (1) amended, p. 494, § 102, effective July 1.

**8-77-105. Discontinuance of unemployment trust fund.** The provisions of sections 8-77-101 to 8-77-104, to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist and so long as the secretary of the treasury of the United States of America continues to maintain for this state a separate book account of all funds deposited therein by this state for benefit purposes, together with this state's proportionate share of the earnings of such unemployment trust

fund, from which no other state is permitted to make withdrawals. If such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the unemployment compensation fund of this state shall be transferred to the treasurer of the unemployment compensation fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the director of the division in accordance with provisions of articles 70 to 82 of this title. Such moneys shall be invested in readily marketable classes of securities as now provided by law with respect to public moneys of the state. Such investment, at all times, shall be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the unemployment compensation fund only under the direction of the director of the division.

**Source:** L. 39: p. 588, § 1. L. 41: p. 782, § 9. CSA: C. 167A, § 9. L. 43: p. 607, § 6. L. 51: p. 811, § 8. CRS 53: § 82-7-5. C.R.S. 1963: § 82-7-5. L. 86: Entire section amended, p. 494, § 103, effective July 1.

**8-77-106. Unemployment revenue fund.** (1) There is hereby created the unemployment revenue fund, to which shall be credited all interest collected by the division on delinquent premiums or surcharges pursuant to the provisions of section 8-79-101, all penalties collected by the division pursuant to sections 8-79-104 (1) (a) and (1) (c) and 8-81-101 (4) (a) (II), all remaining moneys in the federal advance interest repayment fund after all known interest charges and associated administrative costs pursuant to section 8-77-103 have been paid pursuant to section 8-77-108 (3), and all investigative costs collected by the division pursuant to section 8-81-101 (4) (a) (III).

(2) All moneys accruing to the unemployment revenue fund in any manner whatsoever shall be maintained in a separate account by the state treasurer and shall be annually appropriated by the general assembly to the division for the purpose of enforcing compliance with the "Colorado Employment Security Act". Moneys in the unemployment revenue fund shall first be used to make refunds of interest erroneously collected under the provisions of section 8-79-101.

(3) and (4) Repealed.

(5) Prior to the beginning of any fiscal year in which the department requests an allocation diversion from the unemployment revenue fund, the joint budget committee in conjunction with the state auditor shall certify that the department has met the goals and time lines established in the work plans submitted the previous year. No additional money shall be appropriated until all such prior conditions of the work plan are satisfied.

(6) Of the moneys appropriated to the department for allocation to the division for administrative services, not less than fifty percent shall be used to fund enforcement activities. None of the remaining moneys shall be allocated to services which compete directly with services available in the private sector.

**Source:** L. 36, 3rd Ex. Sess.: p. 49, § 18. CSA: C. 167A, § 18. L. 41: p. 801, § 18. CRS 53: § 82-7-6. C.R.S. 1963: § 82-7-6. L. 73: p. 967, § 5. L. 77: (2) amended, p. 470, § 24, effective July 7. L. 79: (1) amended, p. 355, § 23, effective September 30. L. 81: (1) amended, p. 503, § 19, effective July 1. L. 87: (3) amended, p. 414, § 1, effective June 20. L. 90: (2) amended and (5) and (6) added, p. 1765, § 6, effective June 8; (3) and (4) repealed, p. 1766, § 8, effective June 8. L. 2000: (1), (2), and (5) amended, p. 814, § 2, effective July 1. L. 2009: (1) amended, (HB 09-1363), ch. 363, p. 1904, § 24, effective July 1.

**Editor's note:** The provisions of the "Colorado Employment Security Act" are contained in articles 70 to 82 of this title.

**8-77-107. Appropriation of administrative costs.** (1) Moneys credited to the account of the state of Colorado in the federal unemployment trust fund pursuant to section



903 of the federal "Social Security Act" may be requisitioned only for payment of the costs incurred by the division for administration of the provisions of articles 70 to 82 of this title, and for benefits. Such administrative costs shall be expended only pursuant to specific appropriations made by the general assembly and only if such costs are incurred and requisitions made therefor after enactment of an appropriation act.

(2) Any appropriation act enacted shall:

(a) Specify the amount of money appropriated and the purpose for which appropriated; and

(b) (Deleted by amendment, L. 2003, p. 2047, § 1, effective May 22, 2003.)

(c) Limit the amount which may be obligated during any twelve-month period beginning on July 1 and ending on the following June 30 to an amount which does not exceed the amount by which the aggregate of the amounts credited to such unemployment trust fund pursuant to section 903 of the federal "Social Security Act" during the same twelve-month period and the thirty-four preceding twelve-month periods exceeds the aggregate of the amounts paid out for benefits and obligated for administrative costs during such thirty-five twelve-month periods.

(3) Amounts credited to the unemployment trust fund pursuant to section 903 of the federal "Social Security Act" which are obligated for payment of administrative costs or paid out for benefits shall be charged against equivalent amounts which were first credited and which are not already so charged; except that no amount obligated for administrative costs during any twelve-month period specified in subsection (2) of this section may be charged against any amount credited during any twelve-month period earlier than the thirty-fourth twelve-month period preceding such period.

(4) Moneys appropriated as provided in subsection (2) of this section for payment of administrative costs shall be requisitioned from time to time by the division as required for payment of such costs as incurred, and upon receipt shall be credited to an appropriately designated account to which all payments shall be charged. Any unexpended portion of moneys appropriated for payment of administrative costs shall be returned for credit to the account of the state of Colorado in the federal unemployment trust fund.

**Source:** L. 73: p. 967, § 6. C.R.S. 1963: § 82-7-7. L. 83: (2)(c) and (3) amended, p. 436, § 6, effective April 12. L. 2003: (2)(a) and (2)(b) amended, p. 2047, § 1, effective May 22.

**Cross references:** For section 903 of the "Social Security Act", see 42 U.S.C. § 1103.

**8-77-108. Federal advance interest repayment fund.** (1) There is hereby created the federal advance interest repayment fund, to which shall be credited all assessments collected by the division on total wages pursuant to the provisions of section 8-77-103 (2).

(2) All moneys accruing to the fund in any manner whatsoever shall be maintained in a separate account by the state treasurer; except that all funds in the fund are hereby appropriated to the division for use in repayment of interest due and associated administrative costs pursuant to section 8-77-103.

(3) After all known interest charges and associated administrative costs pursuant to section 8-77-103 have been paid, any remaining moneys in the fund may be transferred to the unemployment revenue fund. Interest required to be paid under section 8-77-103 shall not be paid, directly or indirectly, from amounts in the unemployment compensation fund.

**Source:** L. 82: Entire section added, p. 240, § 10, effective July 1. L. 85: (2) and (3) amended, p. 376, § 7, effective July 1.

**Cross references:** For the unemployment revenue fund, see § 8-77-106; for the unemployment compensation fund, see § 8-77-101.

**8-77-109. Employment support fund - employment and training technology fund - created - uses - repeal.** (1) (a) (I) There is hereby established the employment support

fund which shall be credited with fifty percent of the premium surcharge established by section 8-76-102 (4) (d) beginning July 1, 1999. The employment support fund shall not be included in or administered by the enterprise established pursuant to section 8-71-103 (2).

(II) This paragraph (a) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

(b) (I) There is hereby established the employment support fund. This fund consists of the first 0.0011 assessed as part of each employer's premium under section 8-76-102.5 (3) (a) or the amount expended from the employment support fund in the year prior to July 1, 2011, adjusted by the same percentage change prescribed in section 8-70-103 (6.5), whichever is less. The division must transfer to the unemployment compensation fund amounts in excess of the amount expended from the employment support fund in the year prior to July 1, 2011, adjusted each year by the same percentage change prescribed in section 8-70-103 (6.5). In addition, revenues to pay nonprincipal-related bond costs for bonds issued under section 29-4-710.7, C.R.S., or section 8-71-103 (2) (d) may be added to amounts assessed under this section. The division may transfer any moneys in the employment support fund to the unemployment bond repayment account created in section 8-77-103.5 to pay nonprincipal-related bond costs for bonds issued under section 29-4-710.7, C.R.S., or section 8-71-103 (2) (d). The employment support fund is not included in or administered by the enterprise established pursuant to section 8-71-103 (2).

(II) This paragraph (b) is effective on and after the repeal of paragraph (a) of this subsection (1).

(2) (a) The state treasurer shall credit the moneys collected pursuant to this section to the employment support fund created in subsection (1) of this section. The general assembly shall appropriate the moneys in the employment support fund annually to the department of labor and employment:

(I) To be used to offset funding deficits for program administration, including information technology initiatives, under the provisions of articles 70 to 83 of this title and to further support programs to strengthen unemployment fund solvency; and

(II) (A) To fund labor standards, labor relations, and the Colorado works grievance procedure under the provisions of articles 1 to 6, 9, 10, 12, and 13 of this title and section 26-2-716 (3) (b), C.R.S.

(B) (Deleted by amendment, L. 2003, p. 2181, § 1, effective June 3, 2003.)

(a.5) (Deleted by amendment, L. 2003, p. 2181, § 1, effective June 3, 2003.)

(a.7) Notwithstanding any provision of this subsection (2) to the contrary, on March 5, 2003, the state treasurer shall deduct five million four hundred thousand dollars from the employment support fund and transfer such sum to the general fund.

(a.8) Notwithstanding any provision of this subsection (2) to the contrary, on April 20, 2009, the state treasurer shall deduct five million dollars from the employment support fund and transfer such sum to the general fund.

(a.9) (I) (A) Notwithstanding any provision of this subsection (2) to the contrary, beginning July 1, 2009, through December 31, 2016, twenty percent of the premium surcharge established by section 8-76-102 (4) shall be credited to the employment and training technology fund, which is hereby created in the state treasury. Moneys in the employment and training technology fund shall be used for employment and training automation initiatives established by the director of the division. Moneys in the employment and training technology fund are subject to annual appropriation by the general assembly for the implementation of this paragraph (a.9) and shall not revert to the general fund or any other fund at the end of any fiscal year. The moneys in the employment and training technology fund are exempt from section 24-75-402, C.R.S. If the balance of the unemployment compensation fund created in section 8-77-101 falls below twenty-five million dollars, the moneys in the employment and training technology fund shall be allocated to the unemployment compensation fund. At any other time, the moneys in the employment and training technology fund may be allocated to the unemployment compen-



sation fund at the discretion of the executive director of the department of labor and employment.

(B) This subparagraph (I) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

(II) (A) Notwithstanding any provision of this subsection (2) to the contrary, on and after July 1, 2011, 0.0004 assessed against each employer's premium under section 8-76-102.5 (3) (a) or ten million dollars of all revenue collected annually under section 8-76-102.5 (3) (a), whichever is less, shall be credited to the employment and training technology fund, also referred to in this paragraph (a.9) as the "fund", which is hereby created in the state treasury. Any amount collected in excess of ten million dollars under this subparagraph (II) shall be credited to the unemployment compensation fund. Moneys in the fund shall be used for employment and training automation initiatives established by the director of the division. Moneys in the fund are subject to annual appropriation by the general assembly for the purposes of this paragraph (a.9) and shall not revert to the general fund or any other fund at the end of any fiscal year. The moneys in the fund are exempt from section 24-75-402, C.R.S. If the balance of the unemployment compensation fund created in section 8-77-101 falls below one hundred million dollars, the moneys in the employment and training technology fund shall be allocated to the unemployment compensation fund. Once cumulative revenue to the employment and training technology fund equals one hundred million dollars, less any moneys transferred to the unemployment compensation fund, no additional moneys shall be credited to the employment and training technology fund but instead shall be allocated to the unemployment compensation fund. At any other time, the moneys in the employment and training technology fund may be allocated to the unemployment compensation fund at the discretion of the executive director of the department of labor and employment.

(B) This subparagraph (II) is effective on and after the repeal of subparagraph (I) of this paragraph (a.9).

(b) The unexpended and unobligated moneys in the employment support fund shall not revert to the general fund at the end of any fiscal year, and any unobligated amounts remaining in the fund at the end of any fiscal year shall be retained in the employment support fund for purposes of this subsection (2).

(c) On and after July 1, 2001, moneys from the statewide indirect cost allocation agreement with the federal government may be used to supplement moneys in the employment support fund, in a manner that is consistent with the provisions of this subsection (2).

(d) (Deleted by amendment, L. 2002, p. 207, § 1, effective August 7, 2002.)

(3) (Deleted by amendment, L. 99, p. 974, § 2, effective May 28, 1999.)

(4) Repealed.

**Source:** **L. 90:** Entire section added, p. 1766, § 7, effective June 8. **L. 92:** (3) amended, p. 1796, § 8, effective April 10. **L. 96:** (1) amended, p. 996, § 2, effective May 23; (4) repealed, p. 1229, § 47, effective August 7. **L. 99:** (1), (2), and (3) amended, p. 974, § 2, effective May 28. **L. 2001:** (2) amended, p. 1218, § 1, effective June 5. **L. 2002:** (2)(a.5) added, p. 151, § 3, effective March 27; (2)(a)(II) and (2)(d) amended, p. 207, § 1, effective August 7. **L. 2003:** (2)(a.7) added, p. 455, § 5, effective March 5; (2)(b) amended, p. 1540, § 2, effective May 1; (2)(a)(II)(B), (2)(a.5), and (2)(c) amended, p. 2181, § 1, effective June 3. **L. 2009:** (2)(a.8) added, (SB 09-208), ch. 149, p. 619, § 4, effective April 20; (1) amended and (2)(a.9) added, (SB 09-076), ch. 409, p. 2252, §§ 2, 3, effective July 1; (1) and (2)(a.9) amended, (HB 09-1363), ch. 363, p. 1904, §§ 25, 26, effective July 1. **L. 2011:** (1) and (2)(a.9) amended, (HB 11-1288), ch. 212, p. 929, § 14, effective July 1. **L. 2012:** IP(2)(a) and (2)(a)(I) amended, (HB 12-1120), ch. 27, p. 106, § 18, effective June 1. **L. 2012, 1st Ex. Sess.:** (1)(a)(II), (1)(b)(I), and (2)(a.9)(I)(B) amended, (HB 12S-1002), ch. 2, p. 2429, § 13, effective June 1.

**Editor's note:** (1) Amendments to subsection (1) by Senate Bill 09-076 and House Bill 09-1363 were harmonized.

(2) As of publication date, the revisor of statutes has not received the notices specified in subsections (1)(a)(II) and (2)(a.9)(I)(B) of this section.

(3) The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**Cross references:** For the legislative declaration contained in the 1996 act repealing subsection (4), see section 1 of chapter 237, Session Laws of Colorado 1996.

## ARTICLE 78

### Employment Security Administration Fund

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-78-101. Establishment of administration fund.

8-78-103. Deposit and disbursement.  
8-78-104. Reimbursement of fund.

8-78-102. Protection against loss.

**8-78-101. Establishment of administration fund.** There is hereby created in the state treasury a special fund to be known as the employment security administration fund. All money deposited or paid into this fund shall be continuously available to the division for expenditure in accordance with the provisions of articles 70 to 82 of this title, and shall not lapse at any time or be transferred to any other fund. The fund shall consist of all money received from the United States of America, or any agency thereof; all money received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency; all amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the employment security administration fund or by reason of damage to property, equipment, or supplies purchased from money in such fund; and all proceeds realized from the sale or disposition of any such property, equipment, or supplies which may no longer be necessary for the proper administration of articles 70 to 82 of this title.

**Source:** L. 36, 3rd Ex. Sess.: p. 42, § 13. CSA: C. 167A, § 13. L. 39: p. 577, § 10. L. 41: p. 792, § 13. L. 49: p. 727, § 9. L. 51: p. 818, § 12. CRS 53: § 82-8-1. L. 54: p. 138, § 2. C.R.S. 1963: § 82-8-1.

**8-78-102. Protection against loss.** Such money shall be secured by the depository in which it is held to the same extent and in the same manner as required by the general depository law of this state. The state treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the employment security administration fund provided under this article. The liability imposed under this section shall exist in addition to any liability upon any separate bond existent on March 15, 1951, or which may be given in the future.

**Source:** L. 36, 3rd Ex. Sess.: p. 43, § 13. CSA: C. 167A, § 13. L. 51: p. 818, § 12. CRS 53: § 82-8-2. C.R.S. 1963: § 82-8-2.

**8-78-103. Deposit and disbursement.** All money in the employment security administration fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as provided by law for other special funds in the state treasury. All money in this fund shall be expended solely for the purposes and in the amounts found necessary by the secretary of labor for the proper and efficient administration of the employment security program; except that moneys received pursuant to the federal "Social Security Act", as amended, which constitute this state's share of the excess



remaining in the federal unemployment account on July 1 of any fiscal year shall be disbursed solely for the purposes and in the amounts found necessary for the proper and efficient administration of articles 70 to 82 of this title, as determined and mutually agreed upon by the director of the division, the controller, and the governor.

**Source:** L. 51: p. 818, § 12. CSA: C. 167A, § 13. CRS 53: § 82-8-4. C.R.S. 1963: § 82-8-4. L. 76: Entire section amended, p. 352, § 19, effective October 1.

**Cross references:** For the "Social Security Act" generally, see 42 U.S.C. § 301 et seq.

**8-78-104. Reimbursement of fund.** If any money received in the employment security administration fund, which is not a part of this state's share of the excess remaining in the federal unemployment account on July first of any fiscal year, is found by the secretary of labor, because of any action or contingency, to have been lost or to have been expended for purposes other than, or in amounts in excess of, those found necessary by the secretary of labor for the proper administration of the employment security program, it is the policy of this state that such money shall be replaced by money appropriated for such purpose from the general funds of this state to the employment security administration fund for expenditures as provided in section 8-78-103 or by those funds which constitute this state's share of the excess remaining in the federal unemployment account on July first of any fiscal year. Upon receipt of such a finding by the secretary of labor, the division shall promptly report the amount required for such replacement to the governor, and the governor, at the earliest opportunity, shall submit to the general assembly a request for the appropriation of such amount.

**Source:** L. 51: p. 818, § 12. CSA: C. 167A, § 13. CRS 53: § 82-8-5. C.R.S. 1963: § 82-8-5.

## ARTICLE 79

### Collection of Contributions, Penalties, Interest

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-79-101.	Interest on past-due premiums and surcharges.	8-79-104.	Failure to file true report - penalty - repeal.
8-79-102.	Collection of premiums and surcharges, benefit overpayments, penalties, and interest.	8-79-105.	Levy on property - sale.
		8-79-106.	No indemnity bond required.
		8-79-107.	Immediate assessment - when.
8-79-103.	Premiums, surcharges, and assessments a lien on property.	8-79-108.	Refunds.

**8-79-101. Interest on past-due premiums and surcharges.** Premiums or surcharges unpaid on the date on which they are due and payable, as prescribed by the division, shall bear interest at the rate of eighteen percent per annum or one and one-half percent per month or any portion thereof on and after such date until payment plus accrued interest is received by the division. Interest collected pursuant to this section shall be paid into the unemployment revenue fund.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 41: p. 794, § 14. L. 45: p. 715, § 7. L. 51: p. 820, § 13. CRS 53: § 82-9-1. C.R.S. 1963: § 82-9-1. L. 76: Entire section amended, p. 352, § 20, effective October 1. L. 81: Entire section amended, p. 503, § 20, effective July 1. L. 83: Entire section amended, p. 2045, § 9, effective October 1. L. 86: Entire section amended, p. 495, § 104, effective July 1. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1905, § 27, effective July 1.

**Editor's note:** Section 10 of chapter 510, Session Laws of Colorado 1983, provides that the section of the act amending this section is effective October 1, 1983, but the governor did not approve the act until October 14, 1983.

### ANNOTATION

**Law reviews.** For article, "Collecting Pre- and Post- Judgment Interest in Colorado: A Primer", see 15 Colo. Law. 753 (1986). For

article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado", see 15 Colo. Law. 990 (1986).

**8-79-102. Collection of premiums and surcharges, benefit overpayments, penalties, and interest.** (1) The division shall institute such practices and procedures as it deems necessary to collect any money due the division in the form of delinquent premiums, surcharges, or overpaid benefits, including all penalties and interest thereon. In the case of overpaid benefits, the division may, in addition to instituting collection procedures, withhold subsequent benefit payments to which the claimant is or becomes entitled and apply the amount withheld as an offset against the overpayment. However, any amount withheld shall not exceed twenty-five percent of a claimant's benefit payments except in those cases where overpayments have occurred on an established current claim or as a result of false representation or willful failure to disclose a material fact.

(2) The division, in its role as guardian of unemployment insurance trust fund dollars, is exempt from the provisions of section 24-30-202.4, C.R.S. If the division determines an account to be uncollectible, such account may be referred to the controller for collection. Reasonable fees for collection, as determined by the director of the division and the controller, shall be added to the amount of debt. The debtor shall be liable for repayment of the total of the amount outstanding plus the collection fee. All money collected by the controller shall be returned to the division for credit to the fund; except that, all fees collected shall be retained by the controller. If less than the full amount is collected, the controller shall retain only a proportionate share of the collection fee.

(3) If, after due notice, any employer or claimant defaults in any payment of premiums or surcharges, the repayment of overpaid benefits, or the payment of any interest or penalties thereon, the amount due may be collected by civil action, which shall include the right of attachment in the name of the division. Court costs shall not be charged to the division, but any employer or claimant against whom judgment is taken shall be charged with all costs of such action. All costs collected by the division shall be paid into the registry of the court.

(4) The collection efforts of the division shall be in accordance with subsections (1) and (2) of this section; except that, in instances involving willful violation of any provision of articles 70 to 82 of this title, or if deemed appropriate by the director of the division, the division may seek relief under subsection (3) of this section.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 39: p. 578, § 11. L. 41: p. 794, § 14. CRS 53: § 82-9-2. C.R.S. 1963: § 82-9-2. L. 81: Entire section amended, p. 504, § 21, effective July 1. L. 83: Entire section R&RE, p. 431, § 10, effective June 3. L. 85: (1) amended, p. 368, § 6, effective July 1. L. 2009: (1) and (3) amended, (HB 09-1363), ch. 363, p. 1905, § 28, effective July 1.

### ANNOTATION

The amount that may be assessed against a person by this section is a collection fee and thus dischargeable in bankruptcy. In re O'Brien, 110 Bankr. 27 (Bankr. D. Colo. 1990).

Once the department of labor and employment determined that it had overpaid benefits and that the bankruptcy debtor had obtained those overpayments by false representation and/or willful failure to dis-

close material facts, subsection (1) allowed it to withhold subsequent benefit payments to which the claimant became entitled and apply the amount withheld as an offset against the overpayment in addition to instituting collection procedures. In re Adamic, 291 B.R. 175 (Bankr. D. Colo. 2003).

The department's determination that the debtor had received overpayments circum-



scribed, or limited, any future claims for benefits, permitting outright denial of benefits and a recoupment of the amount of the overpayments. In re Adamic, 291 B.R. 175 (Bankr. D. Colo. 2003).

The department is entitled to recoup earlier overpayments from debtor's current claim for benefits without violating an automatic stay. In re Adamic, 291 B.R. 175 (Bankr. D. Colo. 2003).

**8-79-103. Premiums, surcharges, and assessments a lien on property.** (1) The premiums and surcharges imposed by sections 8-76-101 to 8-76-104 and any assessments imposed pursuant to section 29-4-710.7, C.R.S., shall be a first and prior lien upon the real and personal property of any employer subject to articles 70 to 82 of this title, except as to the lien of general property taxes and except as to valid liens existing at the time of the filing of the notice provided for in section 8-79-105, and shall take precedence over all other liens or claims of whatsoever kind or nature. Any employer that sells, assigns, transfers, conveys, loses by foreclosure of a subsequent lien, or otherwise disposes of its business, or any part thereof, shall file with the division such reports as the director of the division, by rule, may prescribe within ten days after the date of any such transaction. The employer's successor shall be required to withhold from the purchase money an amount of money sufficient to cover the amount of premiums or surcharges and assessments due and unpaid until such time as the former owner produces a receipt from the division showing that the premiums, surcharges, or assessments have been paid or a certificate that no premiums, surcharges, or assessments are due. Any successor that fails to comply with this subsection (1) shall be personally liable for the payment of any premiums, surcharges, or assessments due and unpaid.

(2) When the business or property of any employer is placed in receivership, seized under distraint for property taxes, or assigned for the benefit of creditors, all premiums, surcharges, assessments, penalties, and interest imposed by articles 70 to 82 of this title and section 29-4-710.7, C.R.S., shall be a prior and preferred claim against all of the property of said employer, except as to the lien of general property taxes, and as to valid liens existing at the time of the filing of the notice provided for in section 8-79-105, and as to claims for wages of not more than two hundred fifty dollars to each claimant earned within six months after the commencement of the proceeding. No sheriff, receiver, assignee, or other officer shall sell the property of any employer under process or order of court in such cases without first ascertaining from the division the amount of any premiums, surcharges, or assessments due and payable under articles 70 to 82 of this title and section 29-4-710.7, C.R.S. If any premiums, surcharges, or assessments are due, owing, and unpaid, it is the duty of such sheriff, receiver, assignee, or other officer to first pay the outstanding amount of premiums, surcharges, or assessments out of the proceeds of the sale before making payment of any moneys to any judgment creditor or other claims of whatsoever kind or nature, except the costs of the proceedings. In the event of an employer's being subject to an order for relief, judicially confirmed extension proposal, or composition under the federal bankruptcy code of 1978, title 11 of the United States Code, premiums, surcharges, or assessments then or thereafter due shall be entitled to such priority as is provided in section 507 of that code for taxes due the state of Colorado.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 39: p. 578, § 11. L. 41: p. 794, § 14. CRS 53: § 82-9-3. C.R.S. 1963: § 82-9-3. L. 80: (2) amended, p. 782, § 2, effective June 5. L. 81: Entire section amended, p. 504, § 22, effective July 1. L. 86: (1) amended, p. 495, § 105, effective July 1. L. 91: Entire section amended, p. 718, § 4, effective July 1. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1906, § 29, effective July 1.

#### ANNOTATION

**Lessor not liable for lessee's unpaid employment contributions.** Where a lessee abandons the business premises without notice, and the lessor operates the business until arrange-

ments are made for a new lessee to take over, the lessor is not liable for the lessee's unpaid unemployment contributions. Only when a successor pays for the business and fails to withhold from

the purchase price enough money to satisfy unpaid unemployment contributions is that successor personally liable for the contributions.

Mountain's Shadow Inn, Inc. v. Colo. Dept. of Labor & Emp., 672 P.2d 522 (Colo. 1983).

**8-79-104. Failure to file true report - penalty - repeal.** (1) (a) (I) (A) It is the responsibility of each employer subject to articles 70 to 82 of this title to file true and accurate reports whether or not premiums or surcharges are due and to pay all premiums and surcharges when due. Whenever an employer fails to furnish premium reports required by the division by the due date, the employer shall be assessed a penalty of fifty dollars for each occurrence; except that an "employer newly subject" as defined by section 8-76-103 (3) (a) (IV) shall be assessed a penalty of ten dollars for each such occurrence during the first four quarters of coverage. Each subsequent quarter in which the employer continues the failure to file the reports is considered a separate occurrence. Penalties collected by the division pursuant to this paragraph (a) shall be paid into the unemployment revenue fund.

(B) This subparagraph (I) is repealed, effective December 31 of the calendar year in which the revisor of statutes receives the written report pursuant to section 8-76-102.5 (1) indicating that the fund balance of the unemployment compensation fund on any June 30 is equal to or greater than zero dollars and all advances in accordance with the conditions specified in Title XII of the federal "Social Security Act", as amended, have been repaid.

(II) (A) It is the responsibility of each employer subject to articles 70 to 82 of this title to file true and accurate reports, whether or not premiums or surcharges are due, and to pay all premiums and surcharges when due. Whenever an employer fails to furnish premium reports required by the division by the due date, the division shall assess against the employer a penalty of fifty dollars for each occurrence; except that an "employer newly subject" as defined by section 8-76-102.5 (4) shall be assessed a penalty of ten dollars for each occurrence during the first four quarters of coverage. Each subsequent quarter in which the employer continues the failure to file the reports shall be considered a separate occurrence. Penalties collected by the division pursuant to this sub-subparagraph (A) shall be paid into the unemployment revenue fund.

(B) This subparagraph (II) is effective on and after the repeal of subparagraph (I) of this paragraph (a).

(b) If any employer fails or neglects to make and file such reports, as required by articles 70 to 82 of this title or by the rules of the division pursuant thereto, or willfully makes a false or fraudulent report, the division may make an assessment of the premiums or surcharges due from its own knowledge and from such information as it can obtain through testimony or otherwise.

(c) An employer who is delinquent in paying premiums or surcharges on the computation date shall have a penalty assessed by the division. The amount of the penalty shall be the amount of delinquent premiums or surcharges; except that the penalty shall not exceed an amount equal to one percent of the employer's chargeable wages paid that were subject to unemployment insurance in the preceding calendar year. The amount of the penalty for an employer that was not subject to the provisions of articles 70 to 82 of this title in the preceding calendar year shall be the amount of delinquent premiums or surcharges. Such penalty shall be in addition to any payments and interest due under articles 70 to 82 of this title. The penalty shall be payable in four quarterly installments during the current calendar year and shall be remitted to the division with the employer's quarterly report. Penalties collected by the division pursuant to this paragraph (c) shall be paid into the unemployment revenue fund.

(d) Any penalty imposed pursuant to this subsection (1) shall be waived if good cause is shown for failing to pay the premiums or surcharges or to make premium reports, as prescribed by rule of the division. Penalties under this subsection (1) that are unpaid on the date on which they are due shall bear interest at the same rate and in the same manner as unpaid premiums and surcharges under articles 70 to 82 of this title. The provisions of section 13-80-108 (9), C.R.S., shall be used for determining when an offense is committed for the purposes of this subsection (1).

(2) Any assessment so made and certified by the division shall be prima facie good and sufficient for all legal purposes. Notice and demand for premiums or surcharges plus any



interest and penalties imposed by articles 70 to 82 of this title shall be made upon forms as prescribed by the division, and the notice and demand shall become final fourteen calendar days after the date of delivery of the notice and demand to the employer in person or after the date of the transmittal by electronic means or by registered mail to the employer's last-known address or place of business. The employer may file a request for review or modification of the assessment with the division within the fourteen days in the manner and form prescribed by the division. The division, on the basis of evidence submitted by the employer disclosing the correct amount of premiums or surcharges, may amend or otherwise modify its previous assessments.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 39: p. 578, § 11. L. 41: p. 794, § 14. L. 43: p. 609, § 10. CRS 53: § 82-9-4. C.R.S. 1963: § 82-9-4. L. 81: Entire section amended, p. 505, § 23, effective July 1. L. 84: (1) amended, p. 319, § 11, effective July 1. L. 86: (1) amended, p. 703, § 9, effective May 23; (1) amended, p. 496, § 106, effective July 1. L. 91: (1) amended, p. 1359, § 1, effective September 1. L. 96: (1)(a) amended, p. 384, § 11, effective January 1, 1997. L. 2000: (1)(a) and (1)(c) amended, p. 815, § 3, effective July 1. L. 2002: (2) amended, p. 339, § 12, effective April 19. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1907, § 30, effective July 1. L. 2011: (1)(a) amended, (HB 11-1288), ch. 212, p. 931, § 15, effective July 1. L. 2012, 1st Ex. Sess.: (1)(a)(I)(B) amended, (HB 12S-1002), ch. 2, p. 2430, § 14, effective June 1.

**Editor's note:** As of publication date, the revisor of statutes has not received the notice specified in subsection (1)(a)(I)(B) of this section.

**8-79-105. Levy on property - sale.** (1) If any premiums, surcharges, penalties, or interest imposed by articles 70 to 82 of this title, as shown by reports filed by the employer or as shown by assessment duly made as provided in section 8-79-104 or 8-79-107, are not paid within five days after they are due and demand is made therefor, the division may issue a notice setting forth the name of the employer, the amount of the premiums, surcharges, penalties, and interest, the date of the accrual thereof, and a statement that the division claims a first and prior lien therefor, except as provided in this article. Such notice shall be on forms prepared by the division and shall be verified by any duly qualified representative of the division and may be filed or recorded in the office of the county clerk and recorder of any county in the state in which the employer owns property. After such notice has been filed or recorded, the division may issue a warrant under its official seal directed to the sheriff of any county of the state or any duly authorized agent of the division commanding him or her to levy upon, seize, and sell such of the real and personal property of the employer found within his or her county necessary for the payment of the amount due, together with interest and penalties, as provided by law.

(2) It is the duty of any county clerk and recorder to whom such notices are sent to file or record the same without cost. Upon the payment of all premiums, surcharges, penalties, and interest, a lien for such premiums, surcharges, penalties, and interest, as shown upon the records of the county clerk and recorder, shall be released by the division in the same manner as judgments are released.

(3) The sheriff, or any duly authorized agent of the division, shall forthwith levy upon the property of the employer, and personal property so levied upon shall be sold in all respects with like effect and in the same manner as prescribed by law with respect to executions of distraint warrants issued by a county treasurer for the collection of taxes levied upon personal property. Real property shall be levied upon and sold in the same manner as prescribed by law with respect to executions against property upon judgment of a court of record. The sheriff shall be entitled to such fees for executing such warrants as are allowed by law for similar services.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 39: p. 578, § 11. L. 41: p. 794, § 14. CRS 53: § 82-9-5. C.R.S. 1963: § 82-9-5. L. 77: (1) amended, p. 470, § 25, effective July 7. L. 81: (1) and (2) amended, p. 505, § 24, effective July 1. L. 2009: (1) and (2) amended, (HB 09-1363), ch. 363, p. 1908, § 31, effective July 1.

**8-79-106. No indemnity bond required.** In any action of whatever nature brought under articles 70 to 82 of this title, no bond shall be required of the division, nor shall any sheriff or agent of the division require from said division an indemnifying bond for executing the writs of attachment and warrants provided for in this article. No sheriff or agent of the division shall be liable in damages to any person when acting in accordance with such writs and warrants.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 39: p. 578, § 11. L. 41: p. 794, § 14. CRS 53: § 82-9-6. C.R.S. 1963: 82-9-6. L. 64: p. 288, § 219. L. 73: p. 1410, § 66.

**8-79-107. Immediate assessment - when.** If the division believes that the collection of any premiums, surcharges, penalties, or interest under the provisions of articles 70 to 82 of this title will be jeopardized by delay, whether or not the time otherwise prescribed by articles 70 to 82 of this title or any rules issued pursuant thereto for making reports and paying such premiums or surcharges has expired, it may immediately assess such premiums and surcharges, together with all penalties and interest, the assessment of which is provided for by articles 70 to 82 of this title. Such premiums, surcharges, penalties, and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the division for the payment thereof.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 39: p. 578, § 11. L. 41: p. 794, § 14. CRS 53: § 82-9-7. C.R.S. 1963: § 82-9-7. L. 81: Entire section amended, p. 506, § 25, effective July 1. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1908, § 32, effective July 1.

**8-79-108. Refunds.** (1) An employing unit may file an application for the refund of money paid erroneously in such form and manner as the director of the division may prescribe by rule, including in person, by mail, by telephone, or by electronic means. If the division determines that such payment, or any portion thereof, was paid erroneously, the division shall either issue to the employing unit a credit memo therefor, or make a refund thereof, in either event without interest thereon. Where no application is received, and the division determines that premiums or surcharges have been paid erroneously, the division may, at its option, correct any erroneous payments. Any such correction, if it involves less than one hundred dollars, may be by credit memo. In no event may an employing unit recover money paid erroneously, or otherwise, that has been paid prior to January 1 of the first year of the five calendar years immediately preceding the date of the filing of the application for refund. If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof. In the event of court action, no recovery of any money paid prior to January 1 of the first year of the five calendar years immediately preceding the date of the filing of the application shall be allowed. For like cause and for the same period, a recovery, as above indicated, may be allowed on the division's own initiative.

(2) Repealed.

(3) Refunds of interest that was paid into the unemployment compensation fund shall be paid from the unemployment compensation fund, and refunds of interest that was paid into the unemployment revenue fund shall be paid from the unemployment revenue fund. All refunds of premiums and surcharges shall be made from the unemployment compensation fund.

**Source:** L. 36, 3rd Ex. Sess.: p. 44, § 14. CSA: C. 167A, § 14. L. 39: p. 578, § 11. L. 41: p. 794, § 14. L. 43: p. 609, § 10. L. 49: p. 729, § 10. CRS 53: § 82-9-9. C.R.S. 1963: § 82-9-9. L. 81: (2) and (3) amended, p. 506, § 26, effective July 1. L. 83: (1) amended, p. 432, § 11, effective June 3. L. 88: (1) amended, p. 396, § 1, effective July



1. **L. 2001:** (2) repealed, p. 58, § 1, effective August 8. **L. 2002:** (1) amended, p. 340, § 13, effective April 19. **L. 2009:** (1) and (3) amended, (HB 09-1363), ch. 363, p. 1908, § 33, effective July 1.

### ANNOTATION

**Red Cross entitled to refund.** As an instrumentality of the United States government, the Red Cross is exempt from taxation under § 8-70-101 and is entitled to judgment against the defendants for the amounts which it and its various chapters have paid under the employment security act, but the Red Cross is not entitled to recover any interest thereon. *Am. Nat'l Red Cross v. Dept. of Emp.*, 263 F. Supp. 581 (D. Colo. 1965), *aff'd sub nom. Dept. of Emp. v. United States*, 385 U.S. 355, 87 S. Ct. 464, 17 L. Ed.2d 414 (1966).

**Employer not entitled to interest on overpayment of unemployment compensation tax** resulting from an erroneous delinquency assessment by the Division of Employment and Training. Statutory term "paid erroneously" refers to payment made as a result of either the taxpayer's or the division's error. *Martin Marietta v. Div. of Emp. & Training*, 784 P.2d 850 (Colo. App. 1989).

## ARTICLE 80

### Protection of Rights and Benefits

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-80-101. Waiver of rights void.

8-80-102. Limitation of fees.

8-80-103. Assignment of benefits void - exemptions.

**8-80-101. Waiver of rights void.** Any agreement by an individual to waive, release, or commute his or her rights to benefits or any other rights under articles 70 to 82 of this title shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's premiums or surcharges required under articles 70 to 82 of this title from the employer shall be void. No employer shall directly or indirectly make, require, or accept any deduction from wages to finance the employer's premiums or surcharges required from him or her or require or accept any waiver of any rights under articles 70 to 82 of this title by any individual in his or her employ. Any employer or officer or agent of any employer who violates this section is guilty of a misdemeanor and, upon conviction thereof, for each offense, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

**Source:** L. 36, 3rd Ex. Sess.: p. 45, § 15. L. 37: p. 1269, § 11. CSA: C. 167A, § 15. L. 41: p. 799, § 15. CRS 53: § 82-10-1. C.R.S. 1963: § 82-10-1. L. 81: Entire section amended, p. 506, § 27, effective July 1. L. 2009: Entire section amended, (HB 09-1363), ch. 363, p. 1909, § 34, effective July 1.

### ANNOTATION

**Requirements for waiver.** Waiver in the strict legal sense requires a showing of intent and knowledge of material facts on the part of one surrendering his rights. *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 38 Colo. App. 298, 559 P.2d 252 (1976).

**Agreement contrary to public policy.** An agreement having the effect of a waiver or

which would permit the employer and employee to construe the terms of the unemployment compensation statute is contrary to public policy. *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 38 Colo. App. 298, 559 P.2d 252 (1976).

**A leave of absence agreement** which did not contain any explicit relinquishment of claim-

ant's rights to unemployment benefits did not by its terms contravene the prohibition of this section since there was no evidence that claimant intended to forego unemployment benefits, or that she knew her "leave of absence" status would preclude such a claim. *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Emp.*, 38 Colo. App. 298, 559 P.2d 252 (1976).

**The fact that claimant agreed and understood that his employment would end at the expiration of a fixed term** is not a basis for denying him benefits under the Colorado employment security act. *Intermountain Jewish News, Inc. v. Indus. Comm'n*, 39 Colo. App. 258, 564 P.2d 132 (1977).

**8-80-102. Limitation of fees.** No individual claiming benefits shall be charged fees of any kind in any proceeding under articles 70 to 82 of this title by the division or its representatives or by any court or any officer thereof; except that the controller may charge a reasonable fee as provided in section 8-79-102 (2) for the recoupment of benefit overpayments, and any party appealing the decision of a referee shall be assessed the actual costs of preparing a transcript according to rules promulgated by the director of the division except if the appellant is successful the cost of preparing the transcript will be refunded. Any person who violates this provision is guilty of a misdemeanor. Any individual claiming benefits in any proceeding before the division or a court may be represented by counsel. Unless approved by the division, no lien shall be allowed or suit brought for attorney fees, contingent or otherwise, for services rendered for the collection of any individual's claim for benefits.

**Source:** L. 71: p. 943, § 17. C.R.S. 1963: § 82-10-2. L. 83: Entire section amended, p. 432, § 12, effective June 3. L. 86: Entire section amended, p. 496, § 107, effective July 1.

**8-80-103. Assignment of benefits void - exemptions.** Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under articles 70 to 82 of this title shall be void. Except as provided in the "Colorado Child Support Enforcement Procedures Act", article 14 of title 14, C.R.S., such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy provided for the collection of debt. Benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy for the collection of all debts except debts incurred for necessities furnished to such individual, his spouse, or dependents during the time when such individual was unemployed or child support debt or arrearages as specified in article 14 of title 14, C.R.S. Any waiver of any exemption provided for in this section shall be void.

**Source:** L. 36, 3rd Ex. Sess.: p. 45, § 15. L. 37: p. 1269, § 11. CSA: C. 167A, § 15. L. 41: p. 799, § 15. CRS 53: § 82-10-3. C.R.S. 1963: § 82-10-3. L. 85: Entire section amended, p. 587, § 2, effective July 1.

#### ANNOTATION

**Law reviews.** For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den. L.J. 82 (1970).

**The only exception to this section** which prohibits the satisfaction of judgments out of unemployment compensation benefits is for ne-

cessities of the recipient or his dependents required during the period of unemployment and only after the recipient has in fact received unemployment benefits. *Colo. Division of Employment v. Wells*, 693 P.2d 1027 (Colo. App. 1984).

#### ARTICLE 81

##### Penalties and Enforcement

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on and after May 18, 1979, see § 8-70-143.



8-81-101. Penalties.

8-81-103. Representation in court.

8-81-102. Penalties in prior law continue in force.

**8-81-101. Penalties.** (1) (a) Any person who makes false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, with intent to defraud by obtaining or increasing any benefit under articles 70 to 82 of this title or under an employment security law of any other state, of the federal government, or of a foreign government, either for himself or for any other person, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

(b) Any person who, in the opinion of the division, has received a benefit to which he was not entitled by reason of his false representation or failure to disclose a material fact with intent to obtain or increase any benefit for himself or any other person and his trial by court is prevented by the inability of the court to establish its jurisdiction over said person shall be ineligible to receive any benefits under articles 70 to 82 of this title from the date of the discovery of the said act until such time as he makes himself available to the court for trial.

(c) If any employer makes or causes to be made a false statement as to the reason for a claimant's separation from employment or makes or causes to be made a false offer of work to a claimant, which statement or offer shall result in a delay in the payment of benefits to any such claimant, such employer shall be penalized by having his account charged with one and one-half times the amount of benefits due during the period of the delay and with one hundred percent of all other benefit payments paid to the claimant thereafter during his current benefit year, any other provisions of articles 70 to 82 of this title to the contrary notwithstanding, and the claimant shall be compensated by being paid one and one-half times his weekly benefit amount for the period of the delay. "The period of delay" as used in this section shall be determined by the division, and such determination shall be binding upon all parties affected and shall not be subject to review. The penalty imposed by this paragraph (c) shall be in addition to and not in lieu of any other penalty, civil or criminal, provided in articles 70 to 82 of this title.

(2) Any employing unit, or any officer or agent of an employing unit, or any other person who makes a false statement or representation knowing it to be false or who knowingly fails to disclose a material fact either to cause an individual to receive benefits to which such individual is otherwise not entitled or to defraud an individual by preventing or reducing the payment of benefits to which such individual would otherwise be entitled, or to avoid becoming or remaining a subject employer, or to avoid or reduce any premium, surcharge, or other payment required from an employing unit under articles 70 to 82 of this title or under the employment security law of any other state, the federal government, or a foreign government or any such employing unit, officer or agent, or other person who willfully fails or refuses to pay any such premiums or surcharges or make any other payment, or to furnish any reports required under section 8-72-107, or to produce or permit the inspection or copying of records as required under section 8-72-107 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. Each false statement or representation or failure to disclose a material fact and each day such failure or refusal continues shall constitute a separate offense.

(3) Any person who willfully violates any provision of articles 70 to 82 of this title or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of articles 70 to 82 of this title and for which a penalty is neither prescribed in this article nor provided by any other applicable statute, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment. Each day such violation continues shall be deemed a separate offense.

(4) (a) (I) Any person who has received any sum as benefits under articles 70 to 82 of this title to which he was not entitled shall be required to repay such amount to the division for the fund. Such sum shall be collected in the manner provided in section 8-79-102; except that the division may waive the repayment of an overpayment if the division determines such repayment to be inequitable.

(II) If any person receives any such overpayment because of his or her false representation or willful failure to disclose a material fact, inequity shall not be a consideration in any civil, administrative, or criminal action, and the person shall be required to pay the total amount of the overpayment, which shall be paid into the unemployment trust fund, plus a penalty of fifty percent of such overpayment, which shall be paid into the unemployment revenue fund. In addition, such person may be denied benefits, when otherwise eligible, for a four-week period for each one-week period in which such person filed claims for or received benefits to which he or she was not entitled. The provisions of section 13-80-108 (9), C.R.S., shall be used for determining when an offense is committed for the purposes of this subparagraph (II).

(III) All investigative costs awarded by the court and collected by the division in connection with the conviction, in any criminal action, of a person who has received any overpayment because of his or her false representation or willful failure to disclose a material fact shall be paid into the unemployment revenue fund.

(IV) The penalties associated with an overpayment pursuant to subparagraph (II) of this paragraph (a) shall be made known to individuals upon filing an unemployment claim as defined in section 8-70-112.

(b) Pursuant to rules and regulations promulgated by the director of the division, the division may write off all or a part of the amount of any overpayment which it finds to be uncollectible or the recovery of which it finds to be administratively impracticable. Amounts which remain uncollected for more than five years, or seven years for overpayments due to false representation or willful failure to disclose a material fact, may be written off as uncollectible.

(c) Any person aggrieved by a determination of the division made under this subsection (4) may appeal that determination and obtain a hearing before a hearing officer with the right to further appeal as provided by article 74 of this title. The initial appeal must be received within twenty calendar days after the date of notification of such determination by the division; otherwise, the determination shall be final.

(d) Upon final determination pursuant to paragraph (c) of this subsection (4), repayment of an overpayment that is a result of the individual's false representation or willful failure to disclose a material fact pursuant to subparagraph (II) of paragraph (a) of this subsection (4) shall be made within thirty days.

**Source:** L. 36, 3rd Ex. Sess.: p. 47, § 16. CSA: C. 167A, § 16. L. 39: p. 581, § 12. L. 41: p. 800, § 16. L. 51: p. 821, § 14. CRS 53: § 82-11-1. L. 63: p. 682, § 10. C.R.S. 1963: § 82-11-1. L. 65: p. 847, § 10. L. 67: p. 73, §§ 1, 2. L. 69: p. 671, § 10. L. 77: (1)(a) amended, p. 478, § 3, effective July 1; (4)(b) R&RE, p. 478, § 4, effective July 1; (4)(c) added, p. 479, § 5, effective July 1. L. 79: (4)(a) and (4)(c) amended, p. 355, § 24, effective September 30. L. 81: (2) and (4)(a)(I) amended, p. 507, § 28, effective July 1; (4)(a)(I) and (4)(b) amended, p. 487, § 15, effective July 1. L. 83: (4)(a) amended, p. 433, § 13, effective June 3; (4)(d) added, p. 438, § 1, effective June 15. L. 84: (2) amended and (4) R&RE, pp. 319, 320, §§ 12, 13, effective July 1. L. 86: (4)(a)(II) amended, p. 703, § 10, effective July 1; (4)(b) and (4)(c) amended, p. 496, § 108, effective July 1. L. 86, 2nd Ex. Sess.: (4)(c) amended, p. 56, § 4, effective August 15. L. 90: (4)(a)(II) amended, p. 608, § 6, effective April 16. L. 92: (4)(b) amended, p. 1796, § 9, effective April 10. L. 2000: (4)(a)(II) amended and (4)(a)(III) added, p. 815, § 4, effective July 1. L. 2002: (4)(c) amended, p. 340, § 14, effective April 19. L. 2007: (4)(c) amended, p. 805, § 8, effective August 3. L. 2009: (2) amended, (HB 09-1363), ch. 363, p. 1909, § 35, effective July 1. L. 2011: (4)(a)(IV) and (4)(d) added, (HB 11-1288), ch. 212, p. 932, §§ 16, 17, effective July 1.



## ANNOTATION

**This section is constitutional.** The general assembly provided guidelines for application of the penalty provisions by directing that principles of equity determine whether improperly paid benefits are to be repaid or set off against future benefits. *Duenas-Rodriguez v. Indus. Comm'n*, 199 Colo. 95, 606 P.2d 437 (1980).

**A state statutory scheme conditioning receipt of current benefits on recovery of prior overpayments is expressly authorized by Congress,** as is denial of claims for benefits where state eligibility requirements have not been met. *In re Adamic*, 291 B.R. 175 (Bankr. D. Colo. 2003).

**Knowledge of section presumed of claimant.** A claimant who has requested benefits pursuant to the unemployment compensation statutes must be presumed to have knowledge of § 8-74-109 and this section, which specifically provide for recovery of benefits paid in error. *Paul v. Indus. Comm'n*, 632 P.2d 638 (Colo. App. 1981).

**Culpable mental state that must be established by state to prove unlawful receipt of benefits is "knowingly"** under subsection (4)(a)(II). *Div. of Emp. & Training v. Indus. Comm'n*, 706 P.2d 433 (Colo. App. 1985).

**Before an employee who is discharged for falsifying his employment application may be denied unemployment compensation benefits,** the false statements on the employment application must be found to be material to the employee's ability to perform properly the duties for which he was employed. *Casias v. Indus. Comm'n*, 38 Colo. App. 261, 554 P.2d 1357 (1976).

**Representations as to material fact.** Inquiry regarding any circumstance, including school attendance, which has a bearing upon eligibility conditions is not only proper, but is required in the efficient administration of the act. The answers and representations made by the claimant as to school attendance are representations of material facts. *Indus. Comm'n v. Bennett*, 166 Colo. 101, 441 P.2d 648 (1968).

**Admission based upon material false information declared void ab initio.** Where the evidence supported the referee's finding that claimant supplied materially false information upon which his employer and its insurer relied in filing an admission of liability, the referee was justified in declaring the admission void ab initio. *Vargo v. Colo. Indus. Comm'n*, 626 P.2d 1164 (Colo. App. 1981).

**Because the conduct prohibited by subsection (1)(a) of this section is distinct from the conduct prohibited by § 18-4-401,** prosecution under one such statute as opposed to the other does not violate a defendant's constitutional rights. *People v. Chesnick*, 709 P.2d 66 (Colo. App. 1985).

**This section is not intended to penalize an employer where the grounds assigned for discharge are ample** if believed by the employer, even though given a contrary construction by others. *Indus. Comm'n v. Emerson W. Co.*, 149 Colo. 529, 369 P.2d 791 (1962).

**And it is immaterial that an employer does not choose to elaborate on the reasons for discharge** or support them with additional testimony at the hearing, and such lack of elaboration is not proof that what had been reported was not the reason for the discharge. *Indus. Comm'n v. Emerson W. Co.*, 149 Colo. 529, 369 P.2d 791 (1962).

**Where the statements furnished by an employer are not willfully or deliberately false,** they are not such as come within the penal terms of this section. *Indus. Comm'n v. Emerson W. Co.*, 149 Colo. 529, 369 P.2d 791 (1962).

**And without intent to falsify being shown, an employer cannot be held liable for making a false statement.** *Indus. Comm'n v. Emerson W. Co.*, 149 Colo. 529, 369 P.2d 791 (1962).

**By virtue of subsection (4)(a), the division has authority to demand repayment of benefits mistakenly paid,** or may have such overpayments credited to any future benefits to which the claimant may be entitled, if equity and good conscience so require. The division may also waive collection if it deems collection to be administratively impracticable. *Gatewood v. Russell*, 29 Colo. App. 11, 478 P.2d 679 (1964).

**The monetary penalty under subsection (4)(a)(II) from overpayment is mandatory** when the claimant knowingly fails to disclose earnings from employment, regardless of financial hardship. *Woollems v. Indus. Claim Appeals Office*, 43 P.3d 725 (Colo. App. 2001).

**The Colorado Employment Security Act authorizes the imposition of a "four-for-one" penalty for each week that a person received benefits to which he or she was not entitled.** The statute requires recovery of the overpayments and imposition of a 50 percent monetary penalty. The repayment and monetary penalty provisions are mandatory. The provisions concerning recovery of past overpayments by withholding current benefits are permissive. *In re Adamic*, 291 B.R. 175 (Bankr. D. Colo. 2003).

**The public policy behind the 40-week penalty is to protect the integrity of the unemployment insurance system by deterring the filing of false or misleading claims for unemployment benefits.** *In re Adamic*, 291 B.R. 175 (Bankr. D. Colo. 2003).

**The amount that may be assessed against a person by this section is a penalty** and thus not dischargeable in bankruptcy. *In re O'Brien*, 110 Bankr. 27 (Bankr. D. Colo. 1990).

**A governmental unit may satisfy a debtor's pre-petition obligation for receiving overpay-**

**ments of unemployment benefits by offsetting or applying post-petition benefits to the outstanding debt.** An automatic stay in a voluntary Chapter 13 bankruptcy proceeding does not preclude the governmental entity from recouping unemployment benefit overpayments made prior to debtor's bankruptcy filing. *In re Adamic*, 291 B.R. 175 (Bankr. D. Colo. 2003).

Because the debtor is not entitled to receive unemployment compensation under state law as a result of his prior fraud and/or failure to disclose a material fact, he never "acquired" the post-petition payments and those payments do not constitute "earnings for services performed". Accordingly, weekly unemployment payments to which the debtor is not entitled under the Colorado Employment Security Act cannot be property of the estate; and the department's exercise of its right to withhold the post-petition benefits is not an act to collect, assess, or recover a pre-petition claim against the debtor. *In re Adamic*, 291 B.R. 175 (Bankr. D. Colo. 2003).

**The phrase "against equity and good conscience"**, as used in subsection (4)(a), means that adjustment or recovery of an incorrect payment will be considered inequitable if an individual, because of a notice such payment would be made or by reason of the incorrect payment, relinquished a valuable right or changed his position for the worse. *Duenas-Rodriguez v. Indus. Comm'n*, 199 Colo. 95, 606 P.2d 437 (1980).

**And this definition remains applicable**, even through the phase has been amended from "against equity and good conscience" to "not inequitable", because there is no substantial difference between the meaning of the phases. *Mugrauer v. Indus. Comm'n*, 709 P.2d 47 (Colo. App. 1985).

**Regarding the phrase "against equity and good conscience"**, to the extent that *Mugrauer v. Indus. Comm'n*, is construed as having interpreted *Duenas-Rodriguez v. Indus. Comm'n* to

require that this statute carry the same meaning as a similar provision in the federal Social Security Act, that construction is rejected and it is held that the federal act is not the sole means by which inequity is measured under this section. *Hesson v. Indus. Comm'n*, 740 P.2d 526 (Colo. App. 1987).

**Waiver of right of recovery of overpayment.** The commission is not required to determine that recovery of an overpayment is impossible or impractical in order to waive its right to recovery of that overpayment. *Schmidt v. Indus. Comm'n*, 42 Colo. App. 253, 600 P.2d 76 (1979).

**Setoffs applied to benefits of illegal alien.** Where an illegal alien, not legally entitled to work in this country at the time he was receiving benefits to compensate him for being unemployed, presented no evidence that he relinquished any valuable right or changed his position for the worse because he received such benefits, no equitable reason was found for allowing him to avoid setoffs from future benefits to which he may become entitled. *Duenas-Rodriguez v. Indus. Comm'n*, 199 Colo. 95, 606 P.2d 437 (1980).

**Failure to consider financial condition of claimant requesting waiver of overpayment of benefits pursuant to subsection (4)** (a) constituted error. *Kalkbrenner v. Indus. Claim Appeals Office*, 801 P.2d 545 (Colo. 1990).

**Failure to address issue of claimant's having spent the overpaid funds on basic necessities or her impoverished status at the time of the repayment hearing constitutes error.** *Munoz-Navarette v. Indus. Claim App. Off.*, 833 P.2d 827 (Colo. App. 1992).

**Applied in** *Bullers v. Indus. Comm'n*, 37 Colo. App. 412, 547 P.2d 945 (1976); *Nesbit v. Indus. Comm'n*, 43 Colo. App. 398, 607 P.2d 1024 (1979); *Johnson v. Indus. Comm'n*, 652 P.2d 1109 (Colo. App. 1982); *Zadel v. Indus. Comm'n*, 701 P.2d 1270 (Colo. App. 1985); *City and County of Denver v. Indus. Comm'n*, 707 P.2d 1008 (Colo. App. 1985).

**8-81-102. Penalties in prior law continue in force.** Any penalty, forfeiture, or liability, either civil or criminal, which has been incurred in former statutes relating to unemployment compensation shall be held as remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings, and prosecutions for the enforcement of such penalty, forfeiture, or liability which are now pending, or which may hereafter be commenced within the time provided by law for the commencement of such actions, suits, proceedings, and prosecutions, as well as for the purpose of sustaining any judgment, decree, or order which has been or which may be entered or made in such actions, suits, proceedings, or prosecutions.

**Source:** L. 41: p. 813, § 23. CSA: C. 167A, § 22. CRS 53: § 82-11-2. C.R.S. 1963: § 82-11-2.

**8-81-103. Representation in court.** (1) In any civil action to enforce the provisions of articles 70 to 82 of this title, the division and the state shall be represented by the attorney general. Such assistant attorneys general shall be appointed as are necessary for this



purpose.

(2) All criminal actions for violation of any provision of articles 70 to 82 of this title, or of any rules or regulations issued pursuant thereto, shall be prosecuted by the attorney general of the state or, at his request and under his direction, by the district attorney of the judicial district in which the employer has a place of business or the violator resides.

**Source:** L. 36, 3rd Ex. Sess.: p. 49, § 17. CSA: C. 167A, § 17. L. 41: p. 801, § 17. CRS 53: § 82-11-3. C.R.S. 1963: § 82-11-3.

## ANNOTATION

**Applied in** *In re Lowery v. Indus. Comm'n*, 666 P.2d 562 (Colo. 1983).

## ARTICLE 82

### Acquisition of Lands and Buildings

**Cross references:** For applicability of legislation that amends, repeals, or adds to the provisions of this article on or after May 18, 1979, see § 8-70-143.

8-82-101.	Nonprofit corporation - authorization and purposes.	8-82-103.	Purchase and leasehold by division - terms.
8-82-102.	Anticipation warrants - issuance and investment.	8-82-104.	Tax exemption - when.
		8-82-105.	Judicial remedies.

**8-82-101. Nonprofit corporation - authorization and purposes.** For the purpose of performing the functions required under the provisions of the "Colorado Employment Security Act", articles 70 to 82 of this title, the division is hereby authorized to create a nonprofit corporation or authority under the laws of this state and, in the name of such nonprofit corporation or authority, to purchase land and cause to be erected thereon a building or buildings suitable for offices, or for housing equipment, or for both such purposes. Any land so purchased or buildings so constructed may be thereafter sold or exchanged when, in the determination of the directors of the corporation or authority, the division no longer has need for such property, and any funds or proceeds obtained from such sale or exchange shall be the sole property of the division and distributed by it as required by the terms of articles 70 to 82 of this title.

**Source:** L. 55: p. 535, § 1. CRS 53: § 82-12-1. C.R.S. 1963: § 82-12-1. L. 77: Entire section amended, p. 470, § 26, effective July 7. L. 93: Entire section amended, p. 1797, § 103, effective June 6.

**8-82-102. Anticipation warrants - issuance and investment.** For the purpose of defraying the cost of land and for the construction of the proposed buildings, the nonprofit corporation or authority is authorized, with the approval of the governor, to issue and sell anticipation warrants in an amount not to exceed one million eight hundred fifty thousand dollars at an interest rate of not more than four percent per annum. Any state trust funds, and only such funds as may be available for permanent investment, may be used to purchase said anticipation warrants. Such anticipation warrants shall be redeemed and the interest thereon paid in the manner and from the funds enumerated in section 8-82-103.

**Source:** L. 55: p. 535, § 2. L. 56: p. 160, § 1. CRS 53: § 82-12-2. C.R.S. 1963: § 82-12-2.

**8-82-103. Purchase and leasehold by division - terms.** The divisions of employment and training and unemployment insurance may enter into rental or leasehold agreements

with a nonprofit corporation or authority created pursuant to section 8-82-101. The agreements must provide that the particular division acquire title to the land or buildings, or both, upon the payment of stipulated aggregate annual rentals. The plans, specifications, bids, and contracts for the buildings and the terms of all leasehold or rental agreements are not valid until approved by the governor, the director of the division of employment and training or the director of the division of unemployment insurance, as appropriate, and the director of the office of state planning and budgeting. The rentals must be paid solely out of the employment security administration fund, the unemployment revenue fund, or both, or the funds of any other state agency if any part of the buildings are made available to other state agencies. The obligation to pay the rentals does not constitute an indebtedness of the state and must not be paid out of any other funds. The division that enters an agreement pursuant to this section shall include the rental in its annual budgets and shall certify, audit, and pay the rentals in the same manner as all other accounts and expenditures payable out of those funds.

**Source:** L. 55: p. 536, § 3. L. 56: p. 160, § 2. CRS 53: § 82-12-3. C.R.S. 1963: § 82-12-3. L. 75: Entire section amended, p. 819, § 7, effective July 18. L. 83: Entire section amended, p. 969, § 20, effective July 1, 1984. L. 86: Entire section amended, p. 1215, § 5, effective May 30. L. 2012: Entire section amended, (HB 12-1120), ch. 27, p. 106, § 19, effective June 1.

**Editor’s note:** The effective date for amendments to this section by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

**8-82-104. Tax exemption - when.** Property acquired or occupied pursuant to this article shall be exempt from taxation so long as it is used for the purposes of the division or other public purposes.

**Source:** L. 55: p. 536, § 4. CRS 53: § 82-12-4. C.R.S. 1963: § 82-12-4.

**8-82-105. Judicial remedies.** Purchase or leasehold agreements entered into by the division pursuant to this article shall be enforceable in any court of competent jurisdiction.

**Source:** L. 55: p. 536, § 5. CRS 53: § 82-12-5. C.R.S. 1963: § 82-12-5.

ARTICLE 83

Work Force Development

**Editor’s note:** (1) This article was added with relocations in 2012. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated. For a detailed comparison of this article, see the comparative tables located in the back of the index.

(2) The effective date for the addition of this article by House Bill 12-1120 (chapter 27, Session Laws of Colorado 2012) was changed from August 8, 2012, to June 1, 2012, by House Bill 12S-1002 (First Extraordinary Session, chapter 2, p. 2432, Session Laws of Colorado 2012.)

PART 1		8-83-104.	State employment service.
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		PART 2	
8-83-101.	Definitions.	WORK FORCE INVESTMENT ACT	
8-83-102.	Division of employment and training created - director.	8-83-201.	Short title.
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		8-83-203.	Definitions.



8-83-204.	Work force investment program - legislative declaration - purposes.	8-83-214.	Consortium local elected officials board.
8-83-205.	Work force investment program - creation - administration.	8-83-215.	Designation of work force investment areas.
8-83-206.	Local elected officials - function - authority.	8-83-216.	Required and optional partners of work force boards.
8-83-207.	Designated work force investment boards - consortium work force investment boards - local work force investment boards - authority - functions.	8-83-217.	Memorandum of understanding - one-stop operators.
8-83-208.	Implementation - local plans.	8-83-218.	Core services.
8-83-209.	State work force investment plan.	8-83-219.	Intensive services - training services - individual training accounts.
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8-83-211.	Functions of work force boards.	8-83-221.	Title I appropriation - allocation.
8-83-212.	Youth council.	8-83-222.	County block grants formula - use of moneys.
8-83-213.	Consortium work force investment board.	8-83-223.	Allocation process.
		8-83-224.	State council - duties.
		8-83-225.	Colorado department of labor and employment - functions.
		8-83-226.	Responsibilities of governor.

## PART 1

### DIVISION OF EMPLOYMENT AND TRAINING

**8-83-101. Definitions.** As used in this article, unless the context otherwise requires:

- (1) "Department" means the department of labor and employment created in section 24-1-121, C.R.S.
- (2) "Director" means the director of the division.
- (3) "Division" means the division of employment and training in the department.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 79, § 6, effective June 1.

**8-83-102. Division of employment and training created - director.** There is hereby created a division of employment and training within the department of labor and employment, the head of which is the director of the division of employment and training.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 79, § 6, effective June 1.

**8-83-103. Powers, duties, and functions - acceptance of moneys.** (1) The functions of the division comprise all administrative functions of the state in relation to the administration of this article. The director shall perform his or her powers, duties, and functions prescribed under this article under the direction and supervision of the executive director of the department, as prescribed by section 24-1-105 (4), C.R.S. Any vacancy in the office of director shall be filled in the manner provided by law.

(2) The division may accept and expend moneys from gifts, grants, donations, and other nongovernmental contributions for the purposes for which the division is authorized.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 79, § 6, effective June 1.

**8-83-104. State employment service.** (1) The Colorado state employment service is established as a section in the division. The division, through the section, shall establish and maintain free public employment offices in the number and locations as may be necessary for the proper administration of this article and for the purposes of performing the duties that are within the purview of the act of congress entitled "An Act To provide for the establishment of a national employment system and for cooperation with the States in the promotion of such system, and for other purposes.", approved June 6, 1933 (48 Stat. 113; 29 U.S.C. sec. 49 (c)), as amended, and referred to in this section as the "federal act".

(2) The division shall:

(a) Cooperate with any official or agency of the United States having powers or duties under the provisions of the federal act, as amended, or under such other federal acts as may be created for similar purposes;

(b) Cooperate with or enter into agreements with the railroad retirement board with respect to the establishment, maintenance, and use of free employment service facilities; and

(c) Perform all acts necessary to secure to this state the benefits of the federal act, as amended, in the promotion and maintenance of a system of public employment offices.

(3) The state accepts the provisions of the federal act, as amended, in conformity with section 4 of the federal act, and this state will observe and comply with the requirements of the federal act. The division is designated as the agency of this state for the purposes of the federal act. The division shall appoint such officers and employees of the Colorado state employment service as necessary for the proper administration of this article.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 80, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-106 as it existed prior to 2012.

**8-83-105. Personnel.** Subject to other provisions of this article and the state personnel system regulations, the division is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. The division may delegate to any person so appointed such power as it deems reasonable and proper for the effective administration of this article. In its discretion, the division may bond any person handling moneys or signing checks under this article.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 80, § 6, effective June 1.

## PART 2

### WORK FORCE INVESTMENT ACT

**8-83-201. Short title.** This part 2 shall be known and may be cited as the "Colorado Work Force Investment Act".

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 81, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-201 as it existed prior to 2012.

**8-83-202. Legislative declaration.** (1) The general assembly hereby finds and declares that:

(a) Passage of the federal "Workforce Investment Act of 1998", 29 U.S.C. sec. 2801 et seq., gives the state a unique opportunity to develop a work force program and



employment system designed to meet the needs of employers, job seekers, and those who want to further their careers;

(b) The federal act requires that training and employment programs be designed and managed at the local government level, where the needs of businesses and individuals are best understood;

(c) The federal act requires the involvement of business, both to provide information and leadership and to play an active role in ensuring that the system prepares people for current and future jobs;

(d) Passage of the federal act provided local governments with the control and flexibility to carry out the federal act's purposes, subject to the final authority and approval of the governor; and

(e) Therefore, it is in the state's best interest to adopt the Colorado work force investment program set forth in this part 2.

(2) The general assembly recommends that:

(a) To the extent possible, counties or multi-county areas integrate their work force investment program sources of funding to maximize the resources available at the local level to provide the services authorized under this part 2; and

(b) As the responsibility for implementing work force programs continues to be devolved to local governments, Title I moneys identified for state administration of programs implemented at the local level be as specified in Title I of the federal "Workforce Investment Act of 1998".

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 81, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-202 as it existed prior to 2012.

**8-83-203. Definitions.** As used in this part 2, unless the context otherwise requires:

(1) "Colorado work force investment program" or "work force investment program" means the program of work force development created in this part 2.

(2) "Consortium local elected officials board" means the local elected officials appointed by each local work force investment board in the consortium work force investment area to serve as the local elected official for a consortium work force investment area.

(3) "Consortium work force investment area" or "consortium area" means an area designated by the governor as a federal work force investment area. The consortium work force investment area may contain one or more local work force investment areas.

(4) "Consortium work force investment board" or "consortium board" means the work force board appointed by the consortium local elected officials board. The consortium work force investment board serves, on behalf of the local work force boards in the consortium area, as the local work force investment board for specific functions under the federal act.

(5) "Department" means the department of labor and employment created in section 24-1-121, C.R.S., or any other state agency specified by the governor through executive order or otherwise.

(6) "Designated work force investment area" means a county or group of counties that has banded together through an intergovernmental agreement to provide a work force investment program and that is designated by the governor as a federal work force investment area. A designated work force investment area is not the same as the consortium work force investment area.

(7) "Designated work force investment board" means the local work force investment board for a federally designated work force investment area.

(8) "Federal act" means Title I of the federal "Workforce Investment Act of 1998", 29 U.S.C. sec. 2801 et seq.

(9) "Local elected officials" means the boards of county commissioners of the county or counties operating work force investment programs; except that, in the case of a city and county, "local elected officials" means the mayor.

(10) "Local plan" means a plan, developed and executed by a local work force investment board, that outlines the functions and responsibilities for delivery of services within a work force investment area.

(11) "Local work force investment board" means the work force board of a local work force investment area within a consortium work force investment area.

(12) "National program grant" means a grant under subtitle D of Title I.

(13) "One-stop operator" means the entity selected by a work force board, with concurrence by the local elected officials, to operate the one-stop career center in a local area.

(14) "One-stop partner" means a person or organization described in section 8-83-216.

(15) "State council" means the state work force development council created in section 24-46.3-101, C.R.S.

(16) "State plan" means a plan, developed by the governor with the assistance of the state council and based upon local plans, for the delivery of services statewide under the federal act.

(17) "Title I" means Title I of the federal act.

(18) "Title I moneys" means moneys distributed pursuant to Title I.

(19) "Wagner-Peyser Act" means the federal "Wagner-Peyser Act", 29 U.S.C. sec. 49a et seq.

(20) "Wagner-Peyser funds" means federal moneys received by the department pursuant to the "Wagner-Peyser Act".

(21) "Work force board" means either the designated work force investment board or a local work force investment board.

(22) "Work force investment area" means either the designated work force investment area or a local work force investment area.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 81, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-203 as it existed prior to 2012.

#### **8-83-204. Work force investment program - legislative declaration - purposes.**

(1) The general assembly finds, determines, and declares that this part 2 is adopted pursuant to the requirements of the federal "Workforce Investment Act of 1998", and is intended to comply with the federal act's express requirements for participants in the operation of work force investment programs.

(2) The purposes of this part 2 are to:

(a) Establish a central, coordinated delivery system at the local or regional level through which any citizen may look for a job, explore work preparation and career development services, and access a range of employment, training, and occupational education programs offering their services through local or regional work force investment programs;

(b) Develop strategies and policies that encourage job training, education and literacy, and vocational programs;

(c) Consolidate and coordinate programs and services to ensure a more streamlined and flexible work force development system at the local or regional level;

(d) Establish single contact points for employers; and

(e) Allow counties increased responsibility for the administration of the work force investment program.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 83, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-204 as it existed prior to 2012.



**8-83-205. Work force investment program - creation - administration.** (1) Under authority of the governor, the department shall cooperate with the state council to help establish and operate a network of work force investment areas as set forth in this part 2.

(2) Work force investment areas may be established at a county level or at a multi-county level through intergovernmental agreements reached by the applicable local elected officials of the work force investment area and subject to approval by the governor.

(3) Local elected officials shall govern the operation of work force investment areas with policy guidance from work force boards appointed by the local elected officials. At the option of the local elected officials and the work force board, work force investment programs may be operated by a county, the department, other governmental agencies, nonprofit or not-for-profit organizations, or private entities; except that Wagner-Peyser funds shall not be used to award contracts to nonprofit or not-for-profit organizations or private entities. An entity that applies to become a work force program operator and is not selected may appeal the decision through any available appeal process of the applicable local governmental entity.

(4) If federal or state financial support for the provision of employment and training services is eliminated or is reduced by an amount that is considered substantial by the local elected officials, the local elected officials are not required to continue funding or operating work force investment programs.

(5) The state council shall ensure that a work force investment area may function as a federally designated work force investment area in applying for available national program grants under the federal act. Each work force board may apply for a grant for its own area in the manner it deems most appropriate. A work force board may apply for a grant for its own area and receive any corresponding moneys awarded exclusively or may apply through other means and with other work force areas. Any grant moneys awarded to a work force investment area shall be a direct pass-through from the federal government to the applicable work force investment area or areas.

(6) A work force investment area created pursuant to this part 2 is authorized to operate with the same authority and functions as if the area were a federally designated work force investment area.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 83, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-205 as it existed prior to 2012.

**8-83-206. Local elected officials - function - authority.** The local elected officials shall maintain a strong role in all phases and levels of implementation of the federal act. The local elected officials of a work force investment area, in agreement with the work force board, are authorized to award contracts for the administration, implementation, or operation of any aspect of the work force investment program to any appropriate public, private, or nonprofit entity in accordance with applicable county regulations and federal law; except that Wagner-Peyser funds shall not be used to award contracts to private or nonprofit entities.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 84, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-206 as it existed prior to 2012.

**8-83-207. Designated work force investment boards - consortium work force investment boards - local work force investment boards - authority - functions.** (1) Designated work force investment boards are subject to this part 2 and the federal act. Designated work force investment boards operate for a federally designated work force investment area.

(2) (a) The consortium work force investment board shall delegate to the local work force investment boards the functions and requirements specified in this part 2 and in the federal act for work force boards. Subject to the limits specified in this part 2, the consortium board operates as the local work force investment board for the federally designated consortium work force investment area.

(b) The consortium local elected officials board functions only as the local elected official for the consortium work force investment board. The consortium local elected officials board performs only those specified functions authorized in section 8-83-214.

(3) Local work force investment boards operate as the work force boards for the local work force investment areas operating within the consortium work force investment area and as further specified in section 8-83-213. To the extent possible, local work force investment boards are subject to the requirements contained in this part 2 and the federal act. If a local work force investment board finds that compliance with any such requirement is not practicable, the work force board shall include in its local plan a description of the requirement and an explanation of why compliance is impracticable. Requirements that may be so described and explained include work force board membership requirements as specified in section 8-83-210, youth council membership requirements listed in section 8-83-212, and requirements for partners described in section 8-83-216. Although each local work force investment board has such discretion, it is subject to the outcome and performance measures required by the federal act and as negotiated with the consortium work force investment board in approving the local plan. Each local work force investment board shall meet the intent and purposes of this part 2 and the federal act.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 84, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-207 as it existed prior to 2012.

**8-83-208. Implementation - local plans.** (1) (a) The Colorado work force investment program shall be administered according to the state five-year plan prepared in accordance with the local plans created pursuant to this section. Each designated work force investment area shall submit a plan that meets the requirements of subsection (2) of this section to the governor for approval.

(b) The consortium work force investment board shall develop a local plan that consists of a compilation of local plans submitted by each local work force investment board. The consortium work force investment board shall ensure that the local plan for the consortium area, in total, meets the requirements specified in subsection (2) of this section and shall submit such plan to the governor for approval. Local work force investment boards within the consortium work force investment area shall submit local plans to the consortium work force investment board for approval.

(2) **Local plans for work force investment areas.** Subject to the approval of, and in partnership with, the local elected officials, each work force board shall develop a comprehensive five-year local plan. The plan shall include:

(a) A description of:

(I) The work force development needs of businesses, job seekers, and workers in the area;

(II) The current and projected employment opportunities in the area; and

(III) The job skills necessary to obtain such employment opportunities;

(b) A description of the work force investment program to be established in the work force investment area, including:

(I) How the work force board will ensure the continuous improvement of eligible providers of services through the system and ensure that such providers meet the employment needs of local employers and participants;

(II) A copy of each memorandum of understanding between the work force board and each of the federally required one-stop partners concerning the operation of the work force investment program in the local area; and



(III) A description of the local levels of performance negotiated with the governor and local elected officials, for the purpose of measuring the performance of the local area and to be used by the work force board for measuring the performance of the local fiscal agent, if designated, eligible providers, and the work force investment program in the local area;

(c) A description and assessment of the type and availability of adult and dislocated worker employment and training activities in the local area;

(d) A description of how the work force board will coordinate work force investment activities carried out in the area with statewide rapid response activities, as appropriate;

(e) A description and assessment of the type and availability of youth activities in the area, including an identification of successful providers of such activities;

(f) A description of the process used by the work force board to provide an opportunity for public comment, including comment by representatives of businesses and labor organizations, where applicable, and input into the development of the local plan before submission of the plan;

(g) Identification of the entity responsible for the disbursal of Title I moneys described in section 8-83-221 as determined by the local elected officials or the governor pursuant to said section;

(h) A description of the competitive process to be used to award the grants and contracts in the work force investment area for activities implemented pursuant to this part 2; and

(i) Such other information as the governor may require.

(3) **Process.** Prior to the date the work force board submits a local plan under this section, the work force board shall:

(a) Make available copies of the local plan to the public through such means as public hearings and local news media including, where feasible, the internet;

(b) Allow members of the work force board and members of the public, including representatives of business and labor organizations, to submit comments on the proposed plan to the work force board beginning on the date on which the proposed local plan is made available and continuing for a period of thirty days; and

(c) Include with the local plan submitted to the governor under this section any such comments that represent disagreement with the plan.

(4) **Plan submission and approval.** A local plan submitted to the governor under this section is considered approved by the governor at the end of the ninety-day period that begins on the day the governor receives the plan, unless the governor makes a written determination during the ninety-day period that:

(a) Deficiencies in activities carried out under this part 2 have been identified, and the area has not made acceptable progress in implementing corrective measures to address the deficiencies; or

(b) The plan does not comply with requirements under the federal act.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 85, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-208 as it existed prior to 2012.

**8-83-209. State work force investment plan.** (1) In accordance with the federal act, the governor shall submit to the federal government a state plan that outlines a five-year strategy for the Colorado work force investment program that meets the requirements of the federal act. In addition to the plan requirements specified in subsection (2) of this section, the state plan must be based upon and consistent with the local plans submitted to the governor pursuant to section 8-83-208.

(2) **Content.** The state plan must include:

(a) A description of the state council, including how the state council collaborated in the development of the state plan and a description of how the state council will continue to collaborate in carrying out the functions of the state council specified in section 8-83-224;

(b) A description of state-imposed requirements for the Colorado work force investment program;

- (c) A description of the performance accountability standards that apply to work force activities;
- (d) Information describing:
  - (I) The needs of the state with regard to current and projected employment opportunities, by occupation;
  - (II) The job skills necessary to obtain such employment opportunities;
  - (III) The skills and economic needs of the state's existing work force; and
  - (IV) The type and availability of work force activities in the state;
- (e) An identification of the work force investment areas in the state, designated work force investment areas, the consortium work force investment area, and the local work force investment areas in the consortium area, including a description of the process used for the designation of such areas;
- (f) Identification of the criteria to be used by local elected officials for the appointment of members of work force boards;
- (g) The detailed plans required under the "Wagner-Peyser Act";
- (h) A description of the procedures that will be taken by the state to assure coordination of and avoid duplication among:
  - (I) Work force investment activities authorized pursuant to the federal act and this part 2;
  - (II) Additional federal programs authorized to be included in work force systems;
  - (i) A description of the common data collection and reporting processes used for the programs and activities described in paragraph (h) of this subsection (2);
  - (j) A description of the process used by the state, consistent with the process for local plans specified in section 8-83-208 (3), to provide an opportunity for public comment, including comment by representatives of businesses and representatives of labor organizations, and input into development of the plan before submission of the plan;
- (k) Information identifying how the state will use Title I moneys the state receives under the federal act to leverage other federal, state, local, and private resources in order to maximize the effectiveness of such resources and to expand the participation of business, employees, and individuals in the Colorado work force investment program;
- (l) Assurances that the state will continue to provide, in accordance with federal requirements for fiscal control, accounting procedures that may be necessary to ensure the proper disbursement of, and accounting for, Title I moneys paid by the federal government to the state and allocated to the work force investment areas;
- (m) A description of the methods and factors the state will use in distributing Title I moneys to local areas for youth activities and adult employment and training activities, in accordance with section 8-83-223;
- (n) A description of how the state consulted with the local elected officials in work force investment areas throughout the state in determining such money distribution, in accordance with section 8-83-223;
- (o) A description of the formula for the allocation of Title I moneys to work force investment areas for dislocated worker employment and training activities, in accordance with section 8-83-223;
- (p) Information specifying the actions that constitute a conflict of interest prohibited in the state as set forth for members of the state council described in section 24-46.3-101, C.R.S., or members of work force boards;
- (q) A description of the strategy of the state for assisting local governments in the development and implementation of a fully operational work force investment program in the state;
- (r) A description of the appeals process allowing a county or group of counties that requests but is not granted authority to form a work force investment area to submit an appeal of such decision to the state council;
- (s) A description of the competitive process to be used by the state to award grants and contracts in the state for activities carried out by the state under this part 2; and
- (t) A description of the employment and training activities and youth activities provided by work force investment areas.



(3) The state plan must also include, to the extent practicable, how the state will pursue coordination and integration with other applicable federal and state programs in work force investment areas.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 87, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-209 as it existed prior to 2012.

**8-83-210. Work force boards - membership.** (1) There shall be established, in each work force investment area of the state, a work force board, which the local elected officials of the work force investment area shall appoint to oversee the one-stop career center or work force investment program in that county or area. Work force boards operate in partnership with and subject to the approval of the local elected officials for the work force investment area. Such boards are authorized to operate only with the approval of the local elected officials. Subject to requirements under the federal act, the local elected officials shall determine the membership and functions of the boards.

(2) Membership of each such board must include, at a minimum:

(a) Representatives of business in the work force investment area who are owners of businesses, who represent businesses with employment opportunities that reflect the employment opportunities of the local area, and who are appointed from among individuals nominated by local business organizations and business trade associations;

(b) Representatives of local educational entities, which may include public schools, boards of cooperative educational services, private occupational schools, and private or charter schools;

(c) Representatives of organized labor for those work force investment areas that have organized labor organizations;

(d) Representatives of community-based organizations, at least one of whom may represent the needs of persons with disabilities;

(e) Representatives of economic development agencies, including private sector economic development entities; and

(f) Representatives of each of the work force partners for the work force investment area.

(3) Members of the work force board who represent organizations, agencies, or other entities must be individuals with optimum policy-making authority within such organizations, agencies, or entities.

(4) A majority of the members of each work force board must be business representatives specified in paragraph (a) of subsection (2) of this section.

(5) Each work force board shall elect a chairperson for the board from among the business representatives specified in paragraph (a) of subsection (2) of this section.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 89, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-83-210 as it existed prior to 2012.

**8-83-211. Functions of work force boards.** (1) Each work force board shall, in partnership with and subject to the approval of the local elected officials for the work force investment area, conduct the following functions:

(a) Develop the local plan;

(b) Designate, certify, and oversee work force investment programs;

(c) Select one-stop operators to operate the one-stop career center in a local area;

(d) Authorize grants for youth services;

(e) Identify eligible providers of intensive services, if one-stop operators do not provide such services, and training services;

- (f) Develop and enter into memorandums of understanding with work force partners specified in section 8-83-216 (1);
  - (g) Develop a budget for the purpose of carrying out the duties of the work force board;
  - (h) Negotiate local performance measures;
  - (i) Oversee and assist in statewide employment statistics systems;
  - (j) Coordinate and develop employer linkages with work force investment activities carried out in the local area, including coordination of economic development strategies; and
  - (k) Promote participation of private employers with the work force investment program while ensuring the effective provision, through the work force system, of connecting, brokering, and coaching activities through intermediaries such as the one-stop operator in the local area or through other organizations to assist such employers in meeting their hiring needs.
- (2) The work force board shall not provide training services; except that the governor may waive this prohibition annually if the work force board is a qualified provider of training that is in demand and in short supply for that county or area.
- (3) Work force boards are authorized to operate only with the approval of the local elected officials and governor.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 90, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-211 as it existed prior to 2012.

**8-83-212. Youth council.** (1) Each work force board shall establish, as a subgroup within the work force board, a youth council. The work force board shall appoint the youth council with the cooperation and approval of the local elected officials. Members of the youth council who are not members of the work force board are voting members of the youth council but are not voting members of the work force board.

(2) **Membership.** Membership of the youth council must be as required under the federal act and must include:

- (a) Members of the work force board with a special interest or expertise in youth policy;
- (b) Representatives of youth service agencies, including juvenile justice and local law enforcement agencies, and representatives of local public housing authorities;
- (c) Parents of eligible youth seeking assistance under the youth grant provisions of the federal act that may include parents representing issues affecting youth with disabilities;
- (d) Individuals, including former participants and representatives or organizations, that have experience relating to youth activities;
- (e) Representatives of the federal job corps if represented in the local area; and
- (f) Other individuals as the board, in cooperation with and with the approval of the local elected officials, determine to be appropriate.

(3) **Duties.** The youth council shall perform the following duties as specified in the federal act:

- (a) Develop the portion of the local plan relating to eligible youth, as determined by the chairperson of the work force board;
- (b) Subject to the approval of the work force board and consistent with section 123 of the federal act, recommend eligible providers of youth activities to be awarded grants or contracts on a competitive basis by the board to carry out youth activities;
- (c) Conduct performance oversight of eligible providers of youth activities in the local area;
- (d) Coordinate youth activities authorized under section 129 of the federal act in the local area; and
- (e) Other duties determined to be appropriate by the chairperson of the work force board.



**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 91, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-212 as it existed prior to 2012.

**8-83-213. Consortium work force investment board.** (1) The consortium local elected officials board in a consortium work force investment area shall establish and appoint a consortium work force investment board. At a minimum, the membership of the consortium board must consist of representatives who are members of local work force investment boards. The consortium board shall meet the membership requirements under the federal act for a work force board for each local work force investment area of the consortium; except that members, as appropriate, may represent more than one entity specified by the federal act for the purpose of meeting local work force investment board membership requirements. The consortium board shall develop its own operational procedures.

(2) **Functions of consortium board - delegation to local boards.** Unless otherwise specified in this section and subject to federal law, the consortium board shall delegate to the local work force investment boards in the consortium area such local work force investment board authority and functions specified under this part 2 and the federal act. Authority and functions of the consortium board are limited to the following:

(a) Meeting the federal membership requirements for a designated work force investment board for the local work force investment areas;

(b) Negotiating with, and approving local plans submitted by, local work force investment boards;

(c) Compiling and consolidating each approved local plan of the consortium area into one local plan for the consortium area and ensuring that the plan meets the requirements under the federal act for a local plan;

(d) Submitting the local plan to the governor for approval;

(e) Negotiating with the governor for performance standards for the consortium area;

(f) Making recommendations to the governor concerning procedures to temporarily replace or correct a local work force investment area that is out of compliance with its local plan, as appropriate;

(g) Facilitating and coordinating local work force investment area grant applications, as appropriate;

(h) Ensuring that any grant moneys awarded to a local work force investment area or areas are a direct pass-through from the federal government to the eligible local work force investment area or areas;

(i) Establishing, as a subgroup within the consortium board, a youth council appointed by the consortium board in cooperation with the consortium local elected officials board. Establishment of a consortium youth council must meet the federal act requirements for youth council membership. The consortium youth council shall review and comment, as appropriate, upon that portion of the local plan relating to eligible youth and shall submit the plan to the consortium work force investment board. Subject to federal law, the consortium board shall delegate to the local work force investment boards in the consortium area duties and functions specified in the federal act and in section 8-83-212 concerning youth councils.

(j) Subject to federal law, delegating to the local work force investment boards in the consortium area duties and functions specified in the federal act and in sections 8-83-216 and 8-83-217 outlining requirements for one-stop partners and the memorandum of understanding between work force boards and one-stop partners.

(3) **Local work force investment boards.** (a) To the extent possible and as outlined in the applicable local plan, each local work force investment board shall function as set forth in the federal act. In carrying out its duties, the local work force investment board shall operate in partnership with, and subject to the approval of, the local elected officials for the designated work force investment area.

(b) **Membership.** Notwithstanding section 8-83-210 (3), the local elected officials shall appoint members of each local work force investment board. Membership, to the extent possible, must meet the requirements of the federal act.

(c) **Functions.** Notwithstanding section 8-83-211, at a minimum, functions of the local work force investment board must be as set forth in this part 2 and the federal act. In addition, each local work force investment board shall:

(I) Upon the approval of and in partnership with the local elected officials, develop a comprehensive five-year local plan for its local work force investment area and shall submit the local plan for approval to the consortium work force investment board. The plan must include a description of those requirements under the federal act that the local work force investment board determines cannot be reasonably met while still fulfilling the intent and purposes of the federal act.

(II) Apply for federal grants. Each local work force investment board may apply for national program grants on behalf of the area or in partnership with any other work force investment area. Any national program grant moneys awarded to a local work force investment area are a direct pass-through from the federal government to the applicable work force investment area or areas.

(III) To the extent possible and as outlined in the local plan, with the agreement of the local elected officials and notwithstanding the provisions of sections 8-83-216 and 8-83-217, designate or certify the one-stop partners and develop and negotiate the memorandum of understanding as set forth in sections 8-83-216 and 8-83-217;

(IV) Establish, as a subgroup within the local work force investment board, a youth council to be appointed by the work force board in cooperation with the local elected officials. To the extent possible and as outlined in the local plan, the youth council's membership and functions must be as set forth in the federal act and section 8-83-212.

(V) Oversee the one-stop system in the local work force investment area.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 92, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-213 as it existed prior to 2012.

**8-83-214. Consortium local elected officials board.** (1) In order to satisfy requirements under the federal act for the role of local elected officials in a work force area, there shall be a consortium local elected officials board for the local consortium work force investment board. The consortium local elected officials board consists of one local elected official appointed by each local work force investment area in the consortium. Membership is for a term of two years, which term may be renewable.

(2) Functions of the consortium local elected officials board are to appoint members to the consortium work force investment board and ensure that the consortium work force investment board meets federal requirements for membership and delegate fiscal responsibility and contractual responsibility to the local elected officials of local work force investment areas. The consortium local elected officials board shall develop its own operational procedures.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 94, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-214 as it existed prior to 2012.

**8-83-215. Designation of work force investment areas.** (1) Subject to section 116(a) of chapter 2 of the federal act concerning designation of work force areas, any current or previously recognized service delivery area operating before August 7, 1998, may automatically be designated as a work force investment area.

(2) If an area does not qualify for automatic designation, on an annual basis any county or group of counties may petition the governor to form a new work force investment area.



(3) Subject to the governor's approval, counties may choose, through intergovernmental agreements, to band together to form a work force investment area for an area consisting of more than one county or may choose to operate a work force investment area as a single county. If the proposed work force investment area meets the minimum federal requirements for an area as set forth in the federal act, the governor should not unreasonably withhold approval of the work force investment area.

(4) (a) The governor may authorize and approve as a federally designated work force investment area any area that applies and qualifies as specified in subsection (1) of this section.

(b) Automatic designation as a designated work force investment area shall be granted to any unit of local government with a population of five hundred thousand or more.

(c) Automatic temporary designation as a designated work force investment area shall be granted to any unit or units of local government with a total population of two hundred thousand or more that constituted a service delivery area before August 7, 1998, and that requests such designation. Temporary designation is for a period of not more than two years; except that the period may be extended until the end of the period covered by the five-year plan if the work force investment area has substantially met the local performance measures and sustained the fiscal integrity of its Title I moneys.

(5) (a) The governor shall designate an additional federally designated work force investment area for the state, specified as the "consortium of local work force investment areas", which consists of all approved local work force investment areas. Any current or previously recognized service delivery area operating after August 7, 1998, may enter into or withdraw from the consortium of local work force investment areas. Such decision shall be allowed on an annual basis, with notice to be given by February 1, for any designation to go into effect for the subsequent program year by July 1 of the same year.

(b) Any approved local work force investment area in the consortium work force investment area shall operate with the same authority as, and function as if it were, a federally designated work force investment area.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 94, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-215 as it existed prior to 2012.

**8-83-216. Required and optional partners of work force boards.** (1) **Required partners.** Each work force board, with the agreement of the local elected officials, is authorized to designate or certify the following partners for purposes of participating in the delivery of services for the one-stop system or work force investment program in the work force investment area:

- (a) Work force investment programs;
  - (b) Adult education and literacy programs;
  - (c) Welfare-to-work programs;
  - (d) Programs under the federal "Carl D. Perkins Vocational and Applied Technology Education Act", 20 U.S.C. sec. 2301 et seq.;
  - (e) Community service block grants;
  - (f) Unemployment insurance;
  - (g) "Wagner-Peyser Act" services;
  - (h) Vocational rehabilitation programs;
  - (i) Programs under the federal "Older Americans Act of 1965";
  - (j) Programs under the federal "Trade Adjustment Assistance Reform and Extension Act of 1986";
  - (k) Programs under 38 U.S.C. sec. 4100 et seq., concerning local veterans' employment representatives and disabled veterans' outreach programs; and
  - (l) Employment and training programs administered by the federal department of housing and urban development.
- (2) **Optional partners.** Optional partners may include:

- (a) Programs authorized under part A of Title IV of the federal "Social Security Act", 42 U.S.C. sec. 601;
- (b) Programs authorized under the federal "Food Stamp Act of 1977", 7 U.S.C. sec. 2011 et seq.;
- (c) Programs authorized under the federal "National and Community Service Act of 1990", 42 U.S.C. sec. 12501 et seq.;
- (d) Programs resulting from the federal "Ticket to Work and Work Incentives Improvement Act of 1999", Pub.L. 106-170; and
- (e) Other appropriate federal, state, or local programs, including programs in the private sector.

(3) **Functions of required partners.** All required one-stop partners shall perform the following functions:

- (a) Make available to participants through the one-stop system the core services that are required of and applicable to the partner's programs;
- (b) Serve as representatives on the work force board;
- (c) Use a portion of moneys, personnel, and other available resources to create and maintain a one-stop system; except that, to the extent such use would violate federal law or lead to a loss of federal moneys, this paragraph (c) does not apply; and
- (d) Enter into a memorandum of understanding with the work force board relating to the operation of the one-stop career center, including a description of services, how the cost of the identified services and operating costs of the system will be funded, and methods for referrals of individuals.

(4) **Functions of optional partners.** (a) Optional one-stop partners shall perform the following functions:

- (I) Make available to participants through the one-stop system the core services that are required of and applicable to the partner's programs;
- (II) Participate in the operation of such one-stop system, consistent with the terms of the memorandum of understanding approved by the work force board and with the requirements of the federal act in which the program is authorized, if the work force board and local elected official approve such participation.
- (b) If an optional partner is designated or certified pursuant to subsection (1) of this section, its functions and responsibilities are the same as those of a required partner as set forth in subsection (3) of this section.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 95, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-216 as it existed prior to 2012.

**8-83-217. Memorandum of understanding - one-stop operators.** (1) (a) The work force board, with the agreement of the local elected officials, shall develop and enter into a memorandum of understanding between the work force board and the one-stop partners concerning the provision of services in the one-stop system in the local area.

- (b) Each memorandum of understanding must contain provisions describing:
  - (I) The services to be provided through the one-stop system;
  - (II) How the costs of such services and the operating costs of the system will be funded;
  - (III) Methods for referral of individuals between the one-stop operator and one-stop partners for the appropriate services and activities;
  - (IV) The duration of the memorandum of understanding and the procedures for amending the memorandum of understanding during the term of the memorandum of understanding; and
  - (V) Such other provisions, consistent with the federal act, as the parties to the agreement determine to be appropriate.

(2) **One-stop operators.** (a) Consistent with the requirements of the federal act for one-stop partners, the work force board, with the agreement of the local elected official, is authorized to designate or certify one-stop operators and to terminate for cause the eligibility of such operators.



(b) To be eligible to receive moneys to operate a one-stop career center, an entity, which may be a consortium of entities, must be designated or certified as a one-stop operator by any of the following three methods:

(I) If a one-stop system or work force investment program was established in a local area prior to August 7, 1998, the work force board and local elected official for that area may agree with each other and with the governor, on a case-by-case basis, to designate or certify as a one-stop operator an entity carrying out activities under such preexisting system or program, subject to the requirements of section 8-83-216 and this section and of the memorandum of understanding.

(II) An entity may be selected for designation or certification as a one-stop operator through a competitive process.

(III) An entity may be selected for designation or certification as a one-stop operator in accordance with an agreement reached between the work force board and a consortium of entities that, at a minimum, includes three or more of the required one-stop partners described in section 8-83-216 and may be a public or private entity, or consortium of entities, of demonstrated effectiveness in the local area and may include the following:

(A) A postsecondary educational institution;

(B) An employment service agency established under the federal "Wagner-Peyser Act";

(C) A private, nonprofit organization, which may include a community-based organization;

(D) A private for-profit entity;

(E) A government agency; and

(F) Another interested organization or entity, which may include a local chamber of commerce or other business organization.

(c) Elementary schools and secondary schools are not eligible for designation or certification as one-stop operators; except that nontraditional public secondary schools and area vocational education schools shall be eligible for such designation or certification.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 97, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-217 as it existed prior to 2012.

**8-83-218. Core services.** (1) The work force investment program, as implemented through one-stop career centers, shall provide a core set of services, as defined by the federal act, to individuals who are adults or dislocated workers, including, at a minimum, access for job seekers to a comprehensive array of services and information, which may include:

(a) Registration into the centralized computer system;

(b) Career center operations;

(c) Education and training program information;

(d) A multi-media resource library providing access to internet-based services;

(e) Labor market information;

(f) Skill assessment services that are designed to determine each participant's employability, aptitudes, abilities, and interests, by means of individual interviews whenever possible;

(g) Job referral and placement;

(h) Self-help resume preparation resources;

(i) Referral services for community and social services, including welfare-to-work programs, employment programs for persons with disabilities, employment programs for older workers, community-based organizations, vocational rehabilitation, adult literacy, supportive services, and youth programs and services;

(j) Veterans' benefits and services information, subject to the availability of Wagner-Peyser funds and to the following:

(I) Any one-stop career center receiving Wagner-Peyser funds or housing Wagner-Peyser Act staff shall provide veterans with priority employment and training services in accordance with chapter 41 of title 38, U.S.C.;

(II) In one-stop career centers that have been assigned disabled veteran outreach program and local veteran employment representative positions, such positions must be held by state employees and are in addition to, and do not supplant, Wagner-Peyser staff in providing priority employment and training services; and

(III) All one-stop career centers shall make the full array of core services available to veterans in the following order of priority: Disabled veterans, Vietnam-era veterans, veterans, and other eligible persons.

(2) Work force boards are encouraged to consider and determine, at a minimum, the feasibility of providing access for employers to a comprehensive array of services and information, which may include:

- (a) Professional account representatives and management;
- (b) Assistance in individual and mass recruiting;
- (c) Referrals of skilled applicants;
- (d) Labor market information;
- (e) Education and training program information;
- (f) Access to internet-based services;
- (g) Information and referral for community and social services;
- (h) Layoff assistance; and
- (i) Other employment-related services and information.

(3) At the option of the local elected officials, other services for job seekers and employers may be offered to meet the needs of a work force investment area.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 98, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-218 as it existed prior to 2012.

#### **8-83-219. Intensive services - training services - individual training accounts.**

(1) Access to intensive services, as specified in the federal act, must be available to individuals who are adults or dislocated workers who are unemployed, unable to obtain employment through core services, and have been determined by a one-stop operator to be in need of more intensive services to obtain employment or who are employed but are determined by a one-stop operator to be in need of such services. Such services may include diagnostic testing, individual or group counseling and career planning, case management and follow-up services, and training services specified in subsection (2) of this section.

(2) Participants who have met the eligibility requirements for intensive services, are unable to obtain or retain employment through such services, are determined by the one-stop operator to be in need of such services, and are eligible for such services as specified in the federal act must have access to training services, as specified in the federal act. Such training services include occupational skills training, on-the-job training, and training programs operated by the private sector.

(3) The one-stop system shall provide training services authorized under this section to eligible individuals through the use of individual training accounts, as specified in the federal act. Exceptions to the use of individual training accounts, as set forth in the federal act, include customized training, training services not provided by a training provider within the work force area, or training services that are offered by community-based organizations or other private organizations that serve such special populations that face multiple barriers to employment.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 100, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-218.5 as it existed prior to 2012.



**8-83-220. Encouragement of nursing education programs - legislative declaration.**

(1) The consortium work force investment board shall encourage work force investment programs and work force investment areas to enroll individuals in educational programs related to practical nursing.

(2) The general assembly finds, determines, and declares that educating individuals eligible to receive moneys from welfare-to-work or temporary assistance to needy families will benefit such individuals. In addition, the general assembly finds, determines, and declares that Colorado is facing a shortage of licensed practical nurses and that encouraging individuals to follow such a career path further benefits Colorado and its residents.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 100, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-218.7 as it existed prior to 2012.

**8-83-221. Title I appropriation - allocation.** As specified in section 191(a) of the federal act, Title I moneys received by the state under the federal act are subject to appropriation by the general assembly, consistent with the terms and conditions required under the federal act. The local elected officials or their designee shall serve as the local grant recipient for the Title I moneys allocated to the work force investment area by the governor for the purposes of a work force investment area's administration and implementation of the work force investment program pursuant to the allocation formula described in section 8-83-223. The department shall contract directly with each local work force investment board. In order to assist in the administration of Title I moneys, the local elected officials may designate an entity to serve as a local grant sub-recipient for such moneys or as a local fiscal agent. Except when the designee is the department, a designation does not relieve the local elected officials of the liability for any misuse of grant moneys.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 221, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-219 as it existed prior to 2012.

**8-83-222. County block grants formula - use of moneys.** Subject to available appropriations by the general assembly, the department shall allocate Title I moneys to each work force investment area for the operation of the work force investment program in that work force investment area.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 101, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-220 as it existed prior to 2012.

**8-83-223. Allocation process.** Subject to federal law and available appropriations, within thirty days after receipt of the federal appropriation from the United States department of labor, the local elected officials from each work force investment area in the state shall develop an allocation formula for each work force investment area. Development of the allocation formula by the local elected officials shall be facilitated through a statewide association of county commissioners, referred to in this section as Colorado counties, incorporated, or CCI. CCI shall ensure that the local elected officials from each work force investment area have an opportunity to participate in the development and final approval of the recommendations for allocation formulas. The department and the state council shall provide technical assistance to CCI as requested in the development of recommended allocations. The local elected officials shall recommend the allocation formula to be applied and each allocation for adult, youth, and dislocated worker services under Title I. CCI shall forward the local elected officials' recommendations to the state council pursuant to section

8-83-224 (2) (f) for review and comment. The state council shall then submit such recommendations, together with the state council's comments, to the joint budget committee of the general assembly for review and comment before forwarding such recommendations to the governor for final determination. If the local elected officials cannot agree on an allocation, the local elected officials shall prepare alternatives and CCI shall submit the alternatives to the state council for review and comment and submission to the joint budget committee, which shall select one alternative and forward it to the governor for final determination. The local elected officials and CCI shall develop their own operational procedures. Any moneys received by the state under Title I, together with any associated state full-time equivalent personnel positions, are subject to appropriation by the general assembly.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 101, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-221 as it existed prior to 2012.

**8-83-224. State council - duties.** (1) The state council shall function as, and is intended to meet the requirements for, the state work force investment board referred to in the federal act. In addition to performing the functions set forth in subsection (2) of this section, the state council shall serve in an advisory role to the governor for those areas specified by the federal act and shall serve as a conduit for information to local work force investment areas, including facilitation of grant applications and assistance to work force investment areas to enable work force investment areas to successfully implement programs under the federal act.

(2) The state council shall assist the governor in the following:

(a) Development of the comprehensive five-year state plan as specified in section 8-83-209; -

(b) Development and continuous improvement of a statewide system of activities that are funded pursuant to the federal act or carried out through a one-stop system as set forth in this part 2 that receives Title I moneys. Such improvement shall include the development of linkages in order to ensure coordination and prevent duplication among the programs and activities authorized in this part 2.

(c) Review of local plans submitted by the designated work force investment boards and consortium work force investment board;

(d) Designation of local work force investment areas;

(e) Commenting at least once annually on the measures taken pursuant to the federal "Carl D. Perkins Vocational and Applied Technology Education Act", 20 U.S.C. sec. 2301 et seq.;

(f) Review and comment on, and submission to the joint budget committee for review and comment on, allocation formulas for the distribution of Title I moneys for adult employment and training activities and youth activities to work force investment areas in accordance with the process established in section 8-83-223;

(g) Preparation of the annual report to the secretary of the United States department of labor;

(h) Development of the statewide employment statistics system described in the "Wagner-Peyser Act";

(i) Development of an application for an incentive grant authorized pursuant to the federal act; and

(j) Any other functions as requested by the governor.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 101, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-222 as it existed prior to 2012.



**8-83-225. Colorado department of labor and employment - functions.** (1) The department shall serve as the administrative entity for Title I moneys received pursuant to the federal act. The department also is responsible for:

(a) Administering the statewide labor market information and fiscal systems to the extent such systems pertain to activities under the federal act;

(b) Assisting in the establishment and operation of one-stop career centers as requested by a local work force area;

(c) Disseminating lists of eligible training providers;

(d) Contracting and administering Title I moneys appropriated by the general assembly in accordance with the federal act;

(e) With input from the applicable work force investment areas, continuing the centralized computer system that links work force investment programs and includes training and technical support. A description of the state centralized system and procedures for developing, maintaining, and training must be included in the state plan required in section 8-83-209.

(f) Providing staff development and training services and technical assistance to local work force investment areas.

(2) The department shall provide ongoing consultation and technical assistance to each work force investment area for the operation of work force investment programs.

(3) The department shall encourage work force investment areas to inform individuals of the career possibilities in the field of nursing and the availability of practical nursing education programs.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 102, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-223 as it existed prior to 2012.

**8-83-226. Responsibilities of governor.** (1) The governor shall perform the following functions, as specified in the federal act:

(a) Appoint members to the state council in accordance with section 24-46.3-101 (2), C.R.S.;

(b) Establish criteria for local elected officials to use in appointing members of local work force investment boards;

(c) Designate federal work force investment areas in consultation with the local elected officials, including local work force investment areas requesting to be a part of the federal work force investment area comprising a consortium of work force areas;

(d) Designate, modify, and terminate work force investment areas in the state, including temporary designation, and establish an appeal process for review of such decisions;

(e) Certify designated work force investment boards and the consortium work force investment board;

(f) Negotiate with the federal department of labor concerning the contents of the state plan; and

(g) Carry out such other duties and functions as may be required under the federal act.

**Source: L. 2012:** Entire article added with relocations, (HB 12-1120), ch. 27, p. 103, § 6, effective June 1.

**Editor's note:** This section is similar to former § 8-71-224 as it existed prior to 2012.





## **TITLE 9**

# **SAFETY - INDUSTRIAL AND COMMERCIAL**

PLATE I

THE GREAT WALL OF CHINA  
AND  
THE GREAT WALL OF KOREA



# TITLE 9

## SAFETY - INDUSTRIAL AND COMMERCIAL

### BUILDINGS AND EQUIPMENT

- Art. 1. Construction Requirements, 9-1-101 to 9-1-106.
- Art. 1.3. Low-flow Plumbing Fixtures, 9-1.3-101 to 9-1.3-105.
- Art. 1.5. Excavation Requirements, 9-1.5-101 to 9-1.5-107.
- Art. 2. Safety Glazing Materials (Repealed).
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- Art. 3. Fire Extinguishers - Sale and Use, 9-3-101 to 9-3-105.
- Art. 4. Boiler Inspection, 9-4-101 to 9-4-118.
- Art. 5. Standards For Accessible Housing, 9-5-101 to 9-5-106.
- Art. 5.5. Elevator and Escalator Certification, 9-5.5-101 to 9-5.5-120.

### EXPLOSIVES

- Art. 6. Explosives, 9-6-101 to 9-6-108.
- Art. 7. Explosives - Regulation and Inspection, 9-7-101 to 9-7-112.

### SPECIAL SAFETY PROVISIONS

- Art. 10. Ventilation of Garages and Shops (Repealed).

## BUILDINGS AND EQUIPMENT

### ARTICLE 1

#### Construction Requirements

**Cross references:** For coal and metal mines safety, see title 34; for petroleum products safety, see article 20 of title 8; for railroad safety appliances, see article 29 of title 40.

- |                              |                                  |
|------------------------------|----------------------------------|
| 9-1-101. Doors - passages.   | 9-1-104. Doors open outward.     |
| 9-1-102. Penalty.            | 9-1-105. Fireproof stairways.    |
| 9-1-103. No action for rent. | 9-1-106. Loss of life - penalty. |

**9-1-101. Doors - passages.** Every room or building intended to be used as a theatre, opera house, music hall, concert hall, church, or other like place of public assemblage shall be provided with at least one doorway of not less than five feet in width for each two hundred fifty persons who may be seated within such building in the part thereof intended for public assemblage and with proper and sufficient ways and passages leading to and from every such doorway, so that in case of fire or other sudden alarm those who may be within such building may speedily and safely escape therefrom.

**Source:** G.L. § 111. G.S. § 132. R.S. 08: § 427. C.L. § 5466. CSA: C. 26, § 1. CRS 53: § 17-1-1. C.R.S. 1963: § 17-1-1. L. 2008: Entire section amended, p. 1095, § 6, effective August 5.

**9-1-102. Penalty.** Every proprietor who builds or procures to be built or leases, procures, or permits to be used as a theatre, opera house, concert hall, music hall, public school, church, or for any other like public assemblage any building not in conformity to this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars.

**Source:** G.L. § 113. G.S. § 134. R.S. 08: § 429. C.L. § 5468. CSA: C. 26, § 3. CRS 53: § 17-1-2. C.R.S. 1963: § 17-1-2.

**9-1-103. No action for rent.** No action shall lie to recover the rent on any lease or contract for the use or occupation of any room or building used as a theatre, opera house, concert hall, music hall, public school, church, or other like place of public assemblage unless such room or building at the time of such renting, use, or occupation has doorways, passages, and means of safe escape therefrom in case of fire, in conformity with this article.

**Source:** G.L. § 114. G.S. § 135. R.S. 08: § 430. C.L. § 5469. CSA: C. 26, § 4. CRS 53: § 17-1-3. C.R.S. 1963: § 17-1-3.

**9-1-104. Doors open outward.** All doors provided for the doorways of every such room or building shall open outwards, and every person using or occupying any such room or building as a theatre, opera house, concert hall, music hall, public school, church, or for other like public assemblage during the whole of every exhibition, performance, or assemblage therein shall cause all the doors thereof to be left unfastened or latched or barred upon the inner side only so that any person may readily and speedily open the same from the inner side of such room or building and shall cause all the stairways and other ways and passages leading to every such door to be kept open and free from persons seated or standing therein or other obstructions. Any person failing to observe this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars.

**Source:** G.L. § 115. G.S. § 136. R.S. 08: § 431. C.L. § 5470. CSA: C. 26, § 5. CRS 53: § 17-1-4. C.R.S. 1963: § 17-1-4.

**9-1-105. Fireproof stairways.** Whenever any building is erected for the purpose of accommodating public assemblages and the rooms intended for such purpose are not on the first floor of such building, it is the duty of the persons erecting the same to provide and erect at least two fireproof stairways of ample dimensions sufficient for the sudden egress of such assemblages.

**Source:** G.L. § 116. G.S. § 137. R.S. 08: § 432. C.L. § 5471. CSA: C. 26, § 6. CRS 53: § 17-1-5. C.R.S. 1963: § 17-1-5.

**9-1-106. Loss of life - penalty.** If any lives are lost by reason of the willful negligence and failure to observe the provisions of this article, the person through whose default such loss of life was occasioned commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** G.L. § 117. G.S. § 138. R.S. 08: § 433. C.L. § 5472. CSA: C. 26, § 7. CRS 53: § 17-1-6. C.R.S. 1963: § 17-1-6. L. 72: p. 556, § 8. L. 77: Entire section amended, p. 869, § 20, effective July 1, 1979. L. 89: Entire section amended, p. 821, § 7, effective July 1. L. 2002: Entire section amended, p. 1467, § 22, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 21, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** (1) For the penalty for manslaughter and criminally negligent homicide, see §§ 18-3-104 and 18-3-105.

(2) For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.



**ARTICLE 1.3****Low-flow Plumbing Fixtures**

- |            |  |            |  |
|------------|--|------------|--|
| 9-1.3-101. | Legislative declaration.                   | 9-1.3-104. | Waiver of requirements.  |
| 9-1.3-102. | Control standards - definitions - permits. | 9-1.3-105. | State-funded construction - best available water-conserving devices. |
| 9-1.3-103. | Certification of compliance.               |            |  |

**9-1.3-101. Legislative declaration.** The general assembly finds and declares that conservation of potable water by the utilization of low-flow plumbing fittings and fixtures in newly constructed and renovated residential structures and facilities for human use within office, commercial, and industrial buildings is in the best interests of the people of the state of Colorado and that, to such end, the provisions of this article are hereby enacted.

**Source: L. 89:** Entire article added, p. 429, § 1, effective April 19. **L. 90:** Entire section amended, p. 1845, § 34, effective July 1.

**9-1.3-102. Control standards - definitions - permits.** (1) Except as specifically provided under section 9-1.3-104, on and after January 1, 1990, no construction or renovation of residential structures or of facilities for human use within office, commercial, or industrial buildings shall be commenced within the state of Colorado which does not comply with the provisions of this article. The provisions of this article shall not apply to any structures or facilities which are served by a septic system.

(2) For the purposes of this article:

(a) "Manufactured housing" means housing which is in part or entirely manufactured in a factory. This type of housing is built in single or multiple sections on a chassis which enables it to be transported to its occupancy site or is built in single or multiple sections for assembly at the site, and includes modular homes and panelized homes.

(b) "Renovation" includes any addition, replacement, or alteration to an existing residential structure or to a facility for human use within an office, commercial, or industrial building, where plumbing fixtures and fittings are installed as part of the renovation. Limited renovation may not be the basis for a comprehensive or broader change in plumbing fixtures.

(c) "Residential structures" includes, but is not limited to, one- and two-family residences, townhouses, condominiums, apartment buildings, hotels and motels, manufactured housing, and mobile homes defined as any wheeled vehicle, exceeding either eight feet in width or thirty-two feet in length, excluding towing gear and bumpers, without motive power, which is designed and commonly used for occupancy by persons for residential purposes, in either temporary or permanent locations, and which may be drawn over the public highways by a motor vehicle.

(3) No building permit shall be issued on and after January 1, 1990, for the construction or renovation of a residential structure or a facility for human use within an office, commercial, or industrial structure by the local governmental entity with building permit authority unless the fittings and fixtures installed during such construction or renovation conform to the specifications provided in subsection (4) of this section.

(4) The requisite fixtures and fittings for such construction and renovation shall be:

(a) Except in the case of flushometer valves, tank-type water closets which flush with a maximum of three and one-half gallons of water;

(b) Shower heads for bathing which have a maximum flow capacity of three gallons per minute at eighty pounds per square inch; and

(c) Lavatory faucets and sink faucets which have a maximum flow capacity of two and one-half gallons per minute at eighty pounds per square inch.

**Source: L. 89:** Entire article added, p. 429, § 1, effective April 19; (2) amended, p. 1644, § 11, effective July 1. **L. 91:** (4) amended, p. 2030, § 6, effective June 4. **L. 95:** (2) amended, p. 1208, § 20, effective May 31.

**Cross references:** For the short title and legislative declaration contained in the 1991 act amending subsection (4), see sections 1 and 2 of chapter 328, Session Laws of Colorado 1991.

**9-1.3-103. Certification of compliance.** For facilities for human use within office, commercial, and industrial structures, the plumbing contractor or party responsible for the installation of said water flow control fixtures and fittings shall certify to the inspecting governmental entity that the fixtures and fittings conform with the volume and ratio of water flow to gallons per minute stipulated by section 9-1.3-102 (4). In lieu of such certification, the results of tests performed by an approved independent testing laboratory or the manufacturer, using established principles of mechanics, shall be acceptable.

**Source: L. 89:** Entire article added, p. 430, § 1, effective April 19.

**9-1.3-104. Waiver of requirements.** The chief building official of the administrative authority shall waive compliance with the requirements of this article upon satisfactory demonstration by a petitioner or the local administrative authority upon its own motion that the water conservation requirements specified in this article are detrimental to the public health or safety. Such waiver shall also be granted if the administrative authority determines that the requisite fixtures and fittings would cause a sewer hydraulic gradient insufficient to handle reduced water flows.

**Source: L. 89:** Entire article added, p. 430, § 1, effective April 19.

**9-1.3-105. State-funded construction - best available water-conserving devices.** On or after January 1, 1990, any state agency or local governmental entity which commences construction or renovation where plumbing fixtures and fittings are installed as part of the renovation of any building or other structure which is funded wholly or in part with state or federal moneys shall utilize the best available approved devices for the purpose of conserving water in the building being constructed.

**Source: L. 89:** Entire article added, p. 430, § 1, effective April 19.

## ARTICLE 1.5

### Excavation Requirements

- |   |   |
|---|---|
| 9-1.5-101. Legislative declaration.   | 9-1.5-104.5. Civil penalties - applicability.   |
| 9-1.5-102. Definitions.   | 9-1.5-105. Notification association - structure and funding requirements - duties of owners and operators - report. |
| 9-1.5-103. Plans and specifications - notice of excavation - duties of excavators - duties of owners and operators. | 9-1.5-106. Notice requirements.   |
| 9-1.5-104. Injunctive relief. (Deleted by amendment)  | 9-1.5-107. Notice of removal of underground facilities.   |
| 9-1.5-104.3. Alternative dispute resolution.  |   |

**9-1.5-101. Legislative declaration.** The purpose of this article is to prevent injury to persons and damage to property from accidents resulting from damage to underground facilities by excavation. This purpose shall be facilitated through the creation of a single statewide notification system to be administered by an association of the owners and operators of underground facilities. Through the association, excavators shall be able to obtain crucial information regarding the location of underground facilities prior to excavating and shall thereby be able to greatly reduce the likelihood of damage to any such underground facility or injury to any person working at an excavation site.

**Source: L. 81:** Entire article added, p. 520, § 1, effective October 1. **L. 93:** Entire article amended, p. 498, § 1, effective September 1.



## ANNOTATION

**This article does not create an implied waiver of sovereign immunity.** This result is dictated by the lack of language in this article evincing an intent to waive the defense of sovereign immunity, combined with the clear intent of the Governmental Immunity Act to limit the circumstances in which the state or public enti-

ties will be liable for tort damages and the court's history of narrowly construing waivers of sovereign immunity. *Dept. of Hwys. v. Mountain States Tel.*, 869 P.2d 1289 (Colo. 1994) (decided under law in effect prior to repeal of § 9-1.5-104).

**9-1.5-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Damage" includes the penetration or destruction of any protective coating, housing, or other protective device of an underground facility, the partial or complete severance of an underground facility, or the rendering of any underground facility inaccessible.

(2) "Emergency situations" includes ruptures and leakage of pipelines, explosions, fires, and similar instances where immediate action is necessary to prevent loss of life or significant damage to property, including, without limitation, underground facilities, and advance notice of proposed excavation is impracticable under the circumstances.

(3) "Excavation" means any operation in which earth is moved or removed by means of any tools, equipment, or explosives and includes augering, backfilling, boring, ditching, drilling, grading, plowing-in, pulling-in, ripping, scraping, trenching, and tunneling. "Excavation" shall not include routine maintenance on existing planted landscapes.

(4) "Notification association" or "association" means the statewide notification association of owners and operators of underground facilities created in section 9-1.5-105.

(5) (a) "Operator" or "owner" means any person, including public utilities, municipal corporations, political subdivisions, or other persons having the right to bury underground facilities in or near a public road, street, alley, right-of-way, or utility easement.

(b) "Operator" or "owner" does not include any railroad.

(6) "Person" means any individual acting on his or her own behalf, sole proprietor, partnership, association, corporation, or joint venture; the state, any political subdivision of the state, or any instrumentality or agency of either; or the legal representative of any of them.

(6.5) "Routine maintenance" means a regular activity that happens at least once per year on an existing planted landscape if earth is not disturbed at a depth of more than twelve inches by nonmechanical means or four inches by mechanical means and if the activities are not intended to permanently lessen the ground cover or lower the existing ground contours. Mechanical equipment used for routine maintenance tasks shall be defined as aerators, hand-held rototillers, soil injection needles, lawn edgers, overseeders, and hand tools.

(7) "Underground facility" means any item of personal property which is buried or placed below ground for use in connection with the storage or conveyance of water or sewage, electronic, telephonic, or telegraphic communications or cable television, electric energy, or oil, gas, or other substances. "Item of personal property", as used in this subsection (7), includes, but is not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments thereto.

**Source:** **L. 81:** Entire article added, p. 520, § 1, effective October 1. **L. 93:** Entire article amended, p. 498, § 1, effective September 1. **L. 2000:** (3) and (6) amended, p. 685, § 1, effective May 23. **L. 2009:** (2) and (3) amended and (6.5) added, (HB 09-1092), ch. 38, p. 151, § 1, effective August 5.

## ANNOTATION

**Law reviews.** For article, "The Current Law of Underground Utility Location in Colorado", see 23 Colo. Law. 2545 (1994).

**The state's activities in replacing a signpost amounted to an "excavation" within the**

**meaning of § 9-1.5-102 (3).** *Mountain States Tel. v. Dept. of Hwys.*, 857 P.2d 502 (Colo. App. 1993) (decided prior to the 1993 amendment), rev'd on other grounds, 869 P.2d 1289 (Colo. 1994).

**9-1.5-103. Plans and specifications - notice of excavation - duties of excavators - duties of owners and operators.**

(1) (Deleted by amendment, L. 93, p. 499, § 1, effective September 1, 1993.)

(2) Architects, engineers, or other persons designing excavation shall obtain general information as to the description, nature, and location of underground facilities in the area of such proposed excavation and include such general information in the plans or specifications to inform an excavation contractor of the existence of such facilities and of the need to obtain information thereon pursuant to subsection (3) of this section.

(3) (a) Except in emergency situations and except as to an employee with respect to the employer's underground facilities or as otherwise provided in an agreement with an owner or operator, no person shall make or begin excavation without first notifying the notification association and, if necessary, the tier two members having underground facilities in the area of such excavation. Notice may be given in person, by telephone, or in writing if delivered.

(b) Notice of the commencement, extent, and duration of the excavation work shall be given at least two business days prior thereto not including the day of actual notice.

(c) Any notice given pursuant to paragraph (b) of this subsection (3) shall include the following:

(I) The name and telephone number of the person who is giving the notice;

(II) The name and telephone number of the excavator; and

(III) The specific location, starting date, and description of the intended excavation activity.

(d) An excavator may request a written record of any information from an owner or operator of an underground facility regarding the location of specific underground facilities.

(4) (a) Any owner or operator receiving notice pursuant to subsection (3) of this section shall, at no cost to the excavator, use reasonable care to advise the excavator of the location and size of any underground facilities in the proposed excavation area by marking the location of the facilities with clearly identifiable markings within eighteen inches horizontally from the exterior sides of any such facilities. Such markings shall include the depth, if known, and shall be made pursuant to the uniform color code as approved by the utility location and coordinating council of the American public works association. In the event any person is involved in excavating across a preexisting underground facility, the owner of such facility shall, upon a predetermined agreement at the request of the excavator or the owner, provide on-site assistance. Any owner or operator receiving notice concerning an excavator's intent to excavate shall use reasonable care to advise the excavator of the absence of any underground facilities in the proposed excavation area by communicating directly with the excavator and providing documentation thereof, if requested, or by clearly marking that no underground facilities exist in the proposed excavation area. Owners and operators shall, within the time limits specified in subsection (6) of this section, provide to the excavator evidence, if any, of facilities abandoned after January 1, 2001, known to the owner or operator to be in the proposed excavation area.

(b) The marking of underground facilities shall be considered valid so long as the markings are clearly visible but not for more than thirty calendar days. If an excavation has not been completed within the thirty-day period, the excavator shall notify the affected owner or operator and the notification association at least two business days, not including the day of actual notice, before the end of such thirty-day period.

(b.5) Any person who willfully or maliciously removes a marking used by an owner or operator to mark the location of any underground facility, except in the ordinary course of excavation, is guilty of a class 2 misdemeanor, and, upon conviction thereof, in addition to any order for restitution, shall be punished by a fine of not more than five thousand dollars for each offense, by imprisonment for not more than one year, or by both such fine and imprisonment.

(c) (I) When a person excavates within eighteen inches horizontally from the exterior sides of any underground facility, such person shall exercise such reasonable care as necessary to protect any underground facility in or near the excavation area. It shall be the responsibility of the excavator to maintain adequate and accurate documentation, including but not limited to photographs, video, or sketches, at the excavation site on the location and identification of any underground facility throughout the excavation period.



(II) (A) If the documentation maintained pursuant to subparagraph (I) of this paragraph (c) becomes lost or invalid, the excavator shall notify the notification association or the affected owner or operator and request an immediate reverification of the location of any underground facility. Upon receipt of such notification, such affected owner or operator shall respond as quickly as is practicable. The excavator shall cease excavation activities at the affected location until the location of any underground facilities has been reverified.

(B) If the documentation maintained pursuant to subparagraph (I) of this paragraph (c) is determined to be inaccurate, the excavator shall immediately notify the affected owner or operator and shall request an immediate reverification of the location of any underground facility. Upon receipt of such notification, such affected owner or operator shall respond as quickly as practicable. The excavator may continue excavation activity if such excavator exercises due caution and care to prevent damaging any underground facility.

(III) If a person performing routine maintenance discovers an underground facility in the area where the routine maintenance is being performed, the person shall notify the notification association and the affected owner or operator as quickly as practicable and request an immediate verification of the location of any underground facility. Upon receiving notification, the affected owner or operator shall respond as quickly as practicable. The person shall cease routine maintenance activities in the immediate area, as determined by exercising due caution and care, until the location of any underground facilities has been verified.

(5) In emergency situations, excavators shall take such precautions as are reasonable under the circumstances to avoid damage to underground facilities and notify affected owners or operators and the notification association as soon as possible of such emergency excavations. In the event of damage to any underground facility, the excavator shall immediately notify the affected owner or operator and the notification association of the location and extent of such damage.

(6) If documentation requested and needed by an excavator pursuant to subsection (4) of this section is not provided by the owner or operator pursuant thereto within two business days, not including the day of actual notice, or such later time as agreed upon by the excavator and the owner or operator or if the documentation provided fails to identify the location of the underground facilities, the excavator shall immediately give notice to the notification association or the owner or operator and may proceed and shall not be liable for such damage except upon proof of such excavator's lack of reasonable care.

(7) (a) In the event of damage to an underground facility, the excavator, owner, and operator shall cooperate to mitigate damages to the extent reasonably possible, including the provision of in-kind work by the excavator where technical or specialty skills are not required by the nature of the underground facility. Such in-kind work may be under the supervision and pursuant to the specifications of the owner or operator.

(b) If damage to an underground facility meets or exceeds the reporting threshold as established by the notification association pursuant to paragraph (c) of this subsection (7), the owner or operator of the damaged underground facility shall provide the information listed in subparagraphs (I) to (VII) of paragraph (c) of this subsection (7) to the notification association within ninety days after service has been restored.

(c) The notification association shall create and publicize to its members a reporting process, including the availability of electronic reporting and a threshold at which reporting is required, to compile the following information:

- (I) The type of underground facility that was damaged;
- (II) Whether notice of the intention to excavate was provided to the notification association;
- (III) Whether the underground facility had been validly marked prior to being damaged;
- (IV) The type of service that was interrupted;
- (V) The number of persons whose service may have been interrupted;
- (VI) The duration of the interruption; and
- (VII) The location of the area where the underground facility was damaged.

(d) The notification association shall include a statistical summary of the information provided to it under this subsection (7) in the annual report required under section 9-1.5-105 (2.6).

(8) A person who performs maintenance shall take reasonable care when disturbing the soil.

**Source:** **L. 81:** Entire article added, p. 521, § 1, effective October 1. **L. 93:** Entire article amended, p. 499, § 1, effective September 1. **L. 2000:** (4)(a), (4)(c), (6), and (7) amended and (4)(b.5) added, p. 685, § 2, effective May 23. **L. 2009:** (4)(c)(III) and (8) added, (HB 09-1092), ch. 38, p. 152, §§ 2, 3, effective August 5.

#### ANNOTATION

**Law reviews.** For article, "The Current Law of Underground Utility Location in Colorado", see 23 Colo. Law. 2545 (1994).

**Statute requires sanitation district to mark individual service lines** within the public thor-

oughfare where the lines attach to the main. Wycon Const. v. Wheat Ridge Sanitation, 870 P.2d 496 (Colo. App. 1993).

#### **9-1.5-104. Injunctive relief. (Deleted by amendment)**

**Source:** **L. 81:** Entire article added, p. 522, § 1, effective October 1. **L. 93:** Entire article amended, p. 502, § 1, effective September 1.

**Editor's note:** This section was deleted by amendment in 1993. (See L. 93, p. 502.)

**9-1.5-104.3. Alternative dispute resolution.** The notification association shall create a voluntary alternative dispute resolution program in consultation with its members and all affected parties. The alternative dispute resolution program shall be available to all owners or operators, excavators, and other interested parties regarding disputes arising from damage to underground facilities, including, but not limited to, any cost or damage incurred by the owner or operator or the excavator as a result of any delay in the excavation project while the underground facility is restored, repaired, or replaced, exclusive of civil penalties set forth in section 9-1.5-104.5, that cannot be resolved through consultation and negotiation. The alternative dispute resolution program shall include mediation, arbitration, or other appropriate processes of dispute resolution. The issue of liability and amount of damages under Colorado law may be decided by an appointed arbitrator or by the parties in mediation. Nothing in this section shall be construed to change the basis for civil liability for damages.

**Source:** **L. 2000:** Entire section added, p. 687, § 3, effective May 23.

**9-1.5-104.5. Civil penalties - applicability.** (1) (a) Every owner or operator of an underground facility in this state shall join the notification association pursuant to section 9-1.5-105.

(b) Any owner or operator of an underground facility who does not join the notification association in accordance with paragraph (a) of this subsection (1) shall be liable for a civil penalty of two hundred dollars.

(c) (I) If any underground facility located in the service area of an owner or operator is damaged as a result of such owner or operator's failure to comply with paragraph (a) of this subsection (1), the court shall impose upon such owner or operator a civil penalty in the amount of five thousand dollars for the first offense and up to twenty-five thousand dollars for each subsequent offense within a twelve-month period after the first offense. Upon a first offense, the owner or operator shall be required by the court to complete an excavation safety training program with the notification association.

(II) If any owner or operator fails to comply with paragraph (a) of this subsection (1) on more than three separate occasions within a twelve-month period from the date of the



first failure to comply with paragraph (a) of this subsection (1), then the civil penalty shall be up to seventy-five thousand dollars.

(d) If any underground facility is damaged as a result of the owner or operator's failure to comply with paragraph (a) of this subsection (1) or failure to use reasonable care in the marking of the damaged underground facility, such owner or operator shall be presumably liable for:

(I) Any cost or damage incurred by the excavator as a result of any delay in the excavation project while the underground facility is restored, repaired, or replaced, together with reasonable costs and expenses of suit, including reasonable attorney fees; and

(II) Any injury or damage to persons or property resulting from the damage to the underground facility. Any such owner or operator shall also indemnify and defend the affected excavator against any and all claims or actions, if any, for personal injury, death, property damage, or service interruption resulting from the damage to the underground facility.

(2) (a) Any person who intends to excavate shall notify the notification association pursuant to section 9-1.5-103 prior to commencing any excavation activity. For purposes of this paragraph (a), excavation shall not include an excavation by a rancher or a farmer, as defined in section 42-20-108.5, C.R.S., occurring on a ranch or farm unless such excavation is for a nonagricultural purpose.

(b) Any person, other than a homeowner, rancher, or farmer, as defined in section 42-20-108.5, C.R.S., working on such homeowner's, rancher's, or farmer's property, who fails to notify the notification association or the affected owner or operator pursuant to paragraph (a) of this subsection (2) shall be liable for a civil penalty in the amount of two hundred dollars.

(c) (I) If any person, other than a homeowner, rancher, or farmer, as defined in section 42-20-108.5, C.R.S., working on such homeowner's, rancher's, or farmer's property, fails to comply with paragraph (a) of this subsection (2) and damages an underground facility during excavation, such person shall be liable for a civil penalty in the amount of five thousand dollars for the first offense and up to twenty-five thousand dollars for each subsequent offense within a twelve-month period after the first offense. Upon a first offense, such person shall be required to complete an excavation safety training program with the notification association.

(II) If any person fails to comply with paragraph (a) of this subsection (2) on more than three separate occasions within a twelve-month period from the date of the first failure to comply with paragraph (a) of this subsection (2), then the civil penalty shall be up to seventy-five thousand dollars.

(d) If any person, other than a homeowner, rancher, or farmer, as defined in section 42-20-108.5, C.R.S., working on such homeowner's, rancher's, or farmer's property, fails to comply with paragraph (a) of this subsection (2) or fails to exercise reasonable care in excavating or performing routine maintenance and damages an underground facility during such excavation or routine maintenance, such person shall be presumably liable for:

(I) Any cost or damage incurred by the owner or operator in restoring, repairing, or replacing its damaged underground facility, together with reasonable costs and expenses of suit, including reasonable attorney fees; and

(II) Any injury or damage to persons or property resulting from the damage to the underground facility. Any such person shall also indemnify and defend the affected owner or operator against any and all claims or actions, if any, for personal injury, death, property damage, or service interruption resulting from the damage to the underground facility.

(e) Paragraph (d) of this subsection (2) shall not apply to a person who commences excavation affecting an underground facility if the owner or operator of the underground facility has failed to comply with paragraph (a) of subsection (1) of this section or has failed to use reasonable care in the marking of the affected underground facility.

(3) (a) An action to recover a civil penalty under this section may be brought by an owner or operator, excavator, aggrieved party, district attorney, or the attorney general. Venue for such an action shall be proper in the district court for the county in which the owner or operator, excavator, or aggrieved party resides or maintains a principal place of

business in this state or in the county in which the conduct giving rise to a civil penalty occurred.

(b) Any civil penalty imposed pursuant to this section, including reasonable attorney fees, shall be paid to the prevailing party.

(c) The penalties provided in this article are in addition to any other remedy at law or equity available to an excavator or to the owner or operator of a damaged underground facility.

(d) No civil penalty shall be imposed under this section against an excavator or owner or operator who violates any of the provisions of this section if the violation occurred while the excavator or owner or operator was responding to a service outage or other emergency; except that such penalty shall be imposed if such violation was willful or malicious.

(4) Nothing in this article shall be construed to impose an indemnification obligation on any public entity or to alter the liability of public entities as provided in article 10 of title 24, C.R.S.

(5) In determining the liability for or the amount of any damages or civil penalty pursuant to this article, a court or arbitrator shall consider the nature, circumstances, and gravity of the alleged violation and the alleged violator's degree of culpability, history of prior violations, and level of cooperation with the requirements of this article.

**Source:** L. 83: Entire section added, p. 440, § 1, effective July 1. L. 93: (1) and (3) amended, p. 502, § 1, effective September 1; (2) amended, p. 502, § 1, effective January 1, 1994. L. 2000: Entire section R&RE, p. 688, § 4, effective May 23. L. 2009: IP(2)(d) amended, (HB 09-1092), ch. 38, p. 152, § 4, effective August 5.

#### ANNOTATION

**Assessment of \$5,000 civil penalty under subsection (2)(c)(I) mandatory for first offense.** The factors stated in subsection (5) apply only in determining the appropriate penalty for a second or subsequent offense within the specified time period, for which a range of penalties may be considered. *Comcast v. Express Concrete, Inc.*, 196 P.3d 269 (Colo. App. 2007).

**However, award of damages not mandatory under this section,** nor is award of expenses and attorney fees. Subsection (2)(d)(I) creates a presumption of liability, but the court has discretion to determine liability and the amount of damages, if any, that will be awarded.

*Comcast v. Express Concrete, Inc.*, 196 P.3d 269 (Colo. App. 2007).

**Principles of comparative negligence apply to award of damages under this section.** *Comcast v. Express Concrete, Inc.*, 196 P.3d 269 (Colo. App. 2007).

**Trial court not required to make specific determination of damages or percentage of negligence of each party** where trial court's award of zero damages was consistent with the view that the trial court found plaintiff's negligence equal to that of defendant. *Comcast v. Express Concrete, Inc.*, 196 P.3d 269 (Colo. App. 2007).

**9-1.5-105. Notification association - structure and funding requirements - duties of owners and operators - report.** (1) There is hereby created a nonprofit corporation in the state of Colorado, referred to in this article as the "notification association", which shall consist of all owners or operators of underground facilities. All such owners and operators shall join the notification association and shall participate in a statewide program which utilizes a single toll-free telephone number which excavators can use to notify the notification association of pending excavation plans. Upon its organization and incorporation, the association shall file a letter to such effect with the public utilities commission so that the commission may refer inquiries arising under this article to an appropriate person.

(2) All underground facility owners and operators except the Colorado department of transportation shall be members of the notification association which shall be organized as follows:

(a) "Tier one" members who shall be full members of the notification association and shall receive full service benefits as part of such membership as specified in this article. Any owner or operator required to be a member of the association who was a member on February 1, 1993, shall be designated a tier one member without further action by such member.



(b) (I) "Tier two" members who shall be limited members and shall receive limited services as a part of such membership as specified in this article. Tier two members shall pay a one-time membership fee of twenty-five dollars to the notification association to partially defray the costs incurred by the association in organizing pursuant to this article. The notification association shall not assess any charges, costs, or fees to any tier two member other than the one-time membership fee.

(II) All tier two members shall provide the association with accurate information regarding the boundaries of such member's service area, the type of underground facility that may be encountered within such service area, and the name, address, and telephone number of a person who shall be the designated contact person for information regarding such member's underground facilities. A tier two member shall also provide geographical information concerning underground facilities it owns or operates which are not located within the designated service area to the notification association.

(III) Not later than January 1, 1994, the notification association shall provide any person who contacts the association regarding information concerning underground facilities owned or operated by a tier two member with the name of the person specified in subparagraph (II) of this paragraph (b).

(IV) The following owners or operators of underground facilities who are not designated as tier one members pursuant to paragraph (a) of this subsection (2) shall be designated as tier two members:

- (A) Electric cooperative associations;
- (B) Special districts organized under title 32, C.R.S.;
- (C) Cable television operators;
- (D) Municipalities and counties; and
- (E) Telecommunications local exchange providers with fewer than fifty thousand access lines.

(2.3) Any association member may alter the status of its membership and move from tier one to tier two or from tier two to tier one at any time that such member chooses; except that every tier one member shall remain a tier one member for at least two years after becoming a tier one member.

(2.5) The notification association may accept any organization, person, or entity which has an interest in the purposes and functions of the association as a member whether specifically enumerated in this article or not. Any such member shall comply with the bylaws of the association.

(2.6) (a) The notification association shall prepare annual reports on its activities, as follows:

(I) A statistical summary of the information reported to it pursuant to section 9-1.5-103 (7) (b); and

(II) An annual, independent financial audit of its operations.

(b) The notification association shall provide a copy of both reports created under paragraph (a) of this subsection (2.6) to its members and shall provide the report created under subparagraph (I) of paragraph (a) of this subsection (2.6) to the public utilities commission of the state of Colorado.

(3) Except as provided in subsection (2) of this section, each member of the notification association shall provide all of the locations of any underground facilities which such member owns or operates to the notification association, and the association shall maintain such information on file for use by excavators.

(4) The notification association shall be governed by a board of directors which is representative of the membership of the association and shall have at least one director that is a tier two member. The board of directors shall be elected by the membership of the association pursuant to the bylaws of the association.

(5) The notification association shall be incorporated and operated as a nonprofit corporation pursuant to the "Colorado Revised Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S.

(6) This section shall not apply to any owner or occupant of real property under which underground facilities are buried if such facilities are used solely to furnish service or commodities to such real property and no part of such facilities is located in a public street, county road, alley, or right-of-way dedicated to public use.

**Source:** L. 81: Entire article added, p. 522, § 1, effective October 1. L. 93: Entire article amended, p. 503, § 1, effective September 1. L. 97: (5) amended, p. 761, § 27, effective July 1, 1998. L. 2000: IP(2) amended and (2.6) R&RE, pp. 690, 691, §§ 5, 6, effective May 23.

**9-1.5-106. Notice requirements.** (1) The notification association created in section 9-1.5-105 shall:

(a) Receive and record notifications from excavators concerning intended excavation activities including sites, dates, and the nature of any intended excavation;

(b) Maintain a record of each notice of intent to excavate for a minimum of three years; and

(c) File the notification received regarding any proposed excavation site and the notification provided regarding such excavation site, including the date and time of each such notification, by reference number.

(2) The notification association shall establish and maintain a damage prevention safety program and shall conduct periodic public awareness campaigns.

(3) The notification association shall provide prompt notice of any proposed excavation to each affected tier one member that has any underground facilities in the area of the proposed excavation site. The notification association shall also provide the excavator with the name and telephone number of each tier two member that has any underground facilities in the area of the proposed excavation.

**Source:** L. 93: Entire article amended, p. 505, § 1, effective September 1.

**9-1.5-107. Notice of removal of underground facilities.** At least ten days before beginning an excavation to remove an underground facility that is a gas transmission pipeline that has been abandoned or is unused and is not located in a public road, street, alley, or right-of-way dedicated to public use, the excavator shall notify each owner of record and occupant of the real property where such underground facility is located. The notice shall state the commencement, extent, and duration of the excavation in addition to the information required by section 9-1.5-103 (3) (c) and shall be served in the same manner as personal service under the Colorado rules of civil procedure; except that, if such personal service cannot be made through the use of due diligence, notice may be served by mail to the owner's or occupant's last-known address. If a valid mailing address is not available through the use of due diligence, notice may be made by publication in a newspaper published in the county in which the property is located. For purposes of this section, an underground facility is not considered abandoned or unused if it is in operation for its intended purpose or is being actively maintained with reasonable anticipation of a future use.

**Source:** L. 2007: Entire section added, p. 162, § 1, effective August 3.

## ARTICLE 2

### Safety Glazing Materials

**9-2-101 to 9-2-106. (Repealed)**

**Source:** L. 86: Entire article repealed, p. 502, § 125, effective July 1.

**Editor's note:** This article was numbered as article 2 of chapter 80, C.R.S. 1963. For amendments to this article prior to its repeal in 1986, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.



**ARTICLE 2.5****High Voltage Power Lines - Safety Requirements**

9-2.5-101.	Definitions.		procedure - payment - notice.
9-2.5-102.	Activity near overhead line - safety restrictions.	9-2.5-104.	Violation.
9-2.5-103.	Activity in close proximity to lines - clearance arrangements -	9-2.5-105.	Exemptions.
		9-2.5-106.	Compliance with national electrical safety code - due care.

**9-2.5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Authorized person" means:

(a) An employee of a public utility which produces, transmits, or delivers electricity;

(b) An employee of a public utility which provides and the work of which relates to communication services or an employee of a state, county, or municipal agency which has authorized circuit construction on or near the poles or structures of a public utility;

(c) An employee of an industrial plant whose work relates to the electrical system of the industrial plant;

(d) An employee of a cable television or communication services company or an employee of a contractor of a cable television or communication services company if specifically authorized by the owner of any necessary poles to make cable television or communication services attachments;

(e) An employee or agent of a state, county, or municipal agency which has or the work of which relates to overhead electrical lines or circuit construction or conductors on poles or structures of any type.

(2) "High voltage" means voltage in excess of six hundred volts measured between conductors or between a conductor and the ground.

(3) "Overhead line" means all bare or insulated electrical conductors installed above the ground.

(4) "Person or business entity" means a party contracting to perform any function or activity upon any land, building, highway, or other premises.

(5) "Public utility" includes public service corporations, municipally owned electric systems, and districts subject to article XXV of the Colorado constitution.

**Source: L. 83:** Entire article added, p. 441, § 1, effective July 1.

**ANNOTATION**

**Applied** in *Mladjan v. Pub. Serv. Co.*, 797 P.2d 1299 (Colo. App. 1990).

**9-2.5-102. Activity near overhead line - safety restrictions.** (1) Unless danger against contact with high voltage overhead lines has been effectively guarded against as provided by section 9-2.5-103, a person or business entity shall not, individually or through an agent or employee, perform or require any other person to perform any function or activity upon any land, building, highway, or other premises if at any time during the performance of any function or activity it could reasonably be expected that the person performing the function or activity could move or be placed within ten feet of any high voltage overhead line or that any equipment, part of any tool, or material used by the person could be brought within ten feet of any high voltage overhead line during the performance of any function or activity.

(2) No person shall operate an aircraft within ten feet of any high voltage overhead line.

**Source: L. 83:** Entire article added, p. 442, § 1, effective July 1. **L. 88:** Entire section amended, p. 398, § 1, effective April 6.

**9-2.5-103. Activity in close proximity to lines - clearance arrangements - procedure - payment - notice.** (1) If any person or business entity desires to temporarily carry

on any function, activity, work, or operation in closer proximity to any high voltage overhead line than that which is permitted by this article, the person or business entity responsible for performing the work shall promptly notify the public utility operating the high voltage overhead line. The person or business entity may perform the work only after satisfactory mutual arrangements, including coordination of work and construction schedules, have been made between the public utility operating the lines and the person or business entity responsible for performing the work. In cases where the person or business entity responsible for doing the work is doing so under contract or agreement with a governmental entity, and the governmental entity and the public utility operating the lines have already made satisfactory mutual arrangements, further arrangements for that particular activity are not required. Arrangements may include placement of temporary mechanical barriers to separate and prevent contact between material, equipment, or persons and the high voltage overhead lines or temporary deenergization and grounding or temporary relocation or raising of the high voltage overhead lines. The public utility operating the line shall promptly provide to the person or entity responsible for doing the work or having the work done an estimate of the amount to be charged for providing temporary clearances.

(2) (a) The person or business entity responsible for performing the work in the vicinity of the high voltage overhead lines shall pay any actual expenses of the public utility operating high voltage overhead lines in providing arrangements for clearances, except when prior arrangements for payment have been made between a governmental entity for whom the work is to be done and the public utility operating the lines and except in instances where the public utility operating high voltage overhead lines has installed lines within fifteen feet of an existing fixture or structure after the fixture or structure has been in place at a permanent location. The public utility is not required to provide the arrangements for clearances until an agreement for payment has been made; except that, if there is a dispute over the amount to be charged by the utility for providing arrangements for clearance, the utility shall commence with providing temporary clearance as if agreement had then been reached. If agreement for payment has not been reached within fourteen days after completion of temporary clearance, the public utility and the person or business entity responsible for doing the work shall resolve such dispute by arbitration or other legal means. Unless otherwise agreed to by the person or business entity responsible for doing the work, the public utility shall commence construction for temporary clearances within three working days after the date an agreement for payment, if required, has been reached or, if no payment is required, within five working days after the date of the request of the person responsible for the work. Once initiated, the clearance work shall continue without interruption until completed. Should the public utility fail to provide for temporary clearances or safety measures in a timely manner, the public utility shall be liable for costs or loss of production of the person or business entity requesting assistance to work in close proximity to high voltage overhead lines.

(b) A person requesting that the utility clear high voltage overhead lines shall not work near the lines until the utility notifies such person that the clearance is completed. If the location or the conditions of the planned work near a high voltage overhead line changes, the person shall notify the utility of such changes and cease all work until the utility has completed any additional clearance measures that may be necessary.

(3) In locations where identity of the public utility operating the high voltage overhead lines is not easily known, the Colorado public utilities commission shall, upon request, provide the name, address, and telephone number of such utility for notification purposes.

**Source: L. 83:** Entire article added, p. 442, § 1, effective July 1. **L. 2003:** (2) amended, p. 1412, § 1, effective April 29.

**9-2.5-104. Violation.** (1) (a) A person who violates this article may be subject to a civil penalty not to exceed one thousand dollars, to be imposed by any court of competent jurisdiction and credited to the general fund.

(b) A person who violates this article more than once may be subject to a civil penalty not to exceed two thousand dollars for each violation, to be imposed by a court of competent jurisdiction and credited to the general fund. A person who violates this article more than



once may be liable for reasonable attorney fees and costs incurred in the prosecution of the violations as determined by the court.

(2) If a violation of this article results in physical or electrical contact with any high voltage overhead line, the person or business entity violating this article shall be liable to the owner or operator of the high voltage overhead line for damages to the facilities caused by the contact and for the liability incurred by the owner or operator due to the contact.

(3) Provisions of subsection (2) of this section notwithstanding, any person or business entity who has made arrangements for safety clearances and who commences any prohibited activity, work, or operation prior to such safety clearances having been made shall be liable for any damages incurred as a result of physical or electrical contact with the high voltage overhead line.

**Source:** L. 83: Entire article added, p. 443, § 1, effective July 1. L. 2003: (1) and (2) amended, p. 1413, § 2, effective April 29.

#### ANNOTATION

**This section does not permit an employee covered by the Workers' Compensation Act to seek additional remedies beyond those al-**

lowed by said act. *Rodriguez v. Nurseries, Inc.*, 815 P.2d 1006 (Colo. App. 1991).

**9-2.5-105. Exemptions.** (1) Except as provided in subsection (2) of this section, this article does not apply to construction, reconstruction, operation, or maintenance by an authorized person of overhead electrical or communication circuits or conductors and their supporting structures, or to electrical generating, transmission, or distribution systems, or to communication systems, or to the collection of trash and refuse using equipment designed for that purpose, or to highway vehicles or agricultural equipment, including aerial applicators licensed pursuant to section 35-10-106, C.R.S., which in normal use may incidentally pass within the ten-foot clearance limitation, or to governmental entities responding to any emergency situation.

(2) (a) Highway vehicles shall not be operated within four and one-half feet of a high voltage overhead line unless the person or business entity operating the highway vehicle has complied with sections 9-2.5-102 and 9-2.5-103.

(b) This subsection (2) shall not apply to highway vehicles operated by the Colorado department of transportation responding to emergency situations.

**Source:** L. 83: Entire article added, p. 443, § 1, effective July 1. L. 88: Entire section amended, p. 398, § 2, effective April 6. L. 2003: Entire section amended, p. 1413, § 3, effective April 29.

**9-2.5-106. Compliance with national electrical safety code - due care.** Proof of compliance with the requirements of an applicable national electrical safety code standard, as published by the institute of electrical and electronics engineers or a successor entity, that is or was in effect at the time of the installation of the overhead line, establishes the highest degree of care in the defense of a negligence claim asserted by any person or entity that is exempt from this article pursuant to section 9-2.5-105.

**Source:** L. 2004: Entire section added, p. 126, § 1, effective August 4.

#### ARTICLE 3

#### Fire Extinguishers - Sale and Use

9-3-101. Use of toxic fire-extinguishing agents prohibited.

9-3-102. Sale of illegal fire extinguishers prohibited.

- 9-3-103. Enforcement.  
9-3-104. Violation - penalty.  
9-3-105. District attorney to prosecute.

**9-3-101. Use of toxic fire-extinguishing agents prohibited.** No person, partnership, association, or corporation shall use or install for use in any place of public assemblage, public or private school, hospital, institution, business or office building, apartment building, penal institution, nursing or convalescent home, factory, mill, workshop, bakery, hotel, motel, store, boarding or bunkhouse, theatre, motor vehicle used for the transportation of students or passengers for hire, or establishment wherein laborers are employed any fire extinguisher or fire-extinguishing device containing carbon tetrachloride or an active agent having a level of vapor toxicity equal to or greater than carbon tetrachloride. Fire extinguishers acceptable under this article are those covered in national fire protection association's bulletin #10, dated May 19, 1967, entitled "Standard for the Installation of Portable Fire Extinguishers", and national fire protection association's bulletin #10A, dated May 19, 1967, entitled "Maintenance and Use of Portable Fire Extinguishers".

**Source:** L. 69: p. 185, § 1. C.R.S. 1963: § 17-5-1.

**9-3-102. Sale of illegal fire extinguishers prohibited.** No person shall sell, give, or offer for sale any fire extinguisher or fire-extinguishing device containing or designed to contain any active agent prohibited in section 9-3-101, if such fire extinguisher or fire-extinguishing device is intended for installation and use in any building or motor vehicle referred to in section 9-3-101, or is a grenade type or fusible link release device for use in any of said buildings or motor vehicles.

**Source:** L. 69: p. 185, § 2. C.R.S. 1963: § 17-5-2.

**9-3-103. Enforcement.** The sheriffs of every county in this state, the fire chiefs of every town, city, and fire protection district, and the safety inspectors appointed by the executive director of the department of labor and employment have full and concurrent jurisdiction to investigate violations of this article and enforce the provisions thereof.

**Source:** L. 69: p. 185, § 3. C.R.S. 1963: § 17-5-3.

**9-3-104. Violation - penalty.** Any person who violates any provision of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail for a term of not more than thirty days, or by both such fine and imprisonment.

**Source:** L. 69: p. 185, § 4. C.R.S. 1963: § 17-5-4.

**9-3-105. District attorney to prosecute.** Every district attorney to whom there is presented, or who in any way procures satisfactory evidence of any violation of the provisions of this article, shall cause appropriate proceedings to be commenced and prosecuted in the proper courts, without delay, for the enforcement of the penalties as provided in section 9-3-104.

**Source:** L. 69: p. 186, § 5. C.R.S. 1963: § 17-5-5.

## ARTICLE 4

### Boiler Inspection

**Editor's note:** This article was numbered as article 3 of chapter 17, C.R.S. 1963. The substantive provisions of this article were repealed and reenacted in 1971, resulting in the addition, relocation, and



elimination of sections as well as subject matter. For amendments to this article prior to 1971, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume.

9-4-101.	Definitions.	9-4-110.	Special inspectors.
9-4-102.	Boiler inspection section - created - director - chief boiler inspector - inspectors - qualifications.	9-4-110.5.	Owner-user inspection organizations - registration.
9-4-103.	Duties - rules.	9-4-111.	Penalty - inspector fails to perform duty.
9-4-104.	Exemptions.	9-4-112.	Regulations common to all types and services of boilers.
9-4-105.	Inspections of boilers.	9-4-113.	New power boiler installations.
9-4-106.	Owner to report boilers - wrongful use - inspection of new installations.	9-4-114.	Existing power boiler installations.
9-4-106.5.	Owner to report boilers taken out of service.	9-4-115.	New miniature boiler installations.
9-4-107.	Certificate.	9-4-116.	Existing miniature boiler installations.
9-4-108.	Violation by owner or user - penalty - enforcement.	9-4-117.	New heating boilers and hot-water supply boilers installations.
9-4-108.5.	Variances.	9-4-118.	Existing heating boilers and hot-water supply boilers installations.
9-4-109.	Fees for boiler and pressure vessel inspection certificates.		

**9-4-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) "A.S.M.E. boiler and pressure vessel code" means the boiler and pressure vessel code developed by the boiler and pressure vessel committee of the American society of mechanical engineers with amendments, addenda, and interpretations thereto, made and approved by the council of said society, 1968 edition, a copy of which code is on file in the office of the boiler inspection section of the division of oil and public safety.

(1.5) "A.S.M.E. review and survey" means the review and survey of the manufacturers quality control system for the certification of authorization for the use of the A.S.M.E. applicable code symbol stamp.

(2) "Boiler" means a closed pressure vessel in which a fluid is heated for use external to itself by the direct application of heat resulting from the combustion of fuel, solid, liquid, or gaseous, or by the use of electricity or nuclear energy.

(2.5) "Chief boiler inspector" means the person appointed by the director to oversee the boiler inspection section created in section 9-4-102.

(3) "Colorado boiler and pressure vessel code" is used to designate the accepted reference for construction, installation, operation, and inspection of boilers and pressure vessels and will be referred to as the "Colorado boiler and pressure vessel code", which includes the A.S.M.E. boiler and pressure vessel codes and the national board inspection code.

(4) "Condemned boiler" means a boiler which has been inspected and declared unsafe or disqualified as to legal requirements by an inspector qualified to take such action and to which has been applied a stamping or marking designating its rejection.

(5) "Director" means the director of the division of oil and public safety or his or her designee.

(6) "External inspection" means an inspection made when a boiler is in operation.

(7) "Hot-water heating boiler" means a boiler operated at pressure not exceeding one hundred sixty PSIG and temperature not exceeding two hundred fifty degrees Fahrenheit for water.

(8) "Hot-water supply boiler" means a boiler used to supply hot water operated at pressure not exceeding one hundred sixty PSIG and temperatures not exceeding two hundred fifty degrees Fahrenheit at or near the boiler outlet.

(9) "Internal inspection" means an inspection made when a boiler is shut down with all handholes or manholes opened for inspection of its interior.

(10) "Locomotive boiler" means a boiler mounted on a self-propelled track carrier and which is used to furnish motivating power for traveling on rails.

(11) "Miniature boiler" means any boiler which does not exceed any of the following limits:

- (a) Sixteen inches inside diameter of shell;
- (b) Five cubic feet gross volume exclusive of casing and insulation;
- (c) One hundred pounds PSIG maximum working pressure.

(12) "National board inspection code" means the "manual for boiler and pressure vessel inspections" published in 1970 by the national board of boiler and pressure vessel inspectors, 10th edition, and subsequent revisions.

(13) "Nonstandard boiler" means any boiler which does not qualify as a standard boiler.

(14) "Owner or user" means any person, firm, corporation, or business entity of whatever nature owning or operating any boiler within this state.

(14.3) "Owner-user inspection organization" means an owner or user of pressure-retaining items who maintains a regularly established inspection department, and whose organization and inspection procedures meet the requirements of the national board of boiler and pressure vessel inspectors rules or the American petroleum institute's API 510 program and are acceptable to the director.

(14.5) "Owner-user inspector" means an inspector who holds a valid national board of boiler and pressure vessel inspectors owner-user inspector commission and who has passed the examination prescribed by the national board or is an American petroleum institute certified inspector under a jurisdictionally approved owner-user inspection organization.

(15) "Portable boiler" means an internally fired boiler which is primarily intended for temporary locational use, the construction and usage of which is obviously portable for use in multiple locations.

(16) "Power boiler" means any boiler exceeding the miniature boiler size which generates steam or vapor at a pressure of more than fifteen pounds per square inch gauge (PSIG).

(16.5) "Pressure vessel" means a pressure vessel or a container for the containment of pressure, either internal or external. Except as exempted in section 1910.172 of the Colorado occupational safety and health general standards, such pressure may be obtained from an external source or by the application of heat from a direct or indirect source or by any combination of such methods. The scope in relation to the geometry of pressure-containing parts shall terminate at the following: The first circumferential joint for welding end connections, or the face of the first flange in bolted flanged connections, or the first threaded joint in that type of connection.

(17) "Reinstalled boiler" means a boiler removed from its original setting and reerected at the same location or erected at a new location without change of ownership.

(18) "Relief valve" means an automatic pressure-relieving device actuated by static pressure upstream of the valve which opens farther with an increase in pressure over the opening pressure. It is used primarily for liquid service.

(19) "Safety relief valve" means an automatic pressure-actuated relieving device suitable for use either as a safety valve or relief valve, depending on application.

(20) "Safety valve" means an automatic pressure-relieving device activated by static pressure upstream of the valve and characterized by full-opening pop action. It is used for steam, gas, or vapor service.

(21) "Secondhand boiler" means a boiler in which both location and ownership have been changed after primary use.

(22) "Section" means the boiler inspection section of the division of oil and public safety.

(23) "Service and domestic-type water heater" means a water heater of either instantaneous or storage type used for heating or combined heating and storage of hot water for domestic or sanitary purposes or for space heating in which none of the following limitations is exceeded:

- (a) Heat input of two hundred thousand BTUs per hour;
- (b) Fluid temperature of two hundred ten degrees Fahrenheit;
- (c) Normal internal fluid capacity of one hundred twenty gallons.



(24) "Shop inspection" means inspection of new construction of boilers or pressure vessels, and shall include review of the specifications, determination that such construction is in accordance with the applicable codes, and certification to the national board and to the A.S.M.E. that such completed new construction is eligible to be stamped with the appropriate A.S.M.E. symbol.

(25) "Special boiler inspector" means an inspector who has received and maintained in force a commission as inspector issued by the national board of boiler and pressure vessel inspectors and authorized by the boiler inspection section to inspect or insure boilers in the state of Colorado.

(26) "Standard boiler" means a boiler which bears the stamp of the state of Colorado or another state which has adopted a standard boiler construction equivalent to that required by the Colorado boiler and pressure vessel code or a boiler which bears the A.S.M.E. stamp.

(27) "State boiler inspector" means any boiler inspector employed by the division of oil and public safety.

(28) "Steam-heating boiler" means a boiler operated at pressure not exceeding fifteen PSIG for steam.

**Source:** L. 71: R&RE, p. 267, § 1. C.R.S. 1963: § 17-3-1. L. 76: (28) amended and (1.5) and (16.5) added, p. 362, § 1, effective July 1. L. 2001: (1), (22), and (27) amended, p. 1134, § 56, effective June 5. L. 2009: (23)(b) amended, (HB 09-1309), ch. 234, p. 1071, § 1, effective May 4. L. 2011: (2.5) added and (5) amended, (HB 11-1050), ch. 8, p. 16, § 1, effective August 10. L. 2012: (14.3) and (14.5) added, (HB 12-1217), ch. 51, p. 184, § 1, effective August 8.

**9-4-102. Boiler inspection section - created - director - chief boiler inspector - inspectors - qualifications.** (1) The director shall carry out the provisions of this article. The director may appoint a chief boiler inspector to oversee the boiler inspection section, which is hereby created in the division of oil and public safety. The chief boiler inspector and each state boiler inspector must be qualified from practical experience in the construction, maintenance, repair, or operation of boilers as a mechanical or safety engineer, steam engineer, boilermaker, or boiler inspector of not less than five years' actual experience to enable him or her to judge the safety of boilers for use as such. Neither the chief boiler inspector nor any state boiler inspector shall be interested directly or indirectly in the manufacture, ownership, or sale of boilers or boiler supplies.

(2) The chief boiler inspector and state boiler inspectors shall be reimbursed for necessary traveling expenses as provided by law.

**Source:** L. 71: R&RE, p. 269, § 1. C.R.S. 1963: § 17-3-2. L. 2001: (1) amended, p. 1135, § 57, effective June 5. L. 2011: Entire section amended, (HB 11-1050), ch. 8, p. 16, § 2, effective August 10.

**9-4-103. Duties - rules.** (1) The director shall keep in his or her office a complete and accurate record of the names of owners or users of boilers inspected, giving a full description of the boiler, the pressure allowed, the date when last inspected, and by whom. The director or chief boiler inspector shall investigate and report to the division of oil and public safety the cause of any boiler explosion that occurs within the state. Definitions and rules for the safe construction, installation, inspection, operation, maintenance, and repair of boilers and pressure vessels in the state of Colorado, in addition or supplemental to the existing rules, shall be formulated by the section under the direction of the chief boiler inspector and shall become effective upon approval by the director.

(2) The definitions and rules so formulated for new construction shall be based upon and at all times follow the generally accepted nationwide engineering standards, formulas, and practices established and pertaining to boiler and pressure vessel construction and safety, and the section, with the approval of the director of the division of oil and public safety, may adopt an existing codification thereof known as the boiler and pressure vessel code of the American society of mechanical engineers, and when so adopted and incorpo-

rated by reference pursuant to section 24-4-103 (12.5), C.R.S., shall constitute a part of the whole of the definitions and rules of the section.

(3) The section, under the direction of the director, shall formulate rules establishing a schedule for the inspection of boilers and pressure vessels and may formulate other rules governing the inspection, operation, maintenance, and repair of boilers and pressure vessels in addition and supplemental to those rules that are part of the Colorado boiler construction code as originally enacted and amended. The rules so formulated shall be based upon and at all times follow the generally accepted nationwide engineering standards and may be based upon those portions of an existing published codification of such rules known as the inspection code of the national board of boiler and pressure vessel inspectors as are considered by the section to be properly applicable. Rules formulated by the section and identification of those portions of the national board inspection code which are declared to be applicable shall be made available to all persons directly affected by a publication which will be prepared and issued, upon request, to such persons by the section.

(4) Inspectors shall carefully inspect every boiler used or proposed to be used in this state for steaming, hot-water heating purposes, or hot-water supply, including all attachments and connections, in accordance with the inspection schedule established pursuant to subsection (3) of this section.

**Source:** L. 71: R&RE, p. 270, § 1. C.R.S. 1963: § 17-3-3. L. 2000: (3) and (4) amended, p. 163, § 1, effective March 17. L. 2001: (1) and (2) amended, p. 1135, § 58, effective June 5. L. 2011: (1) amended, (HB 11-1050), ch. 8, p. 17, § 3, effective August 10.

**9-4-104. Exemptions.** (1) The following are exempt from the provisions of this article:

- (a) Boilers located in private residences;
- (b) Boilers located in apartment houses having less than six family units;
- (c) Any city or town where boiler inspectors of comparable capability to state boiler inspectors are employed, where adequate records of boiler inspections are maintained, and where there is in effect a boiler inspection code comparable to that of the state pursuant to the ordinances of said city or town. A city or town not now providing such service may, upon application to the director of the division of oil and public safety with submission of proof of such comparability, be authorized by the director of the division of oil and public safety to establish a boiler inspection system that is exempt from the provisions of this article.
- (d) Service and domestic-type water heaters;
- (e) Boilers owned or operated by the federal government;
- (f) Locomotive boilers of carriers subject to the federal locomotive inspection law.

**Source:** L. 71: R&RE, p. 270, § 1. C.R.S. 1963: § 17-3-4. L. 2001: (1)(c) amended, p. 1136, § 59, effective June 5.

**9-4-105. Inspections of boilers.** (1) Inspectors making internal inspections of boilers shall give the owner or user not less than five days' prior notice of the time when they will make such inspections.

(2) An inspector may, upon seeing conditions that, in the inspector's discretion, indicate that there has been deterioration of any pressure-containing portion of a boiler or pressure vessel, assess the leak tightness capability of a boiler or pressure vessel by conducting a pressure test in accordance with the pressure testing considerations and guidance contained in the national board inspection code. The owner or user of the pressure-retaining boiler or pressure vessel shall provide any necessary labor and equipment required to apply the pressure test prescribed by the inspector.

(3) If at any time an inspector finds a boiler or pressure vessel which, according to the Colorado boiler and pressure vessel code, is unsafe after inspection of same, he shall condemn and forbid its future use until satisfactory repairs are made or said boiler is replaced.



**Source:** L. 71: R&RE, p. 271, § 1. C.R.S. 1963: § 17-3-5. L. 2009: (2) amended, (HB 09-1309), ch. 234, p. 1071, § 2, effective May 4.

**9-4-106. Owner to report boilers - wrongful use - inspection of new installations.**

(1) It is the duty of the owner or user of boilers, except those boilers exempt from the provisions of this article under section 9-4-104, used or which are to be used in this state, to report to the section the location of newly installed or relocated boilers.

(2) Before the installers of any boiler have boilers placed in service, they shall notify the section, which, within ten days or as soon thereafter as possible from the date of receiving such notification, shall send an inspector to examine said boilers to determine that the construction, material, bracing, fuel and fluid supply systems, control apparatus, combustion air and ventilating air, electric wiring, piping, and all other parts of such boilers are such as to assure the safety of the boilers.

(3) Upon completion of installation, all boilers shall be inspected by a state boiler inspector. At the time of inspection, each boiler shall be assigned a serial number by the inspector, which serial number shall be stamped on or affixed to the boiler.

(4) The serial number and letters, whether stamped on or affixed to the boiler, shall not be less than five-sixteenths of an inch in height, and the serial number shall be preceded by the letters "Colo". The stamping shall not be concealed by lagging or paint and shall be exposed at all times. Metal tags shall be furnished by the section on which the assigned number may be stamped. The tag shall be securely affixed to the boiler in the area of the manufacturer's identification and must be used when the metal of which the boiler is made may be damaged by direct stamping.

(5) The owners or users of boilers, or engineers in charge of same, shall not allow a greater pressure in any boiler than is stated on the certificate of inspection issued by the section. No person or business entity shall use any boiler that has been condemned as unsafe by a state boiler inspector. No person or business entity shall operate a boiler without a valid certificate of inspection.

**Source:** L. 71: R&RE, p. 271, § 1. C.R.S. 1963: § 17-3-6.

**9-4-106.5. Owner to report boilers taken out of service.** (1) It is the duty of the owner or user of boilers used in this state, except those boilers exempt from the provisions of this article under section 9-4-104, to report to the section the location and state serial number of boilers that have been taken out of service but not removed from the premises. For purposes of this article, a boiler is not "taken out of service" if it is temporarily shut down for routine maintenance or minor repairs.

(2) The section, under the direction of the director, shall formulate rules for the safe removal from service of boilers condemned pursuant to section 9-4-105 (3) or voluntarily taken out of service by the owner or user.

(3) A boiler that has been condemned or voluntarily taken out of service may be placed back in service, subject to any applicable requirements for satisfactory repair, imposed pursuant to section 9-4-105 (3), and subject to compliance with section 9-4-106. For purposes of section 9-4-106, such a boiler shall be treated as a new boiler.

**Source:** L. 2000: Entire section added, p. 164, § 2, effective March 17.

**9-4-107. Certificate.** (1) If, upon inspection, a boiler is found to comply with the Colorado boiler and pressure vessel code, the owner or user thereof shall pay directly to the section such fee as is prescribed by section 9-4-109, and the division of oil and public safety shall issue to such owner or user an inspection certificate bearing the date of inspection and the date of expiration of the certificate and specifying the maximum pressure under which the boiler may be operated.

(2) An inspection certificate is valid for the period stated on the face of the certificate.

(3) The certificate of inspection or a copy of the certificate of inspection shall be posted in the room containing the boiler inspected or, in the case of a portable boiler, shall be kept

in a metal container to be fastened to the boiler. Failure to properly exhibit the certificate of inspection will result in another inspection of the boiler and demand for inspection fees.

**Source:** L. 71: R&RE, p. 272, § 1. C.R.S. 1963: § 17-3-7. L. 2001: (1) amended, p. 1136, § 60, effective June 5. L. 2011: (2) and (3) amended, (HB 11-1050), ch. 8, p. 17, § 4, effective August 10.

**9-4-108. Violation by owner or user - penalty - enforcement.** (1) If the owner of any boiler fails to report the location of such boiler to the section, the owner is guilty of a misdemeanor, and, if the owner or his agent fails to have said boiler ready for internal inspection as provided in this article, said owner shall be liable to pay fees and expenses of the inspector incurred in the inspection of any such boiler.

(2) Any owner who fails or refuses to comply with all requirements or directions of this article pertaining to notification of boiler placement, replacement, or operation; condones operation of condemned boilers; refuses a reasonable request to inspect any boiler used for heating or water supply service or any similar use; refuses to pay inspection and expenses or penalties or license fees; operates any boiler or similar device in defiance of a division of oil and public safety order or an order of the director shall, upon notice, cease to use or operate or allow the use or operation of any approved or nonapproved boiler or water-heating equipment owned by him or her until permission to resume use of such equipment is granted by the director.

(3) Actions shall be instituted by the attorney general or the district attorney, or may be instituted by the city attorney of any city, to prosecute such acts in violation of this article within his jurisdiction as may come to his knowledge or to enforce the provisions of this article independently and without specific direction of the director. Each such violation shall be a separate offense.

(4) Any person convicted of a violation of this article shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for a period of not more than one year, or by both such fine and imprisonment.

**Source:** L. 71: R&RE, p. 272, § 1. C.R.S. 1963: § 17-3-8. L. 76: (3) amended, p. 363, § 2, effective July 1. L. 2001: (2) amended, p. 1136, § 61, effective June 5.

**9-4-108.5. Variances.** Any owner or user may apply to the director for a rule or order for a variance from the standards, rules, regulations, or requirements of this article, upon providing such information as prescribed by the director. The director shall issue such rule or order if he determines that the proponent of the variance has demonstrated that the construction, installation, and operation of the boiler or pressure vessel will be as safe as if the standards, rules, regulations, or requirements were complied with. The rule or order so issued shall prescribe the construction, installation, operation, maintenance, and repair conditions that the owner or user must maintain. Such a rule or order may be modified or revoked upon application by an owner or user or by the director on his own motion at any time after six months from its issuance.

**Source:** L. 76: Entire section added, p. 363, § 3, effective July 1.

**9-4-109. Fees for boiler and pressure vessel inspection certificates.** (1) (a) (I) There shall be paid for the issuance of a certificate of boiler or pressure vessel inspection of each individual boiler or pressure vessel, regardless of how it is joined or connected, according to this article by the owner or user of said boiler or pressure vessel, such fees as shall be established by the director of the division of oil and public safety by rule; except that such fees shall not exceed the amount necessary to accumulate and maintain in the boiler inspection fund a reserve sufficient to defray the division's administrative expenses for a period of two months, and in no event shall the basic fee for an annual inspection exceed one hundred fifty dollars for an internal inspection or eighty-five dollars for an external inspection. The basic fee for a biennial or triennial inspection shall



not exceed eighty-five dollars. The division shall not charge for an inspection other than to assess the fees established pursuant to this subsection (1). Any fees established pursuant to subparagraphs (III) to (V) of this paragraph (a) or pursuant to paragraph (b) of this subsection (1) shall be in addition to the basic fee.

(II) (Deleted by amendment, L. 2001, p. 529, § 1, effective July 1, 2001.)

(III) In addition to the basic fee established in subparagraph (I) of this paragraph (a), the division may assess a reinspection fee for any boiler condemned pursuant to section 9-4-105 (3). The reinspection fee shall be assessed and collected for each reinspection until the repairs are deemed satisfactory in accordance with section 9-4-105 (3).

(IV) In addition to the basic fee established in subparagraph (I) of this paragraph (a), the division may assess a disconnection inspection fee.

(V) In addition to the basic inspection fee established in subparagraph (I) of this paragraph (a), the division shall assess a certificate of boiler operation issuance fee not to exceed twenty-five dollars per certificate.

(b) There shall be paid, for the services provided by the national board of boiler and pressure vessel commissioned inspectors, fees as provided in the following schedule:

(I) Secondhand boiler or equipment at the request of the owner for certificate

..... \$30.00 plus expenses

(II) National board shop inspection or A.S.M.E. quality control survey

..... \$100.00 1/2 day,  
\$200.00 full day plus travel and subsistence expense (1/2 day minimum).

(2) The section may prorate the boiler inspection fees. Twenty-five percent of the inspection fee shall be charged for a period up to and including twenty-five percent of the certificate term. Fifty percent of the inspection fee shall be charged for periods up to and including fifty percent of the certificate term. Seventy-five percent of the inspection fee shall be charged for periods up to and including seventy-five percent of the certificate term. The full fee shall be charged for periods exceeding seventy-five percent of the certificate term.

(2.5) Repealed.

(3) All boiler or pressure vessel inspection certificate fees shall be paid within thirty days from the date of inspection to the department of labor and employment. Upon failure to pay the department of labor and employment, the chief boiler inspector shall issue an order to the owner or user to cease and desist the use or operation or allowing the use or operation of the boiler or pressure vessel until permission to resume use of such equipment is granted by the director.

(4) All fees collected by the department of labor and employment under the provisions of this article shall be used to defray the salaries and operating expenses incurred in the administration of this article and shall be appropriated for such purposes by the general assembly. Such moneys shall be transferred to the state treasurer, who shall deposit the same to the credit of the boiler inspection fund, which fund is hereby created.

(5) If any person who is required to pay a fee pursuant to subsection (1) of this section fails or refuses to remit such fee, the department of labor and employment shall proceed at once to collect the fee by employing such legal processes as may be necessary for that purpose.

(6) The state treasurer shall invest any portion of the boiler inspection fund which is not needed for immediate use. All interest earned upon such invested portion shall be credited to the fund and used for the same purposes and in the same manner as other moneys in the fund. Such moneys may be invested in the types of investments authorized in sections 24-36-109, 24-36-112, and 24-36-113, C.R.S.

**Source:** L. 71: R&RE, p. 273, § 1. C.R.S. 1963: § 17-3-9. L. 76: R&RE, p. 363, § 4, effective July 1. L. 83: (1)(a)(I), (1)(a)(II), (1)(b)(I), and (1)(b)(II) amended and (4), (5), and (6) added, p. 445, § 1, effective July 1. L. 86: (2.5) added, p. 548, § 1, effective May 28. L. 92: (1)(a), (2.5), (3), (4), and (5) amended, p. 1814, § 1, effective March 20. L. 97: (2.5) repealed, p. 1477, § 19, effective June 3. L. 2000: (1)(a) amended, p. 164, § 3, effective March 17. L. 2001: (1)(a)(I) amended, p. 1136, § 62, effective June 5; (1)(a)(I)

and (1)(a)(II) amended and (1)(a)(V) added, p. 529, § 1, effective July 1. **L. 2008:** (1)(a)(I) amended, p. 985, § 3, effective May 21. **L. 2011:** (2) amended, (HB 11-1050), ch. 8, p. 17, § 5, effective August 10.

**Editor's note:** Amendments to subsection (1)(a)(I) by House Bill 01-1373 and House Bill 01-1279 were harmonized.

**9-4-110. Special inspectors.** (1) In addition to the boiler inspectors authorized by this article, the section shall, upon request of any company authorized to insure against loss from explosion of boilers in this state, issue to any boiler inspectors of said company commissions as special boiler inspectors. Each such inspector, before receiving a commission, shall satisfy the division of oil and public safety that such inspector is properly qualified to perform such inspections. Possession of a valid commission as inspector issued by the national board of boiler and pressure vessel inspectors shall be considered to be proper qualification.

(2) Such special boiler inspectors shall receive no salary from, nor shall any of their expenses be paid by, the state, and continuance of a special boiler inspector's commission shall be conditioned upon such special boiler inspector's continuing in the employ of the boiler insurance company duly authorized as aforesaid and upon the maintenance of the standards imposed by the division of oil and public safety. Such special boiler inspectors shall perform their functions in accordance with the instructions for special boiler inspectors formulated by the section.

(3) Such special boiler inspectors shall inspect all boilers insured by their respective companies and, when so inspected, the owners or users of such insured boilers shall pay Colorado boiler inspection fees for the issuance of a certificate of inspection.

(4) Each company employing such special boiler inspectors, within thirty days following each boiler inspection made by such inspectors, shall file a report of such inspection with the section upon appropriate forms promulgated by the division of oil and public safety.

(5) If the division of oil and public safety has reason to believe that a special boiler inspector is no longer qualified to hold an appointment or commission, the division of oil and public safety or its selected agent, upon not less than ten days' written notice to the inspector and the inspector's employer, shall hold a hearing at which such inspector and the inspector's employer shall have an opportunity to be heard. If, as a result of such hearing, the division of oil and public safety or its selected agent finds that such inspector is no longer qualified to hold an appointment or commission, the division of oil and public safety, or upon recommendation of its selected agent, shall revoke or suspend such appointment or commission.

(6) A person whose appointment or commission has been suspended shall be entitled to apply, after ninety days from the date of such suspension, for reinstatement of such appointment or commission.

**Source:** **L. 71:** R&RE, p. 275, § 1. **C.R.S. 1963:** § 17-3-10. **L. 2001:** (1), (2), (4), and (5) amended, p. 1137, § 63, effective June 5; (3) amended, p. 530, § 2, effective July 1.

**9-4-110.5. Owner-user inspection organizations - registration.** (1) A person, firm, partnership, or corporation operating boilers or pressure vessels may seek approval and registration as an owner-user inspection organization by filing an application with the director on prescribed forms.

(2) The applicant shall show the name of the organization and its principal address and the name and address of the person or persons having supervision over inspections made by the organization on the application and registration. The applicant shall report changes in supervisory personnel to the director within thirty days after the change.

(3) Each owner-user inspection organization shall:

(a) Conduct inspection of its nonexempt boilers and pressure vessels, utilizing only qualified inspection personnel;



(b) Retain on file at the location where equipment is inspected a true record or copy of the report of each inspection signed by the owner-user inspector who made the inspection;

(c) Promptly notify the director of any boiler or pressure vessel that does not meet requirements for safe operation;

(d) Maintain inspection records that include a list of nonexempt boilers and pressure vessels, showing the serial number and the abbreviated description as may be necessary for identification, the date of the last inspection of each unit, the approximate date of the next inspection, and documentation of all repairs. Such inspection records shall be readily available for examination by the director, the chief boiler inspector, or their designee during business hours.

(e) Transmit a statement annually to the director, on a date mutually agreed upon. The individual having supervision over the inspections made during the period covered shall sign the statement and shall include the number of vessels inspected during the year and shall certify that each inspection was conducted in accordance with the inspection requirements in the Colorado boiler and pressure vessel rules.

(4) A state-issued certificate of inspection is required for boilers and pressure vessels inspected by an owner-user inspection organization when all of the requirements in this section are met.

(5) An individual or organization performing an inspection pursuant to this section shall have liability insurance appropriate for the size and scope of the relevant inspection.

**Source: L. 2012:** Entire section added, (HB 12-1217), ch. 51, p. 184, § 2, effective August 8.

**9-4-111. Penalty - inspector fails to perform duty.** An inspector of boilers for every failure to perform his duties is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than two months nor more than one year, or by both such fine and imprisonment.

**Source: L. 71:** R&RE, p. 275, § 1. **C.R.S. 1963:** § 17-3-11.

**9-4-112. Regulations common to all types and services of boilers.** (1) Each boiler shall be supported by masonry or structural supports of sufficient strength and rigidity to safely support the boiler. There shall be no excessive vibration in either the boiler or its connecting piping.

(2) All boilers shall be so located that adequate space on each side will be provided for proper operation of the boiler and its appurtenances, for the inspection of all surfaces, tubes, water walls, piping, valves, and other equipment, and for their necessary maintenance and repair.

(3) Inflammable or volatile materials shall not be stored in boiler rooms. Gas meters shall not be installed in boiler rooms.

(4) There shall be provided to all boiler installations sufficient air to assure adequate combustion of fuel. There shall be ventilating air provided to prevent undue overheating in the boiler room. Nationally accepted standards such as the publications of the national fire protection association shall be followed in determining the adequacy of combustion and ventilating air.

(5) Safety or safety relief valves, or both, shall be of adequate capacity to prevent accumulation of excess pressure with fixed settings not in excess of the maximum allowable working pressure of the boiler to which they are attached. All new safety relief valves shall bear stamping which indicates that they have been capacity-rated according to national board standards and that they have been constructed according to A.S.M.E. standards.

(6) The use of weighted-lever safety valves shall be prohibited, and these valves shall be replaced by direct spring-loaded safety or safety relief valves that conform to the requirements of the A.S.M.E. boiler and pressure vessel code.

(7) Safety valves having either a seat or disc of cast-iron construction are prohibited.

(8) The safety or safety relief valve shall be connected directly to the hottest part of the boiler, independent of any other connection, without a shutoff valve of any description between the safety or safety relief valve and the boiler.

(9) Each automatically fired boiler shall be equipped with a flame failure safeguard device which will positively discontinue flow of fuel to the firing chamber in event of absence of flame. Discontinuation must occur in time to prevent an explosive accumulation of fuel in the firing chamber and connecting passages.

(10) Every safety or safety relief valve shall be connected to the boiler in an upright position with spindle vertical and shall be equipped with a try lever to test opening of the valve.

(11) When a discharge pipe is attached to a safety or safety relief valve, it shall not be reduced less than the valve outlet and shall be as short and straight as possible and arranged to avoid undue stresses on the valve. There shall be no shutoff valve in such discharge pipe.

(12) The discharge opening of safety or safety relief valves shall be so located that the released fluids and vapors cannot come into harmful contact with attendants or other persons. All safety or safety relief valve discharges shall be located or piped to clear running boards or platforms. Ample provision for gravity drain shall be made in the discharge pipe at or near each safety valve and where condensation may collect. Any discharge pipe extending above the safety or safety relief valve shall be equipped with a drain hole which will prevent accumulation of fluid above the valve disc.

(13) All electric wiring to boilers and to electrically operated automatic devices and control mechanisms shall be of a high temperature resistant insulation, and wiring shall be in conduit or other approved covering.

(14) All fuel and fluid piping valves and appliances shall be of materials listed in nationally approved standards, installed in a workmanlike manner, with such support as is necessary to prevent vibration. They shall be maintained so as to be free of leakage.

(15) Repairs shall be made in accordance with the regulations set forth in the national board inspection code. Major repairs shall be reported to the section before being performed. The major repair procedure and the shop performing the repair must be approved by the section or the authorized insurer and an inspection made by a state or special boiler inspector before the boiler is used.

(16) All boilers, unless exempt by this article, are subject to regular inspections as provided for in section 9-4-103 (4). Each boiler shall be prepared by the owner or user for inspections or hydrostatic test whenever necessary when notified by the inspector or the section. The owner or user shall prepare each boiler for internal inspection, when so requested by a state boiler inspector, in the manner prescribed in the national board inspection code.

(17) If the boiler is jacketed so that longitudinal seams of shells, drums, or domes cannot be seen, enough of the jacketing, setting, wall, or other form of casing or housing shall be removed to permit the inspection of the size of the rivets, pitch of the rivets, and other data necessary to determine the safety of the boiler if such information cannot be determined by other means.

(18) No person shall remove or tamper with any safety appliances prescribed by this article except for the purpose of making repairs.

(19) All insurance companies insuring boilers operated in this state shall notify the section within thirty days after any insurance policy insuring a boiler has been written, canceled, not renewed, or suspended because of unsafe conditions.

(20) If upon an external inspection there is evidence of a leak or crack, enough of the covering of the boiler shall be removed to permit a boiler inspector to determine the safety of the boiler; or, if the covering cannot be removed immediately, he may order the operation of the boiler stopped until such time as the covering can be removed and proper examination made.



**9-4-113. New power boiler installations.** (1) No power boiler, except those exempt by this article, shall be installed in this state unless it has been constructed, inspected, and stamped in conformity with the rules for construction of power boilers of the A.S.M.E. boiler and pressure vessel code and is registered with the national board of boiler and pressure vessel inspectors, and inspected in accordance with the requirements of this article and the rules and regulations of the section.

(2) A power boiler having the standard stamping of another state that has adopted a standard of construction equivalent to the standard provided in this article may be accepted by the director; however, the person or firm desiring to install the boiler shall make application for the installation and shall file with this application the manufacturer's data report covering the construction of the boiler in question.

(3) All new power boiler installations and reinstalled boilers shall be installed in accordance with the requirements of the A.S.M.E. boiler and pressure vessel code and, in addition, in accordance with the requirements of this section.

(4) All power boilers heated with gas, oil, or mechanical firing, except forced flow steam generators designed to operate without a fixed water level and stoker- or hand-fired coal-burning units which are constantly attended, shall be provided with an automatic low-water fuel cutout and with an automatic fuel-regulating control, controlled by boiler pressure or temperature, or both.

(5) All new power boiler rooms shall be constructed to have at least two means of exit. Each exit shall be remotely located from the other. Each elevation shall have at least two means of egress, each remotely located from the other.

**Source: L. 71: R&RE, p. 277, § 1. C.R.S. 1963: § 17-3-13.**

**9-4-114. Existing power boiler installations.** (1) The maximum allowable working pressure of standard boilers shall be determined by the applicable sections of the codes under which they were constructed and stamped. The maximum allowable working pressure on the shell of a nonstandard boiler or drum shell shall be determined by the strength of the weakest section of the structure computed in accordance with formulas provided by the national board of boiler and pressure vessel inspectors or any other nationally recognized engineering authority.

(2) Each power boiler having not more than five hundred square feet of water-heating surface shall have at least one approved safety valve. Each boiler having more than five hundred square feet of water-heating surface shall have two or more approved safety valves.

(3) The safety valve capacity of each power boiler shall be that which will discharge all the steam that can be generated by the boiler without allowing the pressure to rise more than six percent above the highest pressure any valve is set, and in no case to more than six percent above the maximum allowable working pressure.

(4) Power boilers equipped with one safety valve shall have the safety valve set at or below the maximum allowable working pressure. If additional valves are used, the highest pressure setting on additional valves shall not exceed the maximum allowable working pressure by more than three percent.

(5) When two or more power boilers operating at different pressures and safety valve settings are interconnected, the lower pressure boilers or interconnected piping shall be equipped with safety valves of sufficient capacity to prevent overpressure, considering the generating capacity of the boiler with the lowest allowable pressure.

(6) All power boilers shall have a water-feed supply which will permit the boilers being fed at any time while under pressure.

(7) Power boilers that are fired with solid fuel not in suspension and having more than five hundred square feet of water-heating surface shall have at least two means of feeding water. Each source of feeding shall be capable of supplying water to the boiler at a pressure of six percent higher than the highest setting of any safety valve on the boiler, and one such source of feeding shall be steam-operated.

(8) Power boilers fired by gaseous, liquid, or solid fuel in suspension and having less than five hundred square feet of water-heating surface may be equipped with a single source of feeding water if:

(a) Means are provided for immediate shutoff of heat release:

(b) The boiler furnace and fuel system do not retain sufficient stored heat to cause damage to the boiler if the water-feed supply is interrupted.

(9) Power boilers that have a water-heating surface of not more than one hundred square feet shall not have water-feed piping and connection to the boiler smaller than one-half inch pipe size. For boilers having a water-heating surface of more than one hundred square feet, the water-feed piping and connection to the boiler shall not be less than three-fourths inch pipe size. The feed water shall be introduced into a boiler in such a manner that the water will not be discharged directly against surface-exposed gases of high temperature or to direct radiation from the fire or near any riveted joints of the furnace sheets or shell. The water-feed pipe shall be provided with a check valve near the boiler and a valve or cock between the check valve and the boiler. When two or more boilers are fed from a common source, there shall be a regulating valve on the branch to each boiler between the check valve and the source of supply. In all cases where returns are fed back to the boiler by gravity, a check valve and stop valve shall be on each return line, the stop valve placed between the boiler and the check valve, and both shall be located as close to the boiler as practicable.

(10) Fire-actuated plugs, if used, shall conform to the requirements of the A.S.M.E. boiler and pressure vessel code for power boilers.

(11) No outlet connections, except for damper regulator, feed-water regulator, low-water fuel cutout, drains, or steam gauges, shall be placed on the piping that connects the water column or gauge glass to the boiler. The water column shall be provided with a drain valve of at least three-fourths of an inch pipe size.

(12) Each power boiler, except forced flow steam generators designed to operate without a fixed water level, shall have at least one water-gauge glass; except that boilers operated at pressures over four hundred PSI shall be provided with two water-gauge glasses which may be connected to a single water column or connected directly to the drum, in which case they shall conform to A.S.M.E. requirements. The gauge-glass connections and pipe connections shall not be less than one-half inch pipe size. Each water-gauge glass will be fitted with a drain cock or valve. When the boiler operating pressure exceeds one hundred PSI, the glass will be fitted with a globe or gate-valved drain.

(13) The lowest visible part of the water-gauge glass shall be at least two inches above the lowest permissible water level, which level shall be that at which there will be no danger of overheating any part of the boiler when in operation at that level. This subsection (13) does not apply to forced flow steam generators which are designed to operate without a fixed water level.

(14) Each power boiler shall have a steam gauge, with dial range not less than one and one-half times the maximum allowable working pressure, connected to the steam space or to the steam connection to the water column. The steam gauge shall be connected to a siphon or equivalent device of sufficient capacity to keep the gauge tube filled with water and so arranged that the gauge cannot be shut off from the boiler except by a cock placed near the gauge and provided with a tee or lever handle arranged to be parallel to the pipe in which it is located when the cock is open.

(15) Each power boiler shall be provided with a one-fourth inch nipple and globe valve connected to a steam space for the exclusive purpose of attaching a test gauge when the boiler is in service so the accuracy of the gauge may be ascertained.

(16) Steam-gauge connections shall be suitable for the maximum allowable working pressure and steam temperature; if the temperature exceeds four hundred degrees Fahrenheit, brass or copper pipe or tubing shall not be used.

(17) When a steam-gauge connection longer than eight feet becomes necessary, a shutoff valve may be used near the boiler if the valve is of the outside-screw-and-yoke type and is locked open when the boiler is in operation. The line shall be of ample size with provisions for free blowing.

(18) Each steam-discharge outlet, except a safety valve, shall be fitted with a stop valve located as close as practicable to the boiler. When such outlets are over two-inch pipe size, the valve used on the connection shall be the outside-screw-and-yoke rising spindle type to



indicate, at a distance, the position of its spindle, whether it is closed or open. The wheel may be carried either on the yoke or attached to the spindle.

(19) When power boilers provided with manholes are connected to a common steam main, the steam connection from each boiler shall be fitted with two stop valves having ample free-blow drain between them. The discharge of this drain shall be visible to the operator while manipulating the valves and shall be piped clear of the boiler setting. The stop valve shall consist preferably of one automatic nonreturn valve set next to the boiler and a second valve of the outside-screw-and-yoke type; or two valves of the outside-screw-and-yoke type may be used.

(20) Each power boiler shall have a blow-off pipe fitted with a valve or cock. All fittings and pipe shall conform to the applicable section of the A.S.M.E. boiler and pressure vessel code.

(21) Provisions shall be made for the expansion and contraction of steam mains connected to power boilers by providing substantial anchorage at suitable points so undue strain shall not be transmitted to the boiler. Steam reservoirs shall be used on steam mains when heavy pulsations of the steam currents cause vibration of the boiler shell plates.

(22) All power boilers heated with gas, oil, or mechanical firing, except stoker- or hand-fired coal-burning units which are constantly attended, shall be provided with an automatic low-water fuel cutout and with an automatic fuel-regulating control, controlled by boiler pressure.

(23) All cases not specifically covered by this article shall be treated as new installations or may be referred to the director for instructions concerning the requirements.

**Source: L. 71: R&RE, p. 278, § 1. C.R.S. 1963: § 17-3-14.**

**9-4-115. New miniature boiler installations.** (1) No miniature boiler, except those exempted by rules promulgated by the division of oil and public safety, shall be installed in this state unless it has been constructed, inspected, and stamped in conformity with the rules of construction of miniature boilers of the A.S.M.E. boiler and pressure vessel code and is registered with the national board of boiler and pressure vessel inspectors and inspected in accordance with this article.

(2) A miniature boiler having the standard stamping of another state that has adopted a standard of construction equivalent to the standard of the state of Colorado may be accepted by the director; however, the person or firm desiring to install the boiler shall make application for the installation and shall file with this application the manufacturer's data report covering the construction of the boiler in question.

(3) All new boiler installations and reinstalled boilers shall be installed in accordance with the requirements of the A.S.M.E. boiler and pressure vessel code and this article.

(4) Upon completion of the installation, all boilers shall be inspected by a state or special boiler inspector. At the time of inspection, each boiler shall be assigned a serial number by the inspector, which serial number shall be stamped on or affixed to the boiler as provided by section 9-4-106 (3).

**Source: L. 71: R&RE, p. 281, § 1. C.R.S. 1963: § 17-3-15. L. 2001: (1) amended, p. 1137, § 64, effective June 5.**

**9-4-116. Existing miniature boiler installations.** (1) Miniature boilers shall be installed in accordance with the provisions in section 9-4-113 unless a special exemption is stated in this article or otherwise provided by the director.

(2) The maximum allowable working pressure on the shell or drum of a miniature boiler shall be determined by the provisions of section 9-4-114 (1).

(3) The factor of safety and the construction of miniature boilers, except where otherwise specified, shall conform to that required for power boilers.

(4) Each miniature boiler shall be equipped with a spring-load, pop-type safety valve not less than one-half inch pipe size connected directly to the boiler.

(5) The safety valve shall have sufficient capacity to discharge all the steam that can be generated by the boiler without allowing the pressure to rise more than six percent above the maximum allowable working pressure.

(6) In cases where the miniature boiler is supplied with feed water directly from a pressure main or system without the use of a mechanical feeding device, the safety valve shall be set to release at a pressure not in excess of ninety-four percent of the lowest pressure obtained in the supply main or system feeding the boiler. Return traps shall not be considered mechanical feeding devices.

(7) Each miniature boiler designed for operation with a definite water level shall be equipped with a glass water-gauge for determining the water level.

(8) Miniature boilers operated in a closed system where there is insufficient space for the usual glass water-gauge may use water-level indicators of the glass bull's-eye type.

(9) Every miniature boiler shall be provided with at least one water-feed pump or other water-feeding device, except where it is connected to a water main carrying sufficient pressure to feed the boiler or where it is operated with no extraction of steam, such system being commonly known as a closed system.

(10) The water-feed pipe shall be provided with a check valve and a stop valve no less in size than that of the pipe.

(11) Feed water shall not be introduced through the water column or gauge-glass connection while the boiler is under pressure.

(12) Pressure of a feed water system greater than the maximum allowable working pressure of the boiler shall be fitted with a pressure-reducing valve before feed water is introduced into the boiler.

(13) Each miniature boiler shall be provided with a blow-off connection, not less than one-half inch iron pipe size, connected directly to the lowest water space.

(14) Blow-off piping shall not be galvanized and shall be provided with a valve or cock.

(15) Each miniature boiler shall be equipped with a steam-gauge having its dial graduated to not less than one and one-half times the maximum allowable working pressure. The gauge shall be connected to the steam space or to a steam connection to the water column. The gauge or connection shall contain a siphon or equivalent device which will develop and maintain a water seal that will prevent steam from entering the gauge tube. The minimum size of a siphon, if used, shall be one-fourth inch inside diameter.

(16) The steam piping from a miniature boiler shall be provided with a stop valve located as close to the boiler shell or drum as is practicable, except where the boiler and steam receiver are operated as a closed system.

(17) For miniature boiler installations which are gas-fired, the burners shall conform to the requirements of the American gas association and the A.S.M.E. boiler and pressure vessel code.

(18) The heating element for electrically heated steam boilers, closed system, shall be so constructed that the temperature will not exceed one thousand two hundred degrees Fahrenheit.

(19) All miniature boilers heated with gas, oil, or electrical energy shall be provided with an automatic low-water fuel cutout and with an automatic fuel-regulating control, controlled by boiler pressure.

(20) All cases not specifically covered by this article shall be treated as new installations or may be referred to the director for instructions concerning the requirement.

**Source: L. 71: R&RE, p. 281, § 1. C.R.S. 1963: § 17-3-16.**

**9-4-117. New heating boilers and hot-water supply boilers installations.** No heating boiler or hot-water supply boiler, except those exempt by this article, shall be installed in this state unless it has been constructed, inspected, and stamped in conformity with the rules for construction of low-pressure heating boilers of the A.S.M.E. boiler and pressure vessel code and is approved, registered, and inspected in accordance with the requirements of this article.

**Source: L. 71: R&RE, p. 282, § 1. C.R.S. 1963: § 17-3-17.**



**9-4-118. Existing heating boilers and hot-water supply boilers installations.**

(1) The maximum allowable working pressure of a boiler built in accordance with the A.S.M.E. boiler and pressure vessel code shall in no case exceed the pressure indicated by the manufacturer's identification stamped or cast on the boiler or a plate secured to it.

(2) The maximum allowable working pressure on the shell of a nonstandard, riveted heating boiler shall be determined in accordance with section 9-4-114 (1) covering existing power boiler installations. In no case shall the maximum allowable working pressure of a steam-heating boiler exceed fifteen pounds per square inch gauge, or a hot-water boiler exceed one hundred sixty pounds per square inch gauge, at a temperature not exceeding two hundred fifty degrees Fahrenheit.

(3) The maximum allowable working pressure of a nonstandard steel or wrought-iron heating boiler of welded construction shall not exceed fifteen pounds per square inch gauge. For other than steam service, the maximum allowable working pressure shall be calculated in accordance with the rules for construction of low-pressure heating boilers of the A.S.M.E. boiler and pressure vessel code.

(4) The maximum allowable working pressure of a nonstandard boiler composed principally of cast iron shall not exceed fifteen pounds per square inch gauge for steam service or thirty pounds per square inch gauge for hot-water service.

(5) The maximum allowable working pressure of a nonstandard boiler having cast-iron shell or heads and steel wrought-iron tubes shall not exceed fifteen pounds per square inch gauge for steam service or thirty pounds per square inch gauge for water service.

(6) A radiator in which steam pressure is generated at a pressure of fifteen pounds per square inch gauge or less is a low-pressure boiler.

(7) Each steam-heating boiler shall have one or more officially rated valves of the spring pop-type adjusted to discharge at a pressure not to exceed fifteen PSI. The safety valves shall be arranged so that they cannot be reset to relieve at a higher pressure than the maximum allowable working pressure of the boiler.

(8) No safety valve for a steam-heating boiler shall be smaller than three-fourths of an inch except in case the boiler and radiating surfaces are a self-contained unit.

(9) The safety valve capacity for each steam-heating boiler shall be such that with the fuel-burning equipment installed the pressure cannot rise more than five pounds above the maximum allowable working pressure.

(10) Each hot-water boiler shall have not less than one officially rated pressure relief valve set to relieve at or below the maximum allowable working pressure of the boiler. Each hot-water supply boiler shall have not less than one officially rated relief valve or not less than one officially rated pressure-temperature relief valve of the automatic-reseating type set to relieve at or below the maximum allowable working pressure of the boiler. Relief valves shall be so constructed that they cannot be reset to relieve at a higher pressure than the maximum permitted pressure.

(11) Seats and discs of safety relief valves shall be of material suitable to resist corrosion. No materials subject to deterioration or vulcanization when subjected to saturated steam temperature corresponding to capacity test pressure shall be used in any safety relief valve.

(12) No safety relief valve shall be smaller than three-fourths of an inch nor larger than four and one-half inches pipe size.

(13) When the size of the boiler requires a safety relief valve larger than four and one-half inches in diameter, two or more valves having the required combined capacity shall be used.

(14) Each steam-heating boiler shall have a steam gauge connected to its steam space, or to its water column, or to its steam connection. The gauge or connection shall have a siphon or equivalent device which will develop and maintain a water seal that will prevent steam from entering the gauge tube. The connection shall be so arranged that the gauge cannot be shut off from the boiler except by a cock placed in the pipe at the gauge and provided with a tee or lever handle arranged to be parallel to the pipe in which it is located when the cock is open.

(15) Each hot-water heating boiler or hot-water supply boiler shall have a pressure or altitude gauge connected to it or to its flow connection in such a manner that it cannot be

shut off from the boiler except by a cock with tee or lever handle placed on the pipe near the gauge. The handle of the cock, when the cock is open, shall be parallel to the pipe in which it is located.

(16) The scale on the dial of the pressure or altitude gauge for a hot-water heating boiler shall be graduated to not less than one and one-half nor more than three times the maximum allowable working pressure.

(17) The scale on the dial of a steam-heating boiler gauge shall be graduated to not less than thirty PSIG nor more than sixty PSIG, and travel of the pointer from zero to thirty PSIG pressure shall be at least three inches.

(18) In addition to the mandatory requirements for a pressure relief device, each hot-water heating or hot-water supply boiler shall be fitted with a temperature-actuated control, which will control the rate of combustion to prevent the temperature of the water from rising above two hundred fifty degrees Fahrenheit at or near the boiler outlet. The control shall be constructed so that it cannot be set or reset to permit operation of the firing equipment when the temperature of the water is higher than two hundred degrees Fahrenheit.

(19) When a pressure-actuated control is used on a steam-heating boiler, it shall operate to prevent the steam pressure from rising above fifteen PSIG.

(20) Each automatically fired steam or vapor-system heating boiler shall be equipped with an automatic low-water fuel cutoff, so located as to automatically cut off fuel supply when the surface of the water falls to the lowest safe water line.

(21) Each steam-heating boiler shall have one or more water-gauge glasses attached to the water column or boiler by means of valved fittings with the lower fitting provided with a drain valve of the straightway type with opening not less than one-fourth inch diameter to facilitate cleaning. Gauge-glass replacement shall be possible under pressure.

(22) If, in the judgment of an inspector, a steam-heating or hot-water supply boiler is unsafe for operation at the pressure previously approved, the pressure shall be reduced, proper repair made, or the boiler retired from service.

Source: L. 71: R&RE, p. 283, § 1. C.R.S. 1963: § 17-3-18.

ARTICLE 5

Standards for Accessible Housing

**Editor’s note:** This article was amended with relocations in 2003, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 2003, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor’s notes following those sections that were relocated.

9-5-101.	Definitions.		dards.
9-5-102.	Disabilities covered - purpose.	9-5-105.	Exemptions for certain privately
9-5-103.	Applicability of standards - en- forcement.		funded projects.
		9-5-106.	Implementation plan.
9-5-104.	Responsibility for enforcing stan-		

**9-5-101. Definitions.** As used in this article, unless the context otherwise requires:

(1) “Accessibility point” means a unit of value exchanged for different levels of accessible dwelling types to satisfy the requirements for dwelling accessibility contained in this article.

(2) “Accessible route” means an interior or exterior circulation path that complies with the provisions contained in “ANSI A117.1-1998”.

(3) “ANSI A117.1-1998” means the 1998 version of the “American National Standard for Buildings and Facilities Providing Accessibility and Usability for Physically Handicapped People”, promulgated by the American national standards institute.

(4) “Detached residence” means a one- or two-family residence that is separated from



adjacent dwellings by an unobstructed physical space. A one- or two-family residence that is separated from an adjacent dwelling by a physical space of less than three feet shall not be considered a detached residence.

(5) "Ground story level" means the lowest story in a dwelling unit containing habitable rooms or areas with an accessible entrance located on an accessible route that contains living, sleeping, cooking, bathing, and toilet facilities. For the purposes of this article, a basement shall not be considered the ground story level if the finished basement floor is located more than four feet below the exterior finished grade determined at any point along the exposed periphery of the dwelling unit.

(6) "Project" means the total number of parcels and buildings in a development planned or constructed by the same developer, builder, or entity on one site or contiguous sites, and also includes all parcels and structures that are parts of the same planned development application or agreement. The separation of contiguous individual buildings, units, lots, tracts, or parcels of land by a property line or by a public or private road shall not create a separate project.

(7) "Property" means the site, parcels of land, plats, lots, tracts, individual dwelling units, existing and proposed structures, and the built environment.

(8) "Residential dwelling unit" means any portion of a building that contains living facilities, including a room or rooms in a facility that have shared cooking, bathing, toilet, or laundry facilities such as dormitories, shelters, assisted living facilities, and boarding homes. "Residential dwelling unit" also means facilities that include provisions for sleeping, cooking, bathing, and toilet facilities for one or more persons and are used for extended stays, such as time-shares and extended-stay motels. "Residential dwelling unit" does not mean a guest room in a motel or hotel.

(9) "Technically infeasible", in reference to a proposed alteration to a building or facility, means that the proposed alteration is not implemented because:

(a) An existing structural condition or conditions make such alteration labor- or cost-prohibitive;

(b) The building or facility is in strict compliance with minimum accessibility requirements for new construction and, due to existing physical or site constraints, such alteration would negatively impact such compliance.

(10) "Type A dwelling unit" means a dwelling unit designed in accordance with the provisions of ANSI A117.1-1998, section 1002.

(11) "Type A multistory dwelling unit" means a multiple story dwelling unit with a ground story level designed in accordance with the provisions of ANSI A117.1-1998, section 1002, and, if provided, accessible laundry facilities on the ground story level.

(12) "Type B dwelling unit" means a dwelling unit with a ground floor level designed in accordance with the provisions of ANSI A117.1-1998, section 1003.

(13) "Type B multistory dwelling unit" means a multiple-story dwelling unit with a ground story level that is designed in accordance with the provisions of ANSI A117.1-1998, section 1003, and, if provided, accessible laundry facilities on the ground story level.

(14) "Type B visitable ground floor" means a multiple-story dwelling unit with an accessible entrance and toilet facility designed in accordance with the provisions of ANSI A117.1-1998, section 1003.

(15) "Undue hardship" means a substantial and unusual hardship that is the direct result of unique physical site conditions such as topography or geology, or that is the direct result of other unique or special conditions encountered on a property, but that are not typically encountered in the jurisdiction in which such property is located. Constraints, complications, or difficulties that may arise by complying with these statutory standards for accessibility but that do not constitute an undue hardship shall not serve to justify the granting of an exception or variance.

**Source:** L. 2003: Entire article amended with relocations, p. 1415, § 1, effective April 29.

**9-5-102. Disabilities covered - purpose.** (1) This article is intended to provide accessibility standards for residential projects designed to serve persons with nonambula-

tory disabilities, semiambulatory disabilities, sight disabilities, hearing disabilities, disabilities of incoordination, and aging.

(2) **Design criteria.** Design criteria shall comply with the 1998 version of the "American National Standard for Buildings and Facilities Providing Accessibility and Usability for Physically Handicapped People", promulgated by the American national standard institute, commonly cited as "ANSI A117.1-1998".

**Source: L. 2003:** Entire article amended with relocations, p. 1418, § 1, effective April 29.

**Editor's note:** This section is similar to former §§ 9-5-103 and 9-5-104 as they existed prior to 2003, and the former § 9-5-102 was relocated to § 9-5-103.

**9-5-103. Applicability of standards - enforcement.** (1) The standards and specifications set forth in this article shall apply to all buildings and facilities used for housing that are constructed in whole or in part by the use of state, county, or municipal funds or the funds of any political subdivision of the state or that are constructed with private funds. All such buildings and facilities to be constructed from plans on which architectural drawings are started after July 1, 1975, from any one of these funds or any combination thereof shall conform to each of the standards and specifications prescribed in this article. The governmental unit responsible for the enforcement of this article shall grant exceptions to or modify any particular standard or specification when it is determined that it is impractical and would create an undue hardship. Any such exception or modification of the provisions of this article shall be made in writing as a matter of public record. These standards and specifications shall be adhered to in those buildings and facilities that are constructed or proposed on or after April 29, 2003. This article shall apply to permanent buildings.

(2) The jurisdiction with responsibility for enforcement of this article pursuant to section 9-5-104 shall designate a board of appeals to hear and resolve appeals of orders, decisions, or determinations made by the enforcing agency regarding the application and interpretation of this article.

(3) Any building or facility that would have been subject to the provisions of this article but was under construction prior to July 1, 1976, shall comply with the following:

(a) If the walls or defining boundaries of an element or space are altered, then the altered element or space shall comply with the applicable provisions of section 9-5-105, unless such alteration is technically infeasible. If full compliance with this article is technically infeasible, compliance shall be implemented up to the point of technical infeasibility. No alteration shall be undertaken that negatively impacts accessibility of a building or facility pursuant to ANSI A117.1-1998. This paragraph (a) shall not be construed to require the moving of any existing walls not otherwise planned to be moved.

(b) Any additions to a building or facility shall be treated as new construction for the purposes of enforcement of this article.

(4) The general assembly finds and declares that the standards and specifications set forth in this article are of statewide concern. Nothing in this article shall prohibit any municipality or other governmental subdivision from making and enforcing standards and specifications that are more stringent, and thus provide greater accessibility, than those set forth in this article.

**Source: L. 2003:** Entire article amended with relocations, p. 1418, § 1, effective April 29.

**Editor's note:** This section is similar to former § 9-5-102 as it existed prior to 2003, and the former § 9-5-103 was relocated to § 9-5-102.

**9-5-104. Responsibility for enforcing standards.** (1) The responsibility for enforcement of this article is as follows:

(a) For factory-built residential structures as defined in section 24-32-3302 (10), C.R.S., the division of housing created in section 24-32-704, C.R.S.;



(b) In a political subdivision that does not have a local building code, the division of housing created in section 24-32-704, C.R.S.;

(c) For all other housing or in a political subdivision that has adopted a building code, by the building department, or its equivalent, of the political subdivision having jurisdiction.

**Source:** L. 2003: Entire article amended with relocations, p. 1419, § 1, effective April 29. L. 2004: (1)(a) amended, p. 1189, § 12, effective August 4.

**Editor's note:** This section is similar to former § 9-5-110 as it existed prior to 2003, and the former § 9-5-104 was relocated to § 9-5-102.

**9-5-105. Exemptions for certain privately funded projects.** (1) Accessible dwelling units shall be provided as required in this article; except that this article does not apply to privately funded projects for the construction of a detached residence or residences or to other types of residential property containing less than seven residential units.

For the purpose of determining the number of accessibility points required pursuant to subsection (2) of this section, the accessible dwelling unit types shall have the following point values:

Accessible dwelling unit type:	Accessibility point value per dwelling unit:
Type A dwelling unit	6
Type A multistory dwelling unit	5
Type B dwelling unit	4
Type B multistory dwelling unit	3
Type B visitable ground floor	1

(2) **Residential projects.** (a) A project shall be assigned accessibility points based on the number of units contained within the project as follows:

Number of units within the project:	Accessibility points required:
0-6	0
7-14	6
15-28	12
29-42	18
43-57	24
58-71	30
72-85	36
86-99	42
100-114	48
115-128	54
129-142	60
143-157	66
158-171	72
172-185	78
186-199	84
etc.	+6 additional points every 14 units or fraction thereof

(b) A project shall include enough accessible dwelling units to achieve at least the specified number of accessibility points required pursuant to paragraph (a) of this subsection (2). A project may use any combination of accessible dwelling unit types to comply with this section.

**Source: L. 2003:** Entire article amended with relocations, p. 1420, § 1, effective April 29.

**Editor's note:** This section is similar to former § 9-5-111 as it existed prior to 2003.

**9-5-106. Implementation plan.** The builder of any project regulated by this article shall create an implementation plan that guarantees the timely and evenly phased delivery of the required number of accessible units. Such plan shall clearly specify the number and type of units required and the order in which they are to be completed. Such implementation plan shall be subject to approval by the entity with enforcement authority in such project's jurisdiction. The implementation plan shall not be approved if more than thirty percent of the project is intended to be completed without providing a portion of accessible units required by section 9-5-105; except that, if an undue hardship can be demonstrated, or other guarantees provided are deemed sufficient, the jurisdiction having responsibility for enforcement may grant exceptions to this requirement. The implementation plan shall be approved by the governmental unit responsible for enforcement before a building permit is issued.

**Source: L. 2003:** Entire article amended with relocations, p. 1421, § 1, effective April 29.

## ARTICLE 5.5

### Elevator and Escalator Certification

9-5.5-101.	Short title.	9-5.5-112.	Compliance - rules.
9-5.5-102.	Legislative declaration.	9-5.5-113.	Conveyance - installation and repair - notice of construction and initial inspection.
9-5.5-103.	Definitions.		
9-5.5-104.	Scope.	9-5.5-114.	Periodic inspections and registrations - rules.
9-5.5-105.	Similar or higher standards authorized.	9-5.5-115.	Insurance.
9-5.5-106.	License required.	9-5.5-116.	Enforcement - rules.
9-5.5-107.	License qualifications - contractor - mechanic - inspector.	9-5.5-117.	Liability.
9-5.5-108.	License - rules - issuance - renewal - fee.	9-5.5-118.	Criminal penalties.
9-5.5-109.	License discipline.	9-5.5-119.	Dangerous conveyance - administrative orders.
9-5.5-110.	Accident reports.	9-5.5-120.	Repeal of article.
9-5.5-111.	Registration of existing conveyances - fund.		

**9-5.5-101. Short title.** This article shall be known and may be cited as the "Elevator and Escalator Certification Act".

**Source: L. 2007:** Entire article added, p. 1412, § 1, effective January 1, 2008.

**9-5.5-102. Legislative declaration.** The general assembly hereby declares that in order to ensure minimum safety standards throughout Colorado, the regulation of conveyances is a matter of statewide concern. Nothing in this article shall be construed to prevent a local jurisdiction from regulating conveyances.

**Source: L. 2007:** Entire article added, p. 1412, § 1, effective January 1, 2008.

**9-5.5-103. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Accredited national conveyance association" means a conveyance association that is accredited to certify conveyance inspectors by a nationally recognized standards association, including, without limitation, ASME or ASCE.



(2) “Administrator” means the director of the division of oil and public safety within the department of labor and employment or the director’s designee.

(3) “Approved local jurisdiction” means a local jurisdiction that has been approved by the administrator pursuant to section 9-5.5-112.

(4) “ASCE” means the American society of civil engineers or its successor.

(5) “ASCE 21” means the American society of civil engineers automated people mover standards published as “ASCE standard number ASCE 21-96” as amended by ASCE.

(6) “ASME” means the American society of mechanical engineers or its successor.

(7) “ASME A17.1” means the safety code for elevators and escalators published as “A17.1 - 2000 Safety Code for Elevators and Escalators” as amended by ASME international.

(8) “ASME A17.3” means the safety code for elevators and escalators published as “A17.3 - 2002 Safety Code for Existing Elevators and Escalators” as amended by ASME international.

(9) “ASME A18.1” means the safety code for elevators and escalators published as “A18.1 - 2003 Safety Standard for Platform Lifts and Stairway Chairlifts” as amended by ASME international.

(10) “Certificate of operation” means a document issued by the administrator or an approved local jurisdiction for a conveyance indicating that the conveyance has been inspected by the administrator, an approved local jurisdiction, or a licensed third-party conveyance inspector and approved under this article.

(11) “Conveyance” means a mechanical device to which this article applies pursuant to section 9-5.5-104.

(12) “Conveyance contractor” means a person who engages in the business of erecting, constructing, installing, altering, servicing, repairing, or maintaining conveyances.

(13) “Conveyance helper or apprentice” means a person who works under the general direction of a certified conveyance mechanic.

(14) “Conveyance mechanic” means a person who erects, constructs, installs, alters, services, repairs, or maintains conveyances.

(15) “Dormant conveyance” means a conveyance that has been temporarily placed out of service.

(16) “Licensee” means a person who is licensed as a conveyance contractor, conveyance mechanic, or conveyance inspector pursuant to this article.

(17) “Local jurisdiction” means a city, county, or city and county or any agent thereof.

(18) “Private residence” means a separate dwelling, or a separate apartment in a multiple-apartment dwelling, that is occupied by members of a single-family unit.

(18.5) “Private residence conveyance” means a powered passenger conveyance that is limited in size, capacity, rise, and speed and is designed to be installed in a private residence or in a multiple-family dwelling as a means of access to a private residence.

(19) “Single-family residence” means a private residence that is a separate building or an individual residence that is part of a row of residences joined by common sidewalls.

(20) “Third-party conveyance inspector” means a disinterested conveyance inspector who is retained to inspect a conveyance but is not employed by or affiliated with the owner of the conveyance nor the conveyance mechanic whose repair, alteration, or installation is being inspected.

**Source: L. 2007:** Entire article added, p. 1412, § 1, effective January 1, 2008. **L. 2010:** (10) amended and (18.5) added, (HB 10-1231), ch. 75, p. 254, § 1, effective August 11.

**9-5.5-104. Scope.** (1) Except as provided in subsection (2) of this section, this article applies to the design, construction, operation, inspection, testing, maintenance, alteration, and repair of the following equipment:

(a) Hoisting and lowering mechanisms equipped with a car or platform that moves between two or more landings. Such equipment includes elevators and platform lifts, personnel hoists, and dumbwaiters.

(b) Power-driven stairways and walkways for carrying persons between landings. Such equipment includes, but is not limited to, escalators and moving walks.

- (c) Automated people movers as defined in ASCE 21.
- (2) This article does not apply to the following:
  - (a) Material hoists;
  - (b) Manlifts;
  - (c) Mobile scaffolds, towers, and platforms;
  - (d) Powered platforms and equipment for exterior and interior maintenance;
  - (e) Conveyors and related equipment;
  - (f) Cranes, derricks, hoists, hooks, jacks, and slings;
  - (g) Industrial trucks within the scope of ASME publication B56;
  - (h) Items of portable equipment that are not portable escalators;
  - (i) Tiering or piling machines used to move materials between storage locations that operate entirely within one story;
  - (j) Equipment for feeding or positioning materials at machine tools, printing presses, and other similar equipment;
  - (k) Skip or furnace hoists;
  - (l) Wharf ramps;
  - (m) Railroad car lifts or dumpers;
  - (n) Line jacks, false cars, shafters, moving platforms, and similar equipment used by a certified conveyance contractor for installing a conveyance;
  - (o) Conveyances at facilities regulated by the mine safety and health administration in the United States department of labor, or its successor, pursuant to the "Federal Mine Safety and Health Act of 1977", Pub.L. 91-173, codified at 30 U.S.C. sec. 801 et seq., as amended;
  - (p) Elevators within the facilities of gas or electric utilities that are not accessible to the public;
  - (q) A passenger tramway defined in section 25-5-702, C.R.S.;
  - (r) Conveyances in a single-family residence; or
  - (s) Stairway chair lifts as defined in ASME A18.1 - 2005.
- (3) This article shall not be construed to prohibit a local jurisdiction from regulating conveyances if the local jurisdiction has standards that meet or exceed the standards established by this article.

**Source: L. 2007:** Entire article added, p. 1414, § 1, effective January 1, 2008. **L. 2010:** IP(1), (1)(a), IP(2), (2)(q), and (2)(r) amended and (2)(s) added, (HB 10-1231), ch. 75, pp. 254, 255, §§ 2, 3, effective August 11.

**9-5.5-105. Similar or higher standards authorized.** This article shall not be construed to prevent the use of systems, methods, or devices of equivalent or superior quality, strength, fire resistance, code effectiveness, durability, and safety to those required by this article if technical documentation demonstrates such equivalency or superiority.

**Source: L. 2007:** Entire article added, p. 1415, § 1, effective January 1, 2008.

**9-5.5-106. License required.** (1) (a) A person shall not erect, construct, alter, replace, maintain, remove, or dismantle a conveyance within a building or structure unless the person is licensed as a conveyance mechanic and is working under the supervision of a certified conveyance contractor. A person shall not wire a conveyance unless the person is licensed as a conveyance mechanic and is working under the supervision of a certified conveyance contractor. No other license shall be required for work described in this paragraph (a).

(b) A person shall not be required to be a certified conveyance contractor or licensed conveyance mechanic to remove or dismantle conveyances that are destroyed as a result of a complete demolition of a secured building or structure or where the hoistway or wellway is demolished back to the basic support structure and no access that endangers the safety of a person is permitted.

(c) A conveyance helper or apprentice shall not be required to be licensed when working under the supervision of a licensed conveyance mechanic.



(2) A person shall not inspect a conveyance within a building or structure, including but not limited to a private residence, for purposes of the issuance of a certificate of operation unless licensed as a conveyance inspector.

**Source: L. 2007:** Entire article added, p. 1415, § 1, effective January 1, 2008.

**9-5.5-107. License qualifications - contractor - mechanic - inspector.** (1) (a) To be licensed, a person shall apply solely with the administrator. An applicant shall not be licensed as a conveyance mechanic unless the applicant possesses a certificate of completion of a conveyance mechanic program as approved by the administrator.

(b) In lieu of qualifying pursuant to paragraph (a) of this subsection (1), an applicant shall qualify if the applicant holds a valid license from another state having standards that, at a minimum, are substantially similar to those imposed by this article as determined by the administrator.

(c) In lieu of qualifying pursuant to paragraph (a) of this subsection (1), an applicant shall qualify if the applicant:

(I) Has passed an examination, as determined by the administrator, on the codes and standards that apply to conveyances; and

(II) Furnishes to the administrator acceptable evidence that the applicant worked as a conveyance mechanic for at least three years without direct supervision.

(d) Repealed.

(2) (a) An applicant shall not be licensed as a conveyance inspector unless the applicant is certified to inspect conveyances by a nationally recognized conveyance association.

(b) Repealed.

(c) In lieu of qualifying pursuant to paragraph (a) of this subsection (2), an applicant appointed or designated as a conveyance inspector shall qualify if the applicant is eligible to, and intends to, become nationally certified within one year. A license issued pursuant to this section shall expire upon the termination of employment with the local jurisdiction or after one year from the date of licensure, whichever occurs first. A license issued pursuant to this paragraph (c) shall not be eligible for renewal unless the applicant has obtained national certification.

(3) (a) A person who is not qualified to be a conveyance contractor shall not be certified as a conveyance contractor.

(b) To qualify to be a certified conveyance contractor, an applicant shall demonstrate the following qualifications:

(I) The applicant shall employ at least one licensed conveyance mechanic; and

(II) The applicant shall comply with the insurance requirements in section 9-5.5-115.

(c) Repealed.

**Source: L. 2007:** Entire article added, p. 1416, § 1, effective January 1, 2008. **L. 2008:** (2)(c) added, p. 1996, § 1, effective July 1. **L. 2010:** (3)(c) repealed, (HB 10-1231), ch. 75, p. 255, § 4, effective August 11.

**Editor's note:** (1) Subsection (1)(d)(II) provided for the repeal of subsection (1)(d), effective July 1, 2008. (See L. 2007, p. 1416.)

(2) Subsection (2)(b)(II) provided for the repeal of subsection (2)(b), effective July 1, 2011. (See L. 2007, p. 1416.)

**9-5.5-108. License - rules - issuance - renewal - fee.** (1) (a) Upon the administrator's approval of an application, the administrator shall license the conveyance contractor, conveyance mechanic, or conveyance inspector.

(b) The administrator shall promulgate rules requiring a conveyance mechanic to obtain at least eight hours of continuing education every two years.

(2) (a) When an emergency exists in this state due to a disaster, act of God, or work stoppage and the number of certified conveyance mechanics in the state is insufficient to deal with the emergency, a certified conveyance contractor may respond as necessary to

assure the safety of the public. A person who, in the judgment of a certified conveyance contractor, has an acceptable combination of documented experience and education to perform conveyance work without direct supervision shall seek an emergency conveyance mechanic certification from the administrator within five business days after commencing work for which certification as a conveyance mechanic is required.

(b) The administrator shall issue emergency conveyance mechanic certifications pursuant to paragraph (a) of this subsection (2). The certified conveyance contractor recommending a person for an emergency conveyance mechanic certification shall furnish such proof of the person's competency as the administrator may require.

(c) Each emergency conveyance mechanic certification shall be, and shall state that it is, valid for sixty days after the date of issuance and for such particular conveyances or geographical areas as the administrator may designate. Such certification shall entitle the holder to the rights of a certified conveyance mechanic. The administrator shall renew an emergency conveyance mechanic certification during the existence of an emergency. No fee shall be charged for the issuance or renewal of an emergency conveyance mechanic certification.

(3) (a) A certified conveyance contractor shall notify the administrator when there are no certified conveyance mechanics available to perform conveyance work. The certified conveyance contractor may request that the administrator issue a temporary conveyance mechanic certification to a person who, in the judgment of the certified conveyance contractor, has an acceptable combination of documented experience and education to perform conveyance work without direct supervision. Any such person shall immediately seek a temporary conveyance mechanic certification from the administrator and shall pay such fee as the administrator shall determine.

(b) Each such certification shall be, and shall state that it is, valid for thirty days after the date of issuance and while employed by the certified conveyance contractor who certified the individual as qualified. The certification shall be renewable as long as there is a shortage of licensed conveyance mechanics.

(4) Except for certified inspectors who qualified during the immediately preceding twelve months, the administrator shall not renew a certification issued under this section unless the person meets the qualifications for certification under section 9-5.5-107.

(5) The administrator shall establish and collect annual fees for licenses issued pursuant to this section. The fees shall be in an amount to offset the direct and indirect costs of administering this article.

**Source: L. 2007:** Entire article added, p. 1417, § 1, effective January 1, 2008.

**9-5.5-109. License discipline.** (1) A certification issued pursuant to this article may be suspended or revoked upon a finding by the administrator of any of the following:

- (a) A false statement in the application concerning a material matter;
- (b) Fraud, misrepresentation, or bribery in applying for certification;
- (c) Failure to notify the owner or lessee of a conveyance and the administrator or approved local jurisdiction, if any, of a condition not in compliance with this article; or
- (d) A violation of any provision of this article or of any rule adopted pursuant to this article.

(2) The suspension or revocation of a license shall be made as a result of a notice of violation in accordance with section 8-20-104, C.R.S.

(3) The administrator shall not issue a license to a person whose license has been revoked within the last two years.

**Source: L. 2007:** Entire article added, p. 1418, § 1, effective January 1, 2008. **L. 2010:** (1)(c) amended, (HB 10-1231), ch. 75, p. 255, § 5, effective August 11.

**9-5.5-110. Accident reports.** The owner shall report to the administrator or an approved local jurisdiction, within twenty-four hours, any accident that results in serious injury to an individual.

**Source: L. 2007:** Entire article added, p. 1419, § 1, effective January 1, 2008.



**9-5.5-111. Registration of existing conveyances - fund.** (1) On or before August 1, 2008, the owner or lessee of every existing conveyance shall register the conveyance with the administrator. The registration shall include the type, rated load and speed, name of manufacturer, location, intended purpose for use, and such additional information as the administrator may require. Conveyances constructed or completed after July 1, 2008, shall be registered before they are placed in service.

(2) (a) The administrator shall set annual fees on conveyances for which the administrator has issued the current certificate of operation in an amount necessary to offset the costs of registration and of the administration of this article in accordance with section 24-4-104, C.R.S.

(b) Fees collected pursuant to this article shall be transmitted to the state treasurer, who shall credit the same to the conveyance safety fund, referred to in this article as the "fund", which is hereby created in the state treasury. Moneys in the fund shall be subject to annual appropriation by the general assembly and shall be used to implement this article. The moneys in the fund and interest earned on the moneys in the fund shall not revert to the general fund or be transferred to any other fund and shall be exempt from section 24-75-402, C.R.S.

**Source: L. 2007:** Entire article added, p. 1419, § 1, effective January 1, 2008.

**9-5.5-112. Compliance - rules.** (1) The administrator shall promulgate rules for the construction, alteration, repair, service, and maintenance of conveyances. Except as provided in subsection (3) of this section, such rules shall conform to the following standards:

- (a) ASCE 21;
- (b) ASME A17.1;
- (c) ASME A17.3; and
- (d) ASME A18.1.

(2) (a) The administrator shall determine whether a local jurisdiction's standards are equal to or greater than those of this article. If so, then the administrator shall enter into a memorandum of agreement with the local jurisdiction that approves the jurisdiction's authority to regulate conveyances.

(b) The administrator may establish a schedule for a local jurisdiction to adopt updated standards, equaling or exceeding the standards imposed under subsection (1) of this section, which shall be adopted within a reasonable amount of time as needed for a local jurisdiction to update its standards.

(3) (a) (I) Except as provided in subparagraph (II) of this paragraph (a), the administrator shall promulgate rules exempting a conveyance installed before July 1, 2008, from compliance with ASME A17.3 until approval is required by section 9-5.5-113 for substantial alteration or remodeling of the conveyance.

(II) The administrator shall, in cooperation with local jurisdictions, promulgate rules that authorize the administrator or a local jurisdiction to require an elevator to comply with any portion of ASME A17.3 necessary to protect against a material risk to the public safety.

(b) In promulgating the rules required by subsection (1) of this section, the administrator may adopt changes to the standards listed in subsection (1) of this section that the administrator deems to be in the public interest, including, without limitation, adopting modifications to, changing the applicability of, exempting conveyances from, changing inspector witnessing requirements of, and defining events that trigger the applicability of all or a portion of the standards.

**Source: L. 2007:** Entire article added, p. 1419, § 1, effective January 1, 2008. **L. 2008:** Entire section amended, p. 1996, § 2, effective July 1.

**9-5.5-113. Conveyance - installation and repair - notice of construction and initial inspection.** (1) The owner or lessee of a conveyance shall not erect, construct, install, or alter a conveyance within a building or structure unless it conforms to the rules adopted by

the administrator under this article and the work is performed by a certified conveyance contractor.

(2) The owner or lessee of a conveyance shall not erect, construct, or install a conveyance within a building or structure unless a notice, including the construction plans, has been sent to the administrator or approved local jurisdiction at least thirty days prior to construction and the administrator or approved local jurisdiction has approved the construction.

(3) The owner or lessee of the property where a new or altered conveyance is located shall not operate or permit it to be operated unless:

(a) The conveyance has passed an initial inspection conducted by the administrator, approved local jurisdiction, or third-party inspector;

(b) The person conducting the inspection determines that the conveyance is safe and complies with the rules adopted by the administrator or approved local jurisdiction; and

(c) The administrator or approved local jurisdiction has issued a certificate of operation for the conveyance.

**Source: L. 2007:** Entire article added, p. 1419, § 1, effective January 1, 2008. **L. 2010:** Entire section amended, (HB 10-1231), ch. 75, p. 255, § 6, effective August 11.

**9-5.5-114. Periodic inspections and registrations - rules.** (1) (a) The administrator shall promulgate rules requiring the owner or lessee of a conveyance to periodically certify that the administrator, an approved local jurisdiction, or a licensed third-party conveyance inspector has determined that the conveyance is safe and complies with the rules adopted by the administrator or approved local jurisdiction. Upon such certification, the administrator or approved local jurisdiction shall issue a certificate of operation for the conveyance.

(b) and (c) (Deleted by amendment, L. 2010, (HB 10-1231), ch. 75, p. 256, § 7, effective August 11, 2010.)

(2) Upon request, the administrator shall provide notice to the owner of a private residence where a conveyance is located with relevant information about conveyance safety requirements. The penalty provisions of this article shall not apply to private residence owners.

(3) The administrator shall promulgate rules requiring the owner of the conveyance to have it periodically inspected by a third-party conveyance inspector and the periodic expiration of certificates of operation.

(4) The administrator shall promulgate rules allowing the continued operation of a private residence conveyance that was installed prior to January 1, 2008, in a building that is not a single-family residence.

(5) The owner or lessee of a conveyance shall not permit the conveyance to be operated unless the owner or lessee obtains a certificate of operation from the administrator or approved local jurisdiction.

(6) The owner or lessee shall pay a fee in an amount determined by the administrator for a certificate of operation issued by the administrator. The administrator shall set the fee in accordance with section 24-4-104, C.R.S., to approximate the actual cost of issuing a certificate of operation.

**Source: L. 2007:** Entire article added, p. 1420, § 1, effective January 1, 2008. **L. 2010:** (1) amended and (4), (5), and (6) added, (HB 10-1231), ch. 75, p. 256, § 7, effective August 11.

**9-5.5-115. Insurance.** (1) Each conveyance contractor shall submit to the administrator an insurance policy, certificate of insurance, or certified copy of either issued by an insurance company authorized to do business in Colorado. Such policy shall provide general liability coverage of at least one million dollars for injury or death in each occurrence and coverage for at least five hundred thousand dollars for property damage in each occurrence. In addition, a conveyance contractor shall submit evidence of the



insurance coverage mandated by the “Workers’ Compensation Act of Colorado”, articles 40 to 47 of title 8, C.R.S.

(2) Certified conveyance inspectors shall submit to the administrator an insurance policy, certificate of insurance, or certified copy of either issued by an insurance company authorized to do business in Colorado. Such policy shall provide general liability coverage of at least one million dollars for injury or death in each occurrence and coverage for at least five hundred thousand dollars for property damage in each occurrence.

(3) The administrator shall not certify a conveyance contractor or conveyance inspector unless the applicant has delivered the policy, certified copy, or certificate of insurance required by this section in a form approved by the administrator. A certified conveyance contractor or conveyance inspector shall notify the administrator at least ten days before a material alteration, amendment, or cancellation of a policy is made.

(4) This section shall not apply to a local jurisdiction or the employee of a local jurisdiction in the performance of the employee’s official duties.

**Source: L. 2007:** Entire article added, p. 1420, § 1, effective January 1, 2008. **L. 2008:** (1) and (2) amended and (4) added, p. 1997, § 3, effective July 1.

**9-5.5-116. Enforcement - rules.** (1) The administrator may adopt rules to administer and enforce this article. The administrator may use certified conveyance inspectors for any investigation of an alleged violation of the rules or this article. The administrator may appoint an advisory board to assist in the formulation of rules authorized by this section.

(2) A person may request an investigation into an alleged violation of the rules or this article, or of a danger posed by any conveyance, by giving notice to the administrator of such violation or danger. Such notice shall be in writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the person making the request. Upon the request of a person signing the notice, such person’s name shall not appear on any copy of such notice or any record published, released, or made available.

(3) Upon receipt of such notification, if the administrator determines that there are reasonable grounds to believe that such violation or danger exists, the administrator shall investigate in accordance with this article to determine if such violation or danger exists. If the administrator determines that there are no reasonable grounds to believe that a violation or danger exists, the administrator shall notify the party in writing of such determination.

**Source: L. 2007:** Entire article added, p. 1421, § 1, effective January 1, 2008.

**9-5.5-117. Liability.** This article shall not be construed to relieve or lessen the responsibility or liability of a person owning, operating, controlling, maintaining, erecting, constructing, installing, altering, inspecting, testing, or repairing a conveyance for damages to person or property caused by a defect, nor does the state of Colorado assume any such liability or responsibility by the adoption or enforcement of this article.

**Source: L. 2007:** Entire article added, p. 1421, § 1, effective January 1, 2008.

**9-5.5-118. Criminal penalties.** A person who violates section 9-5.5-106 or 9-5.5-111 commits a class 3 misdemeanor and, upon conviction, shall be punished as provided in section 18-1.3-501, C.R.S.

**Source: L. 2007:** Entire article added, p. 1421, § 1, effective January 1, 2008.

**9-5.5-119. Dangerous conveyance - administrative orders.** (1) (a) If, upon the inspection of a conveyance, the conveyance is found to be in a dangerous condition, an immediate hazard to those riding or using it, or designed or operated in an inherently dangerous manner, the certified conveyance inspector shall notify:

- (I) The owner;
- (II) The approved local jurisdiction; and

(III) If the conveyance is not within an approved local jurisdiction, the administrator.

(b) Upon being notified pursuant to paragraph (a) of this subsection (1), the administrator or approved local jurisdiction shall order such alterations or additions as may be deemed necessary to eliminate the danger.

(2) (a) In lieu of repairing or altering a dangerous conveyance pursuant to subsection (1) of this section, an owner or a lessee may have the conveyance made dormant. A dormant conveyance shall not be used until it is made safe in compliance with this article. In order to qualify under this subsection (2), the owner or lessee of a dormant conveyance shall:

(I) Remove the fuses and lock the mainline disconnect switch in the "off" position;

(II) Park the car and close and latch the hoistway doors;

(III) Have a certified conveyance inspector place a wire seal on the mainline disconnect switch; and

(IV) Prevent the conveyance from being used.

(b) A conveyance shall not be made dormant for more than five years. Upon making a conveyance dormant, a certified conveyance inspector shall report the fact to the administrator.

**Source: L. 2007:** Entire article added, p. 1422, § 1, effective January 1, 2008.

**9-5.5-120. Repeal of article.** This article is repealed, effective July 1, 2017. Prior to such repeal, the functions of the administrator shall be subject to review pursuant to section 24-34-104, C.R.S.

**Source: L. 2007:** Entire article added, p. 1422, § 1, effective January 1, 2008.

## EXPLOSIVES

### ARTICLE 6

#### Explosives

9-6-101.	Explosives on passenger vehicles and trains.	9-6-105.	Marking for sale.
9-6-102.	Packing for shipment.	9-6-106.	Date of manufacture - wrapping.
9-6-103.	Violation - penalty.	9-6-107.	Violation - penalty.
9-6-104.	Death by negligence.	9-6-108.	Applicability.

**9-6-101. Explosives on passenger vehicles and trains.** It is unlawful to transport, carry, convey, or deliver to be transported, carried, or conveyed, or to cause to be delivered to be transported, carried, or conveyed any of the substances or articles known as dynamite, nitroglycerine, or glycerine oil, nitroleum or blasting oil, or nitrated oil, or powder mixed with any such oil, or fiber saturated with any such article or substance in any vehicle used or employed in transporting passengers, or in any train of cars used in transporting passengers; except that an ordinary freight train with a caboose or passenger car used as a caboose shall not be construed as a train of cars used in transporting passengers within the meaning of sections 9-6-101 to 9-6-104.

**Source: L. 1876:** p. 96, § 1. **G.L.** § 1852. **G.S.** § 2788. **R.S.** 08: § 5286. **C.L.** § 5505. **CSA:** C. 64, § 1. **CRS** 53: § 53-1-1. **C.R.S.** 1963: § 53-1-1.

**9-6-102. Packing for shipment.** It is unlawful to ship, send, or forward nitroglycerine, glycerine oil, nitrated oil, nitroleum or blasting oil, or to transport any of the same upon any vehicle of any description, or to deliver the same to be transported, carried, or conveyed unless the same is securely enclosed, deposited, or packed in a metallic vessel surrounded by plaster of paris or other material that is nonexplosive when saturated with such oil or



substance, and separate from all other substances, and the outside of the package containing the same is marked or labeled in a conspicuous manner with the words “nitroglycerine - dangerous”.

**Source:** L. 1876: p. 97, § 2. G.L. § 1853. L. 1881: p. 194, § 1. G.S. § 2789. R.S. 08: § 5287. C.L. § 5506. CSA: C. 64, § 2. CRS 53: § 53-1-2. C.R.S. 1963: § 53-1-2.

**9-6-103. Violation - penalty.** Any person who knowingly violates any of the provisions of sections 9-6-101 and 9-6-102 commits a class 6 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** L. 1876: p. 97, § 3. G.L. § 1854. G.S. § 2790. R.S. 08: § 5288. C.L. § 5507. CSA: C. 64, § 3. CRS 53: § 53-1-3. C.R.S. 1963: § 53-1-3. L. 77: Entire section amended, p. 870, § 21, effective July 1, 1979. L. 89: Entire section amended, p. 821, § 8, effective June 8. L. 2002: Entire section amended, p. 1467, § 23, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**9-6-104. Death by negligence.** When the death of any person is caused by the explosion of any of the articles or substances named in section 9-6-101 while the same is being delivered to any carrier or while the same is being transported or is being removed from the vehicle on which it has been transported or conveyed or on which it has been placed for transportation, every person who knowingly and unlawfully placed, or aided, or permitted the placing of such article or substance on such vehicle, or delivered the same, or caused the same to be delivered contrary to the provisions of sections 9-6-101 to 9-6-104, commits a class 4 felony and shall be punished as provided in section 18-1.3-401, C.R.S.

**Source:** L. 1876: p. 97, § 4. G.L. § 1855. G.S. § 2791. R.S. 08: § 5289. C.L. § 5508. CSA: C. 64, § 4. CRS 53: § 53-1-4. C.R.S. 1963: § 53-1-4. L. 77: Entire section amended, p. 870, § 22, effective July 1, 1979. L. 2002: Entire section amended, p. 1467, § 24, effective October 1.

**Editor's note:** The effective date for amendments made to this section by chapter 216, L. 77, was changed from July 1, 1978, to April 1, 1979, by chapter 1, First Extraordinary Session, L. 78, and was subsequently changed to July 1, 1979, by chapter 157, § 23, L. 79. See *People v. McKenna*, 199 Colo. 452, 611 P.2d 574 (1980).

**Cross references:** For the legislative declaration contained in the 2002 act amending this section, see section 1 of chapter 318, Session Laws of Colorado 2002.

**9-6-105. Marking for sale.** (1) It is unlawful for any person, partnership, or corporation to sell or offer for sale, or take or solicit orders of sale for, or purchase or use, or have on hand or in store for the purpose of sale or use in this state any high explosive that can be detonated by means of a detonator, including without limitation dynamite, detonating cord, cast primers, and cap-sensitive emulsions, slurries, and water gels, or any cartridge or bag containing a blasting agent, or any container used for the packaging of detonators and blasting caps, unless on each container or bag of any such high explosive, blasting agent, detonator, or blasting cap and on each wrapping of the explosive cartridge contained within, there is plainly stamped or printed the name and place of business of the person, partnership, or corporation by which the same was manufactured and a date code or other code identifying the origin of manufacture.

(2) It is unlawful to intentionally remove, alter, or obscure the printed or stamped manufacturer's name and date codes or other identifying codes on the containers used to contain any high explosives, blasting agents, detonators, or blasting caps or on any wrappings thereof.

(3) Mixed binary explosives shall not be subject to the provisions of this section.

**Source:** L. 1887: p. 278, § 1. R.S. 08: § 5290. C.L. § 5509. CSA: C. 64, § 5. CRS 53: § 53-1-5. C.R.S. 1963: § 53-1-5. L. 2001: Entire section amended, p. 759, § 1, effective August 8.

**9-6-106. Date of manufacture - wrapping.** (1) It is unlawful for any person, partnership, or corporation to have more than two different dates or identifying codes on any high explosive that can be detonated by means of a detonator, including without limitation dynamite, detonating cord, cast primer, cap-sensitive emulsion, slurries, and water gels, or on any cartridges or bags containing blasting agents, or on any container used for the packaging of detonators or blasting caps.

(2) It is also unlawful for any person, partnership, or corporation to package any explosives in any container or wrapping formerly used by any other person, partnership, or corporation in the packing of high explosives, detonators, blasting caps, or cartridges or bags containing blasting agents.

(3) The name and place of business of the manufacturer and the date codes or other codes identifying the origin of manufacture shall be the same on the packing container as on each of the high explosive cartridges or blasting agent cartridges within such packing container.

**Source:** L. 1887: p. 278, § 2. R.S. 08: § 5291. C.L. § 5510. CSA: C. 64, § 6. CRS 53: § 53-1-6. C.R.S. 1963: § 53-1-6. L. 2001: Entire section amended, p. 760, § 2, effective August 8.

**9-6-107. Violation - penalty.** If any person, partnership, or corporation violates any of the provisions of sections 9-6-105 and 9-6-106, such person, the members of such partnership, or the officers or agents of such corporation are guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

**Source:** L. 1887: p. 279, § 3. R.S. 08: § 5292. C.L. § 5511. CSA: C. 64, § 7. CRS 53: § 53-1-7. C.R.S. 1963: § 53-1-7.

**9-6-108. Applicability.** Consumer fireworks and display fireworks, as defined in 27 CFR 555.11 of the United States department of the treasury, bureau of alcohol, tobacco, and firearms, or any of its successor agencies, shall not be subject to the provisions of this article.

**Source:** L. 2001: Entire section added, p. 760, § 3, effective August 8. L. 2007: Entire section amended, p. 2019, § 8, effective June 1.

## ARTICLE 7

### Explosives - Regulation and Inspection

9-7-101.	Short title.	9-7-107.	Fees.
9-7-102.	Legislative declaration.	9-7-108.	Issuance of permit - renewal - criminal history record check.
9-7-103.	Definitions.	9-7-108.3.	Transition to three-year permits - repeal. (Repealed)
9-7-104.	Enforcement.	9-7-108.5.	Disposition of fees.
9-7-105.	Duties of director of division.		
9-7-106.	Explosives permits.		



9-7-109.	Records.	9-7-112.	Unlawful use of explosives or incendiaries - penalty. (Repealed)
9-7-110.	Revocation or suspension of permit.		
9-7-111.	Failure to obtain permit - penalty.		

**9-7-101. Short title.** This article shall be known and may be cited as the “Explosives Act”.

**Source:** L. 70: p. 185, § 1. C.R.S. 1963: § 53-7-1.

#### ANNOTATION

**Applied** in People v. Lovato, 630 P.2d 597 (Colo. 1981).

**9-7-102. Legislative declaration.** The general assembly hereby declares that the purpose of this article is to provide for safety inspections to assure suitable control of the procurement of and access to explosives and, at the same time, to avoid undue limitations upon the manufacture, sale, transport, or legitimate use of explosives. To avoid a duplication of supervision, inspection, and enforcement by various governmental agencies, no person, firm, partnership, or corporation that is subject to regulation under articles 20 to 54 of title 34, C.R.S., or 30 CFR part 56, 57, 75, or 77 shall be subject to this article. Fireworks subject to article 28 of title 12, C.R.S., shall not be subject to regulation under this article.

**Source:** L. 70: p. 185, § 1. C.R.S. 1963: § 53-7-2. L. 2006: Entire section amended, p. 249, § 1, effective March 31.

**9-7-103. Definitions.** As used in this article, unless the context otherwise requires:

- (1) Repealed.
- (1.5) “Department” means the department of labor and employment.
- (2) “Division” means the division of oil and public safety in the department of labor and employment.
- (3) “Explosive” or “explosive device” means any material or container containing a chemical compound or mixture that is commonly used or intended for the purpose of producing an explosion and that contains any oxidizing and combustible materials or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, or by detonation of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects, but shall not mean the components for handloading rifle, pistol, and shotgun ammunition and/or rifle, pistol, and shotgun ammunition.
- (4) “Incendiary device” means any flammable material or container containing a flammable liquid or material whose ignition by fire, friction, concussion, detonation, or other method produces destructive effects primarily through combustion rather than explosion.
- (5) “Molotov cocktail” means a breakable container containing an explosive or flammable liquid or other substance, having a wick or similar device capable of being ignited, and may be described as either an explosive or incendiary device. A molotov cocktail is not intended to mean a device commercially manufactured primarily for the purpose of illumination or other such uses.

**Source:** L. 70: p. 185, § 1. C.R.S. 1963: § 53-7-3. L. 86: (1) repealed, p. 502, § 125, effective July 1. L. 2001: (2) amended, p. 1138, § 65, effective June 5. L. 2004: (1.5) added, p. 1169, § 3, effective May 27.

**9-7-104. Enforcement.** (1) The division shall enforce this article and for such purposes shall:

- (a) Issue permits to applicants found by the division, after inspection and investigation, to be qualified for such permit under this article and the rules of the division;
- (b) Deny, suspend, or revoke permits upon a finding of noncompliance or violation of this article or of the applicable rules;
- (c) Hold hearings upon the application of any person aggrieved by any order of the division with respect to the denial, suspension, or revocation of any permit;
- (d) Inspect, during normal business hours, any building, structure, or premises subject to this article, and, upon the discovery of any violation of this article or the applicable rules, issue such orders as are necessary for the safety of workers and the public, and, in the case of imminent hazard, apply for an injunction in the appropriate district court.
- (2) The division may inspect blast sites or request a blast demonstration in a controlled environment pursuant to rules promulgated by the director of the division.

**Source:** L. 70: p. 186, § 1. C.R.S. 1963: § 53-7-4. L. 86: (1)(a) amended, p. 497, § 110, effective July 1. L. 2008: Entire section amended, p. 986, § 4, effective May 21.

**9-7-105. Duties of director of division.** (1) The director of the division shall promulgate rules and regulations to implement the provisions of this article. Such rules and regulations may include requirements not mentioned specifically in this article but which are reasonably necessary for the safety of workers, the public, and the protection of property. The procedure for the promulgation of such rules and regulations shall be in accordance with the provisions of section 24-4-103, C.R.S.

(2) Any person aggrieved by a decision or order of the director of the division may seek judicial review pursuant to the provisions of section 24-4-106, C.R.S.

**Source:** L. 70: p. 186, § 1. C.R.S. 1963: § 53-7-5. L. 86: Entire section amended, p. 497, § 111, effective July 1.

**9-7-106. Explosives permits.** (1) It is a violation of this article to manufacture, sell, purchase, store, transport, or use explosives without first obtaining from the division a permit.

(2) Permits issued under this article shall not be transferable, and shall be readily available for inspection by representatives of the division and law enforcement officials.

(3) The division may place such restrictions and limitations on permits as it deems necessary.

(4) Nothing in this article shall authorize the issuance of a permit for an explosive or incendiary device commonly known as a molotov cocktail, and no permit may be issued for the manufacture, sale, storage, transportation, or use of such device.

(5) No permit shall be required for the occasional purchase of explosives by a person for normal agricultural purposes, if such person is personally known by the seller of such explosives, and a record is kept of such transaction by the seller, including the specific purpose for which such explosives will be used, the location of the proposed use, the signature of the purchaser, and the certification of the seller as to his personal knowledge of the purchaser. Violation of the record requirement of this section shall cause the seller's permit to be cancelled.

(6) No division-issued permit shall be required for a person, firm, partnership, or corporation whose use and storage of explosive materials is for the purpose of underground mining, surface or underground metal mining, or surface or underground coal mining and whose use and storage of explosive materials is regulated by 30 CFR part 56, 57, 75, or 77.

**Source:** L. 70: p. 186, § 1. C.R.S. 1963: § 53-7-6. L. 2004: (1) amended, p. 1168, § 1, effective May 27. L. 2006: (6) added, p. 249, § 2, effective March 31.

**9-7-107. Fees.** An application for initial issuance or renewal of a thirty-six-month permit under this article shall be accompanied by a fee as established by the director of the division; except that the director of the division by rule or as otherwise provided by law may



reduce the amount of the fee if necessary pursuant to section 24-75-402 (3), C.R.S., to reduce the uncommitted reserves of the fund to which all or any portion of the fee is credited. After the uncommitted reserves of the fund are sufficiently reduced, the director of the division by rule or as otherwise provided by law may increase the amount of the fee as provided in section 24-75-402 (4), C.R.S.

**Source:** L. 70: p. 187, § 1. C.R.S. 1963: § 53-7-7. L. 85: Entire section amended, p. 338, § 3, effective July 1. L. 96: Entire section amended, p. 25, § 1, effective July 1. L. 98: Entire section amended, p. 1325, § 23, effective June 1. L. 2000: Entire section amended, p. 165, § 4, effective March 17. L. 2008: Entire section amended, p. 986, § 5, effective May 21.

**9-7-108. Issuance of permit - renewal - criminal history record check.** (1) Permits issued under this article shall be valid for up to thirty-six months after the date of issue unless sooner revoked or suspended. Permits may be issued on a conditional basis, subject to revocation or suspension based on the occurrence or nonoccurrence of an event specified by the division. Permits may be renewed on or before their expiration date upon the payment of the required fee.

(2) Prior to the issuance of a permit pursuant to this article, each applicant for a permit shall submit his or her set of fingerprints to the department. The department shall conduct a criminal history record check of each applicant. If, as a result of such check, the department finds that further investigation is necessary, the department shall forward the fingerprints to the Colorado bureau of investigation for the purpose of conducting a state and national fingerprint-based criminal history record check utilizing the records of the Colorado bureau of investigation and the federal bureau of investigation. The costs associated with the fingerprint-based criminal history record check shall be paid by the applicant to the Colorado bureau of investigation. The department shall consider the information resulting from the criminal history record checks in its determination as to whether the division shall issue a permit to the applicant. Nothing in this section shall preclude the department from making further inquiries into the background of the applicant.

**Source:** L. 70: p. 187, § 1. C.R.S. 1963: § 53-7-8. L. 75: Entire section R&RE, p. 331, § 1, effective June 13. L. 85: Entire section amended, p. 338, § 4, effective July 1. L. 96: Entire section amended, p. 25, § 2, effective July 1. L. 98: Entire section amended, p. 1325, § 24, effective June 1. L. 2000: Entire section amended, p. 165, § 5, effective March 17. L. 2004: Entire section amended, p. 1168, § 2, effective May 27.

### **9-7-108.3. Transition to three-year permits - repeal. (Repealed)**

**Source:** L. 2000: Entire section added, p. 165, § 6, effective March 17.

**Editor's note:** Subsection (2) provided for the repeal of this section, effective July 1, 2002. (See L. 2000, p. 165.)

**9-7-108.5. Disposition of fees.** All fees collected by the division pursuant to this article shall be transmitted to the state treasurer, who shall credit the same to the public safety inspection fund created pursuant to section 8-1-151, C.R.S.

**Source:** L. 85: Entire section added, p. 338, § 5, effective July 1.

**9-7-109. Records.** Every person holding a permit issued under this article shall keep such records as may be required by the division. Records shall be maintained for not less than two years following the year in which the record is made. All such records shall be open to inspection by the division or its representatives during normal business hours.

**Source:** L. 70: p. 187, § 1. C.R.S. 1963: § 53-7-9.

**9-7-110. Revocation or suspension of permit.** A violation of this article or the rules and regulations promulgated pursuant thereto, shall constitute grounds for the revocation or suspension of a permit issued under this article.

**Source:** L. 70: p. 187, § 1. C.R.S. 1963: § 53-7-10.

**9-7-111. Failure to obtain permit - penalty.** Except as provided in section 9-7-106 (5), any person who manufactures, sells, stores, transports, or uses explosives without first obtaining a permit therefor under the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

**Source:** L. 70: p. 187, § 1. C.R.S. 1963: § 53-7-11. L. 81: Entire section amended, p. 2023, § 5, effective July 14.

**9-7-112. Unlawful use of explosives or incendiaries - penalty. (Repealed)**

**Source:** L. 70: p. 187, § 1. C.R.S. 1963: § 53-7-12. L. 74: Entire section repealed, p. 256, § 2, effective March 21.

## **SPECIAL SAFETY PROVISIONS**

### **ARTICLE 10**

#### **Ventilation of Garages and Shops**

**9-10-101 to 9-10-105. (Repealed)**

**Source:** L. 96: Entire article repealed, p. 554, § 3, effective April 24.

**Editor's note:** This article was numbered as article 17 of chapter 13, C.R.S. 1963. For amendments to this article prior to its repeal in 1996, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.











